

SPEED POST



F. No. 372/16/B/2020-R.A.
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...11/03/22

ORDER NO. 86/22-Cus dated 11-03-2022 of the Government of India, passed by Sandeep Prakash, 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. KOL/CUS(Airport)/AKR/520/2020 dated 17.08.2020, passed by the Commissioner of Customs (Appeal), Kolkata.

APPLICANT : Sh. Haider Ali, Kolkata.

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

ORDER

A Revision Application No. 372/16/B/2020-R. A. dated 21.10.2020 has been filed by Sh. Haider Ali, Kolkata (hereinafter referred to as the Applicant) against Order-in-Appeal No. KOL/CUS(Airport)/AKR/520/2020 dated 17.08.2020, passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the order of the Assistant Commissioner of Customs (Airport), Kolkata bearing No. 20/2019(AIU) dated 12.06.2019 wherein foreign currency, USD 2,500/- and Euro 600/-, cumulatively equivalent to Rs. 2,21,665/-, which was recovered from the Applicant, has been absolutely confiscated under section 113(d) and 113(e) of the Customs Act, 1962, read with FEMA,1999 and Rules, Regulations, Orders and RBI Circulars etc. issued in this regard. A penalty of Rs. 22,000/- has also been imposed on the Applicant under Section 114 of the Customs Act, 1962.

2. Brief facts of the case are that the Applicant who was scheduled to depart to Bangkok, by Flight TG 314, on 27.12.2018, from NSCBI Kolkata airport, was intercepted by the Customs Officers while proceeding towards security hold area after completion of immigration formalities. The Applicant was asked whether he was carrying any foreign currency beyond the permissible limit, to which he verbally declared carrying USD 1000/- but could not produce any licit document for the same. Not being satisfied with the reply, on personal search by the Customs officers, assorted foreign currency of USD 2500/- and Euro 600/-, equivalent to Rs. 2,21,655/-, was recovered from an envelope containing ATM card of the Applicant. In his statements dated 18.01.2019 & 15.02.2019, tendered under Section 108 of the Customs Act, 1962, the Applicant stated that he had declared only USD 1000 although USD 2500 and Euro 600 were recovered from his possession; that he had no documents in support of possession of foreign currency; and that the said foreign currency was gifted to him by his friend, Sh. Nasim, a resident of China but he did not have any documents in support of that. The Assistant Commissioner of Customs absolutely confiscated the foreign currency, vide the OIO dated 12.06.2019, and also

imposed a penalty of Rs. 22,000/- on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals) which has been rejected.

3. The revision application has been filed, mainly, on the grounds that the Commissioner (Appeals) has deviated from his earlier stand in this regard when he had allowed the release of foreign currency in similar issues of Sh. Nagendra Sharma and Sh. Sangam Kumar Gupta vide OsIA dated 12.12.2019 and 27.12.2019, respectively; that the foreign currency had been imported as gift or honorarium from abroad on his earlier visits; that there is no other evidence except the statements of the Applicant which prove the allegation of illegal export of the said foreign currency; and that USD 2000/- may be released unconditionally, being permitted as per RBI notification dated 29.12.2015 and the remaining USD 500/- and Euro 600/-, being in excess of the permissible limit, be released on payment of reasonable fine and penalty under Section 125 of Customs Act, 1962 as per precedent practice

4. Personal hearing was fixed on 27.01.2022, 17.02.2022 and 09.03.2022 which were not attended by the Applicant nor any request for adjournment has been received. Sh. Rajendra Rajbanshi, Superintendent appeared on 09.03.2022 for the respondent and supported the orders of the lower authorities. Since sufficient opportunities have been granted, the matter is taken up for disposal on the basis of records available.

5. The Government has examined the matter. It is evident, from the evidence on record, that the foreign currency was recovered from the Applicant. He did not declare the currency to the Customs officers at the airport under Section 77 of the Customs Act, 1962 and did not have any documents or evidence showing lawful possession of the currency.

6. Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, 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, 2000, 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 has not produced any permission from the Reserve Bank of India for export of foreign currency found in his possession. He has also not shown compliance with the provisions of Regulation 3 (iii) of the FEMA (Possession and Retention of Foreign Currency) Regulations, 2001 in as much as no evidence has been produced in support of the contention that the currency was received as a gift. Thus, it is clear that the conditions in respect of possession and export of foreign currency (seized from the Applicant) are not fulfilled.

7.1 The export of foreign currency is 'prohibited'. 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 dated 17.06.2021, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP &Ors (CA Nos. 2217-2218 of 2021), 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."

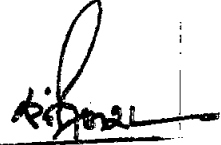
7.2 As brought out in para 6 above, in this case, the conditions subject to which currency could have been legally exported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8.1 The Applicant has prayed for release of foreign currency on payment of redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, the option to release 'prohibited goods', on redemption fine, 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 Raj Grow Impex (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 relevant considerations"*. Further, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex Court, has held that *"non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference."* The Hon'ble High Court has further held that *"when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and reason'"*. In the present case, no grounds are established to hold that the order of absolute confiscation of foreign currency is based on irrelevant or unreasonable considerations.

8.2 The Applicant has averred that the Commissioner (Appeals) has deviated from his earlier stand in this regard when he had allowed the release of foreign currency

in similar cases of Sh. Nagendra Sharma and Sh. Sangam Kumar Gupta vide OSlA dated 12.12.2019 and 27.12.2019, respectively. It is observed that the aforesaid Orders-in-Appeals, allowing redemption of foreign currency, have been set aside by the Government, vide GOI Orders Nos. 20/22-Cus dated 20.01.2022 and 01/22-Cus dated 03.01.2022, respectively.

9. In view of the above, the revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

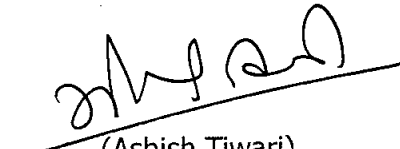
Sh. Haider Ali,
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Kolkata - 700023.

Order No. 86/22-Cus dated 11-03-2022

Copy to:

1. The Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Custom House, Kolkata - 700001.
2. The Commissioner of Customs (Airport & Admn.), NSCBI Airport, Kolkata-700052.
3. Sh. Barinder Singh, Customs Consultant, 'Anamika', 8, Mahanirvan Road, 4th floor, Kolkata-700029.
4. PA to A.S.(RA).
- ✓ 5. Guard File.
6. Spare Copy.

ATTESTED



(Ashish Tiwari)
Assistant Commissioner (RA)