

SPEED POST



F. No. 380/92/B/SZ/2018-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue... 30/10/23

Order No. 259/23-Cus dated 27/10, 2023 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application, filed under Section 129DD of the Customs Act, 1962, against the Order-in-Appeal No. 186/2018 dated 16.04.2018, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : The Commissioner of Customs, Mangaluru

Respondent : Sh. Kareem Kunhali, Kasargod

ORDER

Revision Application No. 380/92/B/SZ/2018-RA dated 16.04.2018 has been filed by the Commissioner of Customs, Mangaluru, (hereinafter referred to as the Applicant department), against the Order-in-Appeal No. 186/2018 dated 16.04.2018, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, modified the Order-in-Original No. 52/2017/(AP) dated 29.08.2017, passed by the Assistant Commissioner of Customs, Mangaluru International Airport, Mangaluru to the extent that redemption of absolutely confiscated foreign currency was allowed to the appellant Sh. Kareem Kunhali, Kasargod (hereinafter referred to as the Respondent herein) upon payment of a redemption fine of Rs. 25,000/-. Vide Order-in-Original No. 52/2017/(AP) dated 29.08.2017, 19 notes of UAE Dirhams of various denominations amounting to Rs. 2,86,888/-, recovered from Sh. Kareem Kunhali, Kasargod were absolutely confiscated under Section 113(d) of the Customs Act, 1962. Besides this, a penalty of Rs. 43,050/- was also imposed upon the Respondent under Section 114(i) of the Act, *ibid*.

2. Brief facts of the case are that on 20.09.2016, Customs officers intercepted the Respondent who was destined for Abu Dhabi from Mangaluru and was proceeding towards Customs departure counter after completing his immigration formalities. Upon being asked as to whether he had anything to declare to Customs, the Respondent replied that he had nothing to declare. Upon being specifically asked as to whether he was carrying any contraband goods or Indian/Foreign currency, he replied in the negative. However, upon the search of his person in the presence of independent witnesses, 19 notes of UAE Dirhams of various denominations were found in the front pocket of his blue coloured jeans trousers. The foreign currency recovered was found to be equivalent to Rs. 3,11,240/- as per the prevalent exchange rate as per Notification No. 97/2015-Cus dated 01.10.2015. In his statement dated 20.09.2016, recorded under Section 108 of the Customs Act, 1962, the Respondent, stated inter-alia that the impugned foreign currency was given to him by his travel agent M/s UAE Traveks, Mogral Kasargod for handing over the same to their associate in Dubai; that he attempted to smuggle the foreign currency for lure of money and had already received the remuneration of Rs.2000/- which was discounted in the ticket fare; that since he had no valid documents to show the purchase of currency from any authorized money exchange dealers, he concealed the said foreign currency notes in his trousers' pocket without declaring to Customs as he attempted to pass through Customs at the Mangalore International Airport for departing to Abu Dhabi on 20.09.2016 and also admitted that carrying of foreign currency outside India, without licit documents is an offence under the provisions of the Foreign Exchange Management Act, 1999 read with the provisions of Money Laundering Act, 2002, the Customs Act, 1962 and RBI regulations.

3. The Revision Application has been filed by the Applicant department mainly on the grounds that the Respondent in this matter had attempted to smuggle foreign currency by not declaring it to Customs; that the foreign currency carried by the passenger did not belong to him and the same cannot be allowed to be redeemed in lieu of fine in terms of judgment of the Hon'ble High Court of Kerala in the case of Abdul Razak reported vide 2012 (275)E.L.T. 300 (Ker), which has been upheld by the Hon'ble Apex Court; that the Commissioner (Appeals) has exercised powers beyond the statutory provisions by way of allowing redemption of currency; that the finding of Commissioner (Appeals) that the currency carried by the Respondent is within permissible limit is improper, as even if the amount carried is within permissible limits, the acquisition thereof has to be answered for.

4. Personal hearings were fixed on 22.05.2023, 09.08.2023 & 04.09.2023. In the hearing held on 09.08.2023, Assistant Commissioner (Mangaluru), appeared for the Applicant department and sought restoration of the OIO. The Respondents did not appear on any of the hearing dates fixed. Hence, it is presumed that the Respondent has nothing to add in the matter. Therefore, the matter is taken up for decision based on available records.

5. The Government has carefully examined the matter. It is observed that the foreign currency was admittedly recovered from the Respondent. It is also on record that the Respondent had not made any declaration in this regard. Further, the Respondent did not have any documents or evidence showing lawful possession of the currency, rather in his own statement he has stated that the impugned currency did not belong to him but to his travel agent and that he was carrying it to hand it over to the agent's associate in Dubai.

6. As per Regulation 5 of the Foreign Exchange Management (Export & Import of Currency) Regulations, 2015, "*Except as otherwise provided in these regulations, no person shall, without the general or special permission of Reserve Bank, export or send out of India, or import or bring into India, any foreign currency.*" Further, in terms of Regulation 3(iii) of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015, any person resident in India can retain foreign currency not exceeding US \$ 2000 or its equivalent in aggregate, subject to the condition that such currency was acquired by that person as payment for services outside India or as honorarium, gift, etc. In the present case, the Respondent has failed to show compliance with the Regulations as above, as he has admitted in his statement that he did not possess any valid documents for the licit purchase of the foreign currency from any authorized money exchange dealer and hence he carried the impugned foreign currency notes concealed in his pocket without declaring it to Customs and denied it even when

asked specifically if he was carrying any foreign currency. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) were not fulfilled.

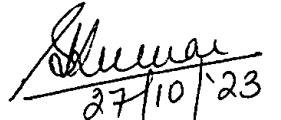
7.1 The Government observes that in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Hon'ble Supreme Court has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term *"Any prohibition" means every prohibition. In other words, all types of prohibition. Restriction is one type of prohibition*". The provisions of Section 113(d) are in pari-materia with the provisions of Sections 111 (d). In the case of Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155)ELT423(SC)}, the Hon'ble Supreme Court has held that *"if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods"*. In its judgment, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (2021-TIOL-187-SC-CUS-LB), the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om Prakash Bhatia (supra) to hold that *"any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions."*

7.2 Thus, following the ratio of the aforesaid judgments, there is no doubt that the impugned currency is 'prohibited goods', as the conditions subject to which the currency could have been exported are not fulfilled in the present case.

8. The Government observes that the option to release seized goods on redemption fine, in terms of the provisions of Section 125 of the Customs Act, 1962, in respect of 'prohibited goods', is discretionary. It is settled by the judgment of the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)], that option to release 'prohibited goods' on redemption fine is discretionary. Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], held that *"Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive."* Hon'ble Kerala High Court has, in the case of Abdul Razak [2012 (275) E.L.T. 300 (Ker.)], held that *"we do not think the appellant, as a matter of right, can claim release of the goods on payment of redemption fine and duty. Even though gold as such is not a prohibited item and can be imported, such import is subject to lot of restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed. There is no need for us*

in this case to consider the conditions on which import is permissible and whether the conditions are satisfied because the appellant attempted to smuggle out the goods by concealing the same in emergency light, mixie, grinder and car horns etc. and hence the goods so brought is prohibitory goods as there is clear violation of the statutory provisions for the normal import of gold. Further, as per the statement given by the appellant under Section 108 of the Act, he is only a carrier i.e. professional smuggler smuggling goods on behalf of others for consideration. We, therefore, do not find any merit in the appellant's case that he has the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Act." Thus, the Commissioner (Appeals)' order to allow redemption is incorrect.

9. The revision application is, accordingly, allowed and the Order-in-Appeal impugned herein is set aside.


27/10/23
(Shubhagata Kumar),
Additional Secretary to the Government of India


The Commissioner of Customs
New Customs House, Panambur
Mangaluru- 575010

Order No. 259/23-Cus dated 27/10.2023

Copy to:

1. Sh. Kareem Kunhali, S/o Sh. Kunhali, Door No.1/235, baith Al-Noor House, Kadavath, Post Mogral Putur, Kasargod-671124.
2. The Commissioner of Customs (Appeals), BMTC Building, Above BMTC Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
3. PPS to AS(RA)
4. Guard file.
5. Spare Copy.
6. Notice board.

ATTESTED


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