



F. No. 372/09/B/2022-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... 25/7/22

Order No. 240/22-Cus dated 25-7-2022 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. KOL/CUS/Airport/AKR/839/2021 dated 07.12.2021 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Sh. Mohammad Adil Ali, Kolkata

Respondent : The Commissioner of Customs (Airport & Admn), Kolkata.

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ORDER

A Revision Application No. 372/09/B/2022-RA dated 23.05.2022 has been filed by Sh. Mohammad Adil Ali, Kolkata (hereinafter referred to as the Applicant), against the Order-in-Appeal No. KOL/CUS/Airport/AKR/839/2021 dated 07.12.2021, passed by the Commissioner of Customs (Appeals), Kolkata. The Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs (Airport), Kolkata, bearing no. 60/2020/ADC dated 30.07.2020, ordering absolute confiscation of foreign currency, amounting to USD 155,000 (equivalent to Rs. 1,05,40,000/-) under Sections 113(d), 113(e) and 113(h) of the Customs Act, 1962 along with torn cardboard boxes and a few wrappers of biscuit packets used for concealing the foreign currency notes, under Section 118(b) & 119 of the Customs Act, 1962. Besides penalty of Rs. 13,00,000/- each was also imposed on the Applicant and his accomplice, namely, Sh. Shyam Jee Singh, under Section 114 of the Act, *ibid*.

2: Brief facts of the case are that the Applicant and his accomplice, namely, Sh. Shyam Jee Singh, were scheduled to depart for Bangkok from NSCBI Airport, Kolkata, on 16.07.2018. The Applicant and his accomplice were intercepted by the officers of Customs at Airport. The Applicant and his accomplice were asked specifically whether they were carrying any contraband or Indian/ Foreign currency beyond the permissible limit, to which they replied in negative. The baggages of the Applicant and his accomplice were searched and it was noticed that foreign currency notes were concealed between the layers of the walls of the cardboard boxes and, 1550 notes of denomination USD 100,

totaling USD 155,000, (equivalent to INR 1,05,40,000/-) were recovered. The Applicant and his accomplice in their statements dated 16.07.2018 & 17.07.2018, recorded under Section 108 of the Customs Act, 1962, stated that they both were going to Bangkok by Bhutan Airlines; that the carton boxes were given to them by a person named 'Bangali Dada' (generally called by this name) outside Airport who instructed them to hand over it, in Bangkok, to a person who would identify them, by the color of their shirt & pant; that they knew 'Bengali Dada' by face and did not have his contact number and of the person to whom they had to hand over the confiscated currency.

3. The revision application has been filed, mainly, on the ground that seized goods are not prohibited goods; that confiscated currency is bonafide baggage item and is liable to be redeemed under Section 125 of the Customs Act, 1962; that the goods were not concealed; that the penalty imposed under Section 114 of the act, ibid is not sustainable; that the Order-in-Appeal may be set aside with consequential relief to the Applicant.

4. A personal hearing, in virtual mode, was held on 22.07.2022. Sh. Debaprasad Biswas, Advocate appeared on behalf of the Applicant and requested that written submissions e-mailed on 22.07.2022 may be taken on records. He reiterated the contents of the RA and written submissions dated 22.07.2022. Sh. D.K. Ramuka, Supdt. supported the orders of lower authorities and highlighted that this is a case of ingenious concealment between layers of the walls of cardboard boxes.

5. The Government has carefully examined the matter. It is evident that the foreign currency was recovered from the Applicant, which was concealed between the layers of the walls of the cardboard boxes carried by him. It is brought out that the Customs officers asked the Applicant as to whether he was carrying any foreign currency to which he replied in negative. Thus, it is evident that the Applicant did not declare the currency, as required under Section 77 of the Customs Act, 1962, and also did not have any documents or evidence showing lawful possession of the currency. Manner of ingenious concealment ^{made} the Applicant's intention to smuggle the foreign currency ~~clear~~ manifest. ^{is} The contents of the statement dated 16.07.2018 & 17.07.2018 do not appear to have been retracted by the Applicant.

6.1 Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, as amended, specifies that "*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 (as amended), any person resident in India could retain foreign currency not exceeding US \$ 2000 or its equivalent in aggregate subject to the condition that such currency was acquired by him by way of payment for services outside India or as honorarium, gift, etc. In the present case, the Applicant failed to produce any legal documents for licit possession of the confiscated currency or any permission from the Reserve Bank of India for export of foreign currency found in his baggage in concealed manner. He has also not shown compliance with the

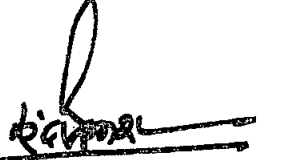
provisions of Regulation 3 (iii) of the FEMA (Possession and Retention of Foreign Currency) Regulations, 2000, as amended. Thus, it is clear that the conditions in respect of possession and export of foreign currency are not fulfilled.

6.2 The contention of the Applicant is that the foreign currency is not a prohibited item. 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."*

6.3 Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods', as the conditions subject to which the currency could have been exported are not fulfilled in the present case. The Applicant's contentions to the contrary are incorrect.

7. The Applicant has prayed that the foreign currency should be released on payment of redemption fine. The Government observes that the option to release seized goods on redemption fine, in respect of "prohibited goods", is discretionary, as held by 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.)]. In the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (supra), the Hon'ble Supreme Court has held *"that when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations"*. Further, *"when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"*. 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."* Thus, the discretion exercised by the original authority could have been interfered with, only if it suffered from any of the vices indicated by the Hon'ble Courts. In the present case, original authority has, after due application of mind, ordered absolute confiscation for the relevant and reasonable considerations. Thus, the Commissioner (Appeals) has correctly refused to interfere in the matter. The case laws relied upon by the Applicant are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

8. In the facts and circumstances of the case, the penalty imposed is just and fair.
9. In view of the above, the revision application is rejected.


(Sandeep Prakash)

Additional Secretary to the Government of India


Sh. Mohammad Adil Ali
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Order No. 240/22-Cus dated 25-7-2022

Copy to:

1. The Commissioner of Customs (Appeals), 3rd floor, Custom House, 15/1, Strand Road, Kolkata-700001.
2. The Commissioner of Customs (Airport & Admn), NSCBI Airport, Kolkata-700052.
3. Sh. Debaprasad Biswas, Advocate, 199, Ramkrishnapur, Barasat, Kolkata-700124.
4. PA to AS(RA).
5. Guard file.
6. Spare Copy.

ATTESTED


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