

SPEED POST



F. No. 373/311/B/SZ/2019-RA
F. No. 380/77/B/SZ/2019-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. 15/02/24

Order No. 45-46/24-Cus dated 14-02-2024 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. 113 & 114/2019 dated 28.06.2019, passed by the Commissioner of Customs (Appeals), Bengaluru.

Applicant : Sh. Anil Amil Lalwani, Thane
The Commissioner of Customs, Mangaluru

Respondent : The Commissioner of Customs, Mangaluru
Sh. Anil Amil Lalwani, Thane

ORDER

Revision Application Nos. 373/311/B/SZ/2019-RA dated 08.08.2019 & 380/77/B/SZ/2019-RA dated 04.10.2019 has been filed by Sh. Anil Amil Lalwani, Thane (hereinafter referred to as the Applicant) and the Commissioner of Customs, Mangaluru, (hereinafter referred to as the department), against the Order-in-Appeal No. 113 & 114/2019 dated 28.06.2019, passed by the Commissioner of Customs (Appeals), Bengaluru. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, modified the Order-in-Original No. 45/2018 ADC dated 28.12.2018, passed by the Additional Commissioner of Customs, Mangaluru International Airport, Mangaluru by setting aside the penalty imposed upon the Applicant under Section 114AA of the Customs Act, 1962. Vide the aforementioned Order-in-Original, 475 foreign currency notes of US Dollars in the denomination of 100, equivalent to Indian Rs. 30,02,000/- recovered from the Applicant were absolutely confiscated under Section 113 (d), (e) & (h) of the Customs Act, 1962. Besides, penalties of Rs. 9,00,000/- and Rs. 4,50,000/- were imposed upon the Applicant under Sections 114 & 114AA, respectively of the Act, *ibid*.

2. Brief facts of the case are that the Applicant who was destined for Dubai from Mangaluru on 26.12.2017 was intercepted by Customs officers as he was proceeding towards security check after completing his immigration formalities. Upon being asked about the purpose of his visit to Dubai and as to whether he had anything to declare to Customs, the Applicant replied that he had nothing to declare to Customs and that he was proceeding to Dubai on visit. Upon being specifically asked as to whether he was carrying any contraband goods or Indian/Foreign currency, he replied that he was in possession of Indian currency but had no foreign currency. On enquiry about the contents of the baggage, he informed that it contained only personal effects and it did not contain any contraband or valuable goods. Upon thorough checking of his baggage, a bundle of paper like objects wrapped in brown paper was found inside two side layers of the said hand bag. On examination of the said brown paper bundle, 8 bundles of currency notes were found wrapped in a black coloured polythene sheet. Upon removing the black coloured

polythene sheet, 475 currency notes of US Dollars of denomination 100 totalling 47500 US Dollars were found. The value of the said foreign currency found to be equivalent to Rs. 30,02,000/- as per the prevalent exchange rate Notification No. 118/2017-Cus. (N.T) dated 21.12.2017.

In his statement dated 26.12.2017 recorded under Section 108 of the Customs Act, 1962, the Applicant, stated inter-alia that he did not possess any documents to prove licit possession of the aforesaid assorted foreign currency amount equivalent to Rs. 30,02,000/-; that since he had no valid documents to show the purchase of currency from any authorized exchange dealers, he did not declare the same to Customs at the time of departure to Dubai; that the said foreign currency was handed over to him by one person named Shri Ramesh whom he met in Mumbai a few days ago, who instructed him to hand over the same to a person who would approach him after he reached Dubai; that for this work, Ramesh had paid him Rs. 10,000/- as remuneration and he did this for the lure of money; and that he was aware that carrying foreign currency notes without licit documents out of India is an offence under the provisions of FEMA and Customs Act, 1962.

The matter was adjudicated vide aforesaid order dated 28.12.2018. Aggrieved, the Applicant filed appeal before the Commissioner (A) which has been modified as mentioned above.

3. The Revision Application has been filed by the Applicant mainly on the grounds that foreign currency is not prohibited goods; that Regulation 7(2) of Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 does not prescribe a maximum amount to be exported by a person resident in India; that the petitioner further submits that permission from RBI could not be taken due to the fact that they were unaware of the said provision of the law; that penalty of Rs. 9,00,000/- imposed upon the Applicant is disproportionate; and that the Applicant claims ownership of the currency and prayed for redemption of the currency.

4. The Department has filed revision application on the grounds that the penalty under Section 114AA was rightly imposed by the original adjudicating authority and needs

to be restored as non-declaration amounts to filing of wrong declaration; and that the penalty of Rs. 9,00,000/- imposed upon the Applicant under Section 114(i) is not appropriate considering the nature of offence and not as per the statutory provisions.

5. Personal hearings were fixed on 01.12.2023 & 18.12.2023. In the hearing held on 01.12.2023, Sh. Prakash, Assistant Commissioner appeared on behalf of the department and submitted that Commissioner (Appeals) vide the impugned OIA has set aside the penalty under section 114AA, which is incorrect in view of the fact that the Applicant did not declare the dutiable goods/currency and non filing of declaration when in fact they were carrying the same, tantamounts to making a false declaration. He quoted an earlier order of the Revisionary Authority, (Champalal Kapur Chand Jain) vide which the authority has upheld the penalty under section 114 in similar cases. He prayed that the OIA be set aside and also that the penalty quantum be increased. No one appeared from the side of Applicant. Since no one appeared from the applicant's side, another opportunity was granted on 18.12.2023 but no one appeared from either side. As such, it is presumed that the Applicant has nothing to add in the matter.

6. The Government has carefully examined the matter. It is observed that the foreign currency was, concealed in black polythene brown paper and side layers of the applicant's bag. It is also on record that the Applicant had not made any declaration in this regard. Further, the Applicant did not have any documents or evidence showing lawful possession of the currency and he has admitted to the same.

7. 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 Applicant has failed to show compliance with the Regulations, as above as he has admitted in his statement, he did not possess any valid documents for the licit purchase of the foreign currency, was paid Rs. 10,000 as remuneration and due to lure of money he carried the said foreign currency notes. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) were not fulfilled.

8.1 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."*

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

9. 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. The Hon'ble Supreme Court has affirmed this position in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi

[1998 (104) E.L.T. 306 (S.C.)]. Hon'ble Delhi High Court has, in the case of Raju Sharma [2020 (372) ELT 249 (Del)], relying upon the judgment of Apex Court in Mangalam Organics Ltd. [2017 (349) ELT 369 (SC)], 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.*" In the present case, the original authority has, after detailed consideration (as evident from paras 22.1 to 22.2 of the OIO), refused redemption. Further, the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023 held that "*.....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer*". Hence, keeping in view the ratio of the decisions aforesaid, the Commissioner (Appeals) has correctly refused redemption of the impugned currency.

10.1 The Commissioner (Appeals) has relied upon an earlier Order of the Revisionary Authority wherein the Authority referred to the objective of introduction of Section 114AA, as explained in the para 63 of the report of Parliament's Standing Committee on Finance (2005-06), to hold otherwise. It is trite that in construing a statutory provision, the first and foremost rule of interpretation is the literal rule of interpretation {M/s. Hiralal Ratanlal vs. STO, AIR 1973 SC 1034 & B. Premanand & Ors. Vs. Mohan Koikal & Ors. (2011) 4SCC 266}. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to other principles of interpretation {Swedish Match AB vs. SEBI AIR 2004 SC 4219}. In the present case, the words of Section 114AA are absolutely clear and unambiguous. There is nothing in the plain language of Section 114AA to even remotely suggest that the provisions thereof are not applicable in baggage cases. Revisionary Authority, Delhi vide its order 143/23-Cus dated 03.04.2023 also held the non-imposition of penalty under Section 114AA to be incorrect as the Applicant in that case was found to have made an incorrect declaration. In the instant case, the Applicant has failed to submit proper declaration indicating the description and value of goods as required under the Customs Act and the same has been duly recorded in findings by the original authority.

Further the applicant intentionally suppressed the correct information and did not make a proper declaration of the actual contents of the baggage; rather he attempted to smuggle out the impugned currency as bonafide baggage in violation of provisions of Customs Act, 1962. Hence, it has to be held that the Commissioner (Appeals) erred in his judgment.

10.2 Thus, the Government holds that the Order of Commissioner (Appeals) setting aside the penalty imposed under Section 114 AA, on the Applicant cannot be sustained and is set aside to this extent.

11. In view of the above, RA No. 380/77/B/SZ/2019-RA filed by the department is partially allowed and the Order-in-Appeal impugned herein is modified to the extent of restoring the penalty imposed vide the Order-in-Original under Section 114AA ibid. RA No. 373/311/B/2019-RA is rejected for the reasons aforesaid.


14/2/24

(Shubhagata Kumar),

Additional Secretary to the Government of India

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2. The Commissioner of Customs,
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Order No. 45-46/24-Cus dated 14-02-2024

Copy to:

1. The Commissioner of Customs (Appeals), BMTc Building, Above BMTc Bus Stand, Old Airport Road, Domlur, Bengaluru-560071.
2. Sh. Prakash K. Shingrani, Advocate, High Court, 12/334, Vivek, New MIG Colony, Bandra (E), Mumbai-400051.
3. PPS to AS(RA)
4. Guard file.
5. ~~Spare Copy.~~
6. Notice board.

ATTESTED


14/2/24

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