
(2020) 12 CESTAT CK 0060

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 10501, 10508 Of 2019

Mr Rajesh Kumar Ishwar Parikh And Anr. @Hash C.C.-Ahmedabad

Date of Decision : 11-12-2020

Acts Referred:

Customs Act, 1962 — Section 2(22), 108, 113(d), 113(e), 113(h), 114(i)
Foreign Exchange Management (Export & Import of Currency) Regulations, 2000 — Regulation 5
Foreign Exchange Management Act, 1999 — Section 2(j)

Citation : (2020) 12 CESTAT CK 0060

Hon'ble Judges : Ramesh Nair, J

Bench : Single Bench

Advocate : Ambarish Pandey, Sanjiv Kinker

Final Decision : Partly Allowed

Judgement

1. The brief facts of the case are that Mr Rajesh Kumar Ishwar Parikh and Mr Ashish Kumar Daya Bhai Patel are partners in M/s. Jaylaxmi

PolyPlast which is engaged in manufacture of PP/HDPE woven bags. Its manufacturing plant is situated at 401/3 GIDC Dholka, Ahmedabad,

Gujarat. On 16.7.17 appellants were travelling to Sharjah, Dubai by Air Arabia Flight No G9-484. On the basis of information the appellants were

searched and their baggage was brought back for inspection. During the inspection of the luggage of the appellant 4000 USD, 24788 USD and 335

Dirhams were found to be in the possession of the appellant Mr Rajesh Kumar Ishwar Parikh. The currency notes were valued collectively at INR

16,33,228.20/-. Similarly, 4000 USD, 9000 USD and 115 Dirhams were also found to be in possession of appellant Shri Ashish Kumar Dayabhai Patel

which were collectively valued at INR 8,55,474. The Currencies were seized under the belief that it is liable for confiscation under the provision of

Customs Act, 1962.

2. The Statements of both the appellants were recorded by AIU Customs SVPI Ahmedabad, wherein, they have stated that they were taking foreign currency notes out of India as their Partnership firm has incurred losses in their business dealing in Dubai and they had to compensate for this loss to the firm in Dubai. The appellants also stated that the currency notes were purchased from the Authorized Dealers M/s. Capital Forex Services Private Ltd having its office at UL-23 Samudra Building, Nr.Classic Gold Hotel, Girish Cold drink Crossing, C.G Road Ahmedabad. They further stated that part of the currency notes obtained from the said dealer were against the receipt however, but the remaining amount, no receipt was provided.

3. As regards the source of the money for buying foreign currency the appellant stated that the amount was available as cash in hand in the balance sheet of Shubh Laxmi Enterprise another partnership concern of which the appellants are partners. Statement dated 01.12.2017 was also recorded from Mr Yashesh Madhusudan Kothari, Principal Officer of the Authorized Dealer. Thereafter, the Show Cause Notice F No.VIII/10-89/SVPIA /O&A/2017 dated 29.12.2017 was issued by the department proposing to confiscate seized foreign currencies found to be in the possession of the appellants under section 113(d) and 113(e) of the Customs Act, 1962 read with Regulation 5 of the Foreign Exchange Management Regulations. The Show Cause Notice also propose to impose Penalty under section 114(i) of the act.

4. After considering the reply submitted by the appellants the Adjudicating Authority Vide Order in Original No 06/ADCâ? MSC/SVPIA/O&A/2018-19 confirming the proposals made in the Show Cause Notice in the matter of Shri Rajesh Kumar Ishwar Bhai Parikh and ordered absolutely confiscation of the foreign currencies notes worth 24788 US Dollars and 335 UAE Dirhams having equivalent value in Indian Rupees as 16,33,28.20/- under section 113(d) and (e) of the Customs Act along with imposition of penalty of Rs. 10 Lacs under section 114(i) of the Customs Act. He Vacated the seizure and ordered release of foreign currency notes worth 3000 USD as the appellant had produced receipt in the same. Similarly, in the matter of Shri Ashish Kumar Dahyabhai Patel ordered the absolute confiscation of foreign currency notes worth 9,000 USD

and 115 UAE Dirhams equivalent value in Indian Rupees as Rs.6,58,524 under Section 113(d) and (e) of the Customs Act along with imposition of penalty of Rs. 5 Lacs under Section 114(i) of the Customs Act. The Adjudicating Authority vacated the seizure and ordered release of foreign currency notes worth 3000 USD as the appellant had produced receipt for the same.

5. Being aggrieved by the part of the above order dated 26.4.2018 the appellant preferred appeal before the Learned Commissioner of Customs (Appeals) Ahmedabad.

6. The Learned Commissioner (Appeals) vide Order-In-Appeal No. AHMCUSTM-000-APP-181-182-18-19 dated 20.12.2018 dismissed the appeals of the appellants and upheld the Order-In-Original dated 20.12.2018, therefore appellants filed the present appeals.

7. Shri Ambarish Pandey, Learned counsel appeared on behalf of both the appellants. Shri Pandey submits the a preliminary objection raised by

Learned Authorized Representative that this case being of baggage, the appeal does not lye before this tribunal and the appellants ought to have filed

revision application before concerned authority. In this regard he submits that various benches of Honâ??ble Tribunal have held in catena of

decisions that currency is distinct from baggage and Section 2(22) of the Customs Act, 1962 makes a clear distinction between the goods and

currencies. He further submits that it has been held that in cases where confiscation is done under Section 113(d) of the Customs Act and not under

Section 113(h) of the Customs Act, 1962, it is implied that there is an attempt to export and not relatable to Baggage Rules, 2016 therefore

Honâ??ble CESTAT does have jurisdiction to entertain such appeals. In support of his submission he placed reliance on the following judgments:- Â

Â SHAMBHUNATH RANA Vs. COMMISSIONER OF CUSTOMS, KOLKATA, 2003 Taxman 1152 (Kolkata-CESTAT); Â

Â PANKAJ KUMAR TRIPATHI Vs. COMMISSIONER OF CUSTOMS, MUMBAI, 2005 Â

Â VIJAY HEMANDAS JAVA Vs. COMMISSIONER OF CUSTOMS, MUMBAI, 2005 (9) TMI 361 (CESTAT-Mumbai); and Â

Â COMMISSIONER OF CUSTOMS, Kolkata Vs. VINOD Kr. SHAW, 2002 (12) TMI 390 (CESTAT-Kolkata)

7.1 As regard merit of the case he submits that in terms of Rule 5 of Foreign

Exchange Management (Export & Import of Currency) Regulations,

2000, RBI's prior approval is required for transaction included in Schedule III of Regulations, 2000. He submits that Section 2(j) of Foreign

Exchange Management Act, 1999 includes -payments due in connection with Foreign Trade, other current business, services and short term banking

and credit facilities in the ordinary course of business as the current account transactions. In the present case the payment was pertaining to business

dealings of the appellant and is therefore covered under Section 2(j) of FEMA. He submits that Sr.No.8 of Schedule III states that release of foreign

exchange in excess of USD 25,000 for business purpose requires the prior approval therefore, as a corollary of the provisions any amount lesser than

USD 25,000 does not require prior approval of the RBI. He further submits that by virtue of Sr.No.2 of the Schedule III to the Regulations, 2000 prior

approval of RBI is required for the amount exceeding USD 10,000. Therefore, for the amount lesser than USD 10,000 no approval is required from

RBI.

7.2 In view of his above submission he argued that the appellants were entitled to carry upto USD 25,000 out of India for business purpose. Even

otherwise assuming that the amount being carried out by the appellants was not for the business purpose as per FEMA Regulations, USD 10,000 can

be taken out of India without any approval from RBI. He submits that the appellants at the time of recording their statements before the officers of

the department had clearly stated that the foreign currency was being exported for business purpose for making good the losses incurred. Therefore,

the impugned order upholding confiscation of foreign currency is liable to be set aside. He alternatively submits that in view of the above submission if

at all the currency liable to be confiscated, the absolute confiscation is too harsh measure. In view of the fact that the foreign currency was being

taken for business purpose.

7.3 He further submits that the currency is not notified as prohibited goods under the provisions of the act or Under FEMA Regulations and thus,

ordering confiscation of the same vide the impugned order is not justified. The option to redeem the same on payment of redemption fine ought to have

been given. In support of his submission he relied upon the following judgments:- Â

Â· PREM KUMAR Vs. CUSTOMS, 2016 (2) TMI 310 Â

Â· PARESH KANJIBHAI PATEL, 2011 (24) STR (248)-GOI

Â· COMMISSIONER OF CUSTOMS Vs. RAJINDER NARULA, 2017 (346) ELT 0009 (Bom.) Â

Â· SAYYED GHOLAMY Vs. COMMISSIONER OF CUSTOMS, 2005 (179) ELT 401 (Tri.-Mum)

Relying on the above judgments it is submitted that the absolute confiscation in the facts of the case was not correct therefore, the impugned order

directing absolute confiscation of Foreign currency deserves to be set aside. As regard imposition of penalty he further submits that there is no

question of imposing any penalty under Section 114(i) of the Customs Act, 1962.

7.4 Without prejudice, it is his submission that appellants were involved in such an activity for the first time and as no prior history in being engaged in

such cases. The appellants were acting in a bonafide manner and was thoroughly cooperating with the department in its investigation therefore,

imposition of penalty by the impugned order is liable to be set aside.

7.5 Without prejudice, absolute confiscation and penalty under Section 114(i) cannot be imposed together. In support he relied upon the judgment in the

case of SURESH HOLE Vs. COMMISSIONER OF CUSTOMS, AIRPORT, MUMBAI, 2015 (327) ELT 0555 (Tri.-Mum.)

8. Shri Sanjiv Kinker, Learned Superintendent (Authorized Representative) appearing on behalf of the revenue submits that the appellant have

misrepresented the facts that appellants in their statement dated 16.7.2017 stated that they have purchased entire foreign currency from M/s.

CAPITAL FOREX SERVICE PVT. LTD. However, the director of the said dealer company has categorically denied this fact and stated that only

part of the foreign currency were purchased against receipt. Thus, the appellant have misrepresented the facts in their statement under Section 108 of

the Customs Act, 1962 therefore, the appellant have committed a fraud. In this regard he placed reliance on the following judgments:- Â

Â· ASHOK LELAND LTD Vs. STATE OF TAMIL NADU AND ANOTHER dated 7th January, 2004. Â

Â· M/S. STRATEGIC CREDIT CAPITAL PVT.LTD. Versus RATNAKAR BANK LTD 2018 (9) G.S.T.L. 209 (Del.)

8.1 He further submits that foreign currency possessed and being taken out by

the appellant is not in accordance with the Foreign Exchange

Management (Possession & Redemption of foreign currency) Regulations, 2000 and therefore it is prohibited goods and is liable for confiscation. He

referred to various provisions of the aforesaid regulations to submit that foreign currency being taken out is prohibited goods therefore, it is clearly

liable for confiscation. He placed reliance on the following judgments:-

Â· COMMISSIONER OF CUSTOMS (AIR), CHENNAI-I Versus SAMYNATHAN MURUGESAN 2009 (247) ELT 21 (Mad.)

Â· This judgment was upheld by the Supreme Court reported as 2010 (254) E.L.T. A15 (S.C.). Â

Â· COMMISSIONER OF CUSTOMS (AIR), CHENNAI Versus VEERACHI VITHAYAPHALERT 2014 (303) E.L.T. 49 (Mad.) Â

Â· VIRENDRA VERMA 2020 (373) E.L.T. 570 (G.O.I.)

Â· RENUKA Versus COMMISSIONER OF CENTRAL EXCISE, NAGPUR 2019 (370) E.L.T. 314 (Tri.-Mumbai) Â

Â· SURESH GANGARAM HOLE Versus COMMISSIOENR OF CUS., AIRPORT, MUMBAI 2015 (327) E.L.T. 555 (Tri.-Mumbai)

8.2 He further submits that the appellant has not procured the foreign currency from authorized resources therefore, it is prohibited. As regard

absolute confiscation and upholding the penalty he submits that the appellant has failed to prove that the said currency is legitimately owned by the

appellant. Even copy of Books of Accounts provided by them also does not come to their rescue. Since the book shows Cash in hand only to the tune

of Rs.19,91,020/-. On the other hand, the INR equivalent of foreign currency seized is Rs. 2488702/- which is higher than Cash in hand shown in

Shubh Laxmi Enterprise, Balance Sheet.

8.3 Apart from that the appellant also failed to show any proof of withdrawal of Indian Rupee from Bank of Baroda as stated in their statement dated

16.07.2017 therefore, order for absolute confiscation is legally correct and the same cannot be released. He placed reliance on the following

judgments:

i.) S.Faisal Khan Vs. Joint commissioner- 2010 (259) E.L.T. 541 (Mad.)

ii.) COMMISSIONER OF CUSTOMS (AIR), CHENNAI Versus VEERACHI VITHAYAPHALERT 2014 (303) E.L.T. 49 (Mad.)

iii.) N.L. TECHNOLOGIES PVT. LTD. Versus COMMISSIONER OF CUSTOMS, COCHIN 2019 (368) E.L.T. 541 (Ker.)

iv.) UNION OF INDIA v. AIJAJ AHMAD- 2009 (244) E.L.T. 49 (Bom.)

v.) COMMISSIONER OF CUSTOMS, CHENNAI Vs. SAVIER POONOLLY 2014 (310) E.L.T. 231 (Mad.)

8.4 He submits that as per the above submission the Order for absolute confiscation as upheld in the Order-In-Appeal is correct and the same may be maintained.

9. I have heard both the sides and perused the records. The issue to be decided in both the appeals are that:

I) Whether appeal is maintainable before this tribunal as the issue involved is confiscation of foreign currency at the airport?

II) Whether the foreign currency being taken out of India seized at the airport is liable for confiscation?

III) If it is liable for confiscation whether the same can be released on payment of fine or remain absolute confiscated?

A.) As regard the maintainability of appeal before this tribunal I find that this tribunal has considered the very issue in the following judgments:-

SHAMBHUNATH RANA Vs. COMMISSIONER OF CUSTOMS, KOLKATA, 2003 Taxman 1152 (Kolkata-CESTAT);

PANKAJ KUMAR TRIPATHI Vs. COMMISSIONER OF CUSTOMS, MUMBAI, 2005

VIJAY HEMANDAS JAVA Vs. COMMISSIONER OF CUSTOMS, MUMBAI, 2005 (9) TMI 361 (CESTAT-Mumbai); and

COMMISSIONER OF CUSTOMS, Kolkata Vs. VINOD Kr. SHAW, 2002 (12) TMI 390 (CESTAT-Kolkata)

9.1 In view of the above judgment there is no doubt that since the issue is of export of currency which is nothing but goods, this tribunal does have jurisdiction to entertain the present appeals.

9.2 As regard merit of the case we find that there is no dispute of the fact that both the appellants were taking out foreign currency of USD & UAE

Dirhams. The confiscated currencies were attempted to export without the approval of RBI. The relevant Rule 5 of Foreign Exchange Management

(Export & Import of Currency) Regulations, 2000 is reproduced below:-

“Except as otherwise provided in these regulations, no person shall, without the general or special permission of the Reserve Bank,

export or send out of India, or import or bring into India, any foreign currency.â??

9.3 As per the above clear provision of Rule 5 of FEMA Regulation, 2000 it is clear that export of foreign currency can be made only by the

permission of the Reserve Bank of India. It is also found that the appellant could not prove the authorized source of procuring the foreign currency

therefore, the foreign currency seized from the appellants are liable for confiscation.

9.4 As regard the issue that in the facts and circumstances of the present case though the foreign currency are liable for confiscation but whether the

same can be released on payment of fine or the absolute confiscation should remain, I find that the confiscation was ordered under Section 113(d) &

(e) of the Customs Act, 1962 which is reproduced below:-

113. Confiscation of goods attempted to be improperly exported, etc.

The following export goods shall be liable to confiscation:

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any

prohibition imposed by or under this Act or any other law for the time being in force;

(e) any goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

With regard to the confiscation under the above provision the option is provided for payment of fine in lieu of confiscation under Section 125 of the

Customs Act, which is reproduced below:-

125. Option to pay fine in lieu of confiscation

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or

exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other

goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have

been seized] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

From the above provision it is clear that the discretion is provided for payment of fine in lieu of confiscation. Therefore, it is not mandatory that in all

the cases the absolute confiscation should be made. In the present case, the appellants are engaged in the business and as per their statement which is undisputed fact that they are running a manufacturing unit for manufacture of PP/HDPE woven bags. They have also stated in their statement that the foreign currency were being taken for the business purpose.

9.5 The Learned Authorized Representative in his submission also confirmed that Rs.19.91 Lacs were shown as Cash in hand in the books of

Partnership Firm of both the appellants therefore, the source of fund for procuring the foreign currency was available with the appellants. The only

lapse on the part of the appellant is that they have not obtained the permission from RBI. I also find that the export of foreign currency is allowed

subject to permission of RBI.

9.6 As per their statements that they were taking this foreign currency for business purpose which is otherwise permitted by the Reserve Bank of

India therefore, it cannot be said that the appellant had any malafide intention to export the foreign currency as they do not have any gain even if

permission is not obtained. As regard the judgments cited by Learned Authorized Representative regarding absolute confiscation of foreign currency, I

find that there is no trite law that in each and every case the confiscation of goods should be made absolute. The issue that whether confiscation of

goods should be made absolute or conditional such as redemption on payment of fine has to be decided on the basis of facts of each case. It is also not

in dispute that the judgments cited by the learned counsel hold that the foreign currency can be released on payment of fine in lieu of confiscation.

Therefore, considering the facts and circumstances of present case I am of the view that appellant is entitle for release of foreign currencies on

payment of fine. Accordingly, as regard the appeal of Mr. Rajesh Kumar Ishwar Parikh I hold that the confiscated foreign currencies has to be

released on payment of fine of Rs.2 Lacs. Similarly, the confiscated foreign currency from Mr. Ashish Kumar DahyaBhai Patel has to be released on

payment of fine of Rs. 1.0 Lacs.

9.7 Considering the same facts and circumstances and the reasons stated above I am of the view that the penalty imposed on both the appellants are

very harsh and deserves to be reduced substantially.

9.8 Accordingly, I reduce the penalty on Mr. Rajesh Kumar Ishwar Parikh to Rs.1

Lac. and in respect of Mr. Ashish Kumar Dahyabhai Patel the penalty is reduced to Rs.50,000.

10. The appeals are partly allowed in the above terms.

(Pronounced in the open court on 11.12.2020)