

**(2013) 09 MAD CK 0335**

**In the Madras High Court**

**Case No :** CMA No. 762 of 2006 and CMP. No. 3035 of 2006

The Commissioner of Customs (Air)

APPELLANT

Vs

Veerachi Vithayaphalart and Customs, Excise and Service Tax  
Appellate Tribunal

RESPONDENT

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**Date of Decision :** 26-09-2013

**Acts Referred:**

**Citation :** (2014) 303 ELT 49 : (2013) 42 GST 559

**Hon'ble Judges :** T.S. Sivagnanam, J;Chitra Venkataraman, J

**Bench :** Division Bench

**Advocate :** S. Thirumavalavan, for the Appellant; T. Ramesh for R1 and Tribunal for R2, for the Respondent

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## **Judgement**

T.S. Sivagnanam, J.—This appeal by the Revenue, is directed against the Final Order No. 681 of 2005, dated 28.04.2005, passed by the CESTAT. The first respondent is a foreign national, holding a Thailand passport and he was a passenger bound for Singapore by Singapore Airlines Flight on 14.03.2001 from Chennai. The officers of the DRI, Chennai Zonal Unit questioned the first respondent about the possession of foreign currency. The first respondent replied that he was having approximately US \$ 20,000 in his hand baggage and he had not declared the same to the Customs Authorities. The first respondent further informed that he was having US \$ 3310 in the form of Traveller's Cheque for which the endorsement has been made in his passport. On an examination of his baggage in the presence of the witnesses, it was found that the first respondent was carrying assorted foreign currencies approximately Rs. 13.95 lakhs and the same was recovered. A query was made to the first respondent about the carrying of foreign currencies, he appears to have stated that he brought the same for the purpose of his nephew's educational expenditure and for his miscellaneous expenditure in India and he does not possess any currency declaration form for the said currencies. Since the first respondent did not possess any valid documents for the illicit exportation of the foreign currencies, the same were seized under the provisions of the Customs Act. The Traveller's

Cheques having been endorsed in the passport, were returned to the first respondent. In the statement given by the first respondent u/s 108 of the Customs Act, the first respondent accepted the offence pleaded for leniency and the matter may be finalised at the earliest by waiving the issuance of show cause notice and affording personal hearing. Further, the first respondent stated that he had not declared foreign currency at the time of arrival in Chennai Airport due to his carelessness and that the currency brought by him for the purpose of his nephew's school admission and to meet small expenses at various Airports during his business trips and he was working as General Manager of processing business in export of frozen shrimp from India to all over the world. The adjudicating authority, after considering the submissions made, ordered for absolute confiscation of currency u/s 113(d) and (h) of the Customs Act 1962, read with Section 6(3) of the Foreign Exchange Management Act, 1999, (hereinafter referred to as "FEMA"). Challenging the said order, the first respondent preferred appeal to the CESTAT.

2. The Tribunal allowed the appeal by order dated 28.04.2005, by observing that as per law, there was no requirement to make a declaration at the time of leaving India about the possession of currency, and that the currency in possession of the first respondent was also within the limit permitted by Reserve Bank of India. Challenging the said order, the Revenue has filed the present appeal, which has been admitted on the following substantial question of law:-

Whether the lower Tribunal is correct in law in its decision that the currency notes were within the limit provided by Reserve Bank of India Regulations without considering the relevant provisions u/s 77 of the Customs Act, 1962; Section 6(3) of Foreign Exchange Management Act, 1999; Section 7 of Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 and the provisions found in Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000, though the original authority reasoned its finding based on the above law?

3. The learned counsel for the appellant contended that the findings of the Tribunal that there is no requirement under law to make a declaration at the time of leaving India about the possession of foreign currency, is incorrect. Since the declaration is a prerequisite and the first respondent neither made a declaration at the time of arrival in India nor produced any evidence to substantiate his case and the Tribunal without addressing the real issues, allowed the appeal on untenable grounds.

4. The learned counsel for the first respondent submitted that there is no power for the Customs authorities to invoke Section 113(d) and (h) of the Customs Act and the absolute confiscation is wholly illegal. It is further stated that there is no restriction provided for the purpose of taking out foreign currency and if at all proceedings could have been initiated under the provisions of the FEMA 1999, there is no power to absolutely confiscate the currency under the provisions of the Customs Act.

5. We have heard the learned counsels on either side and perused the materials available on record.

6. On going through the Order in Original dated 09.07.2001, it is not in dispute that the first respondent attempted to export foreign currencies in U.S. Dollars, Singapore Dollars, Korean Won, Bangkok Baht, New Zealand Dollars, Japanese Yen and Belgium Franc, equivalent to Indian Rs. 13.95 lakhs without declaring the same to the Customs and without proper documents to substantiate his legitimate import and export.

7. Further, the first respondent had admitted that he has not declared the foreign currencies at the time of arrival in India, rather he had explained that the same was brought for the education of his nephew. It is further admitted that the first respondent was having US \$ 3310 in the form of Traveller's cheque with endorsement in the passport and the same was also returned to the first respondent.

8. In this background, what is required to be seen is as to whether the Tribunal was correct in stating that there is no requirement under any law to make declaration at the time leaving India about possession of currency.

9. The order passed by the Tribunal is wholly unsustainable and without considering the effect of FEMA 1999 and the Regulations framed thereunder. We support such conclusion with the following reasons.

10. FEMA was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. In terms of Section 2(h) "currency" is defined to include all currencies notes, postal notes, postal orders, etc. Section 2(i) defines "currency notes" to mean and include cash in the form of coins and bank notes and Sections 2(1) and 2(p) define "export" and "import" respectively. Section 6 of FEMA deals with "capital account transactions" under sub section (3) of Section 6 without prejudice to the generality of the provisions of sub section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate any of the following mentioned clause (a) to (j). For better appreciation, the provision is quoted hereunder:-

Section 6. Capital account transactions:-

(1) .....

(2) .....

(3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following:-

(a) transfer or issue of any foreign security by a person resident in India;

(b) transfer or issue of any security by a person resident outside India;

(c) transfer or issue of any security or foreign security by any branch, office or

agency in India of a person resident outside India;

(d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;

(e) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;

(f) deposits between persons resident in India and persons resident outside India;

(g) export, import or holding of currency or currency notes;

(h) transfer of immovable property outside India, other than a lease out exceeding five years, by a person resident in India;

(i) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;

(j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred:-

(i) by a person resident in India and owed to a person resident outside India; or

(ii) by a person resident outside India.

11. In exercise of power conferred under clause 5 of sub section 3 of Section 6 read with Section 47(2) of FEMA, the Reserve Bank has framed the Foreign Exchange Management (Export and Import of Currency) Regulation 2000 (hereinafter referred to as the "Regulation").

12. Section 5 of the Regulation imposes a prohibition on export and import of foreign currency. As per Regulation No. 6, a person may import foreign exchange in India without limit in any form other than currency note, bank notes and travellers cheques. Similarly, a person may bring into India from any place outside India without any limit of foreign exchange (other than unissued notes). The first proviso to Regulation 6 provides that bringing of foreign exchange into India under the second contingency shall be subject to the condition that such person makes, on arrival in India, a declaration to the Customs authorities in the Currency Declaration Form, format of which has been annexed in the Regulation. The second proviso to Regulation 6 provides that it shall not be necessary to make such declaration, where the aggregate value of the foreign exchange in the form of currency notes, bank notes or traveller's cheques brought in by such person at anyone time does not exceed US \$ 10,000 (US Dollars ten thousand) or its equivalent or its aggregate value any one time does not exceed US \$ 5,000 (US Dollars five thousand) or its equivalent. Regulation 7 deals with "Export of foreign exchange and currency notes", and the Regulations 5, 6 and 7 are quoted herein below:-

5. Prohibition on export and import of foreign currency:-

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.

6. Import of foreign exchange into India:-A person may-

(a) send into India without limit foreign exchange in any form other than currency notes, bank notes and travellers cheques;

(b) bring into India from any place outside India without limit foreign exchange (other than unissued notes):

Provided that bringing of foreign exchange into India under clause (b) shall be subject to the condition

7. Export of foreign exchange and currency notes:-

(1) An authorised person may send out of India foreign currency acquired in normal course of business.

(2) Any person may take or send out of India:-

(i) cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a person Resident in India) Regulations, 2000;

(ii) foreign exchange obtained by him by drawl from an authorised person in accordance with the provisions of the Act or the rules or regulations or directions made or issued thereunder;

(iii) currency in the safes of vessels or aircrafts which has been brought into India or which has been taken on board a vessel or aircraft with the permission of the Reserve Bank.

(3) Any person may take out of India:-

(i) foreign exchange possessed by him in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000;

(ii) unspent foreign exchange brought back by him to India while returning from travel abroad and retrained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000.

(4) Any person resident outside India may taken out of India unspent foreign exchange not exceeding the amount brought in by him and declared in accordance with the proviso to clause (b) of regulation 6, on his arrival in India.

13. Thus on a cumulative reading of the above referred Regulations, it is clear that there is a stringent condition is imposed under the Regulations with regard to export or import of foreign currency and in terms of Regulation 5, a prohibition of export and import of foreign currency except as provided under the Regulations. Therefore, the first respondent, as a matter of right, is not entitled to import or export in the manner as he wishes without complying with the

provisions of the Regulations.

14. Section 113 of the Customs Act deals with "Confiscation of goods attempted to be improperly exported or imported" etc. The goods, which are liable for confiscation have been listed out in clauses of Section 113. Clause (d) of Section 113 states that any goods attempted to be exported or brought within the limits of the customs area for the purpose of being exported, contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force, is liable for confiscation. The Regulation framed under the FEMA makes a clear definition as regards the import and export of currency. Section 2(22)(d) of the Customs Act defines "goods" to include currency and negotiable instruments.

15. Reading of the definition of "goods" as stated in Section 2(22) along with the definition of "currency" stated in Section 2(h) of FEMA, make it clear that export of currency contrary to prohibition imposed under any other law is liable for confiscation. Therefore, the contention of the learned counsel for the first respondent that there is no power to confiscate the currency u/s 113(d) of the Customs Act, is liable to be rejected.

16. In the back ground of the above provisions, the order of the Tribunal holding that there is no provision to declare the foreign currency in hand, cannot be sustainable. The currency possessed by the first respondent, was contrary to the Regulation, particularly Regulation No. 5 which clearly states that as per Regulation, no person shall, without the general or special permission of the Reserve Bank, export or send out of India or bring into India, any foreign currency. The goods attempted to be exported being foreign exchange, as defined under the FEMA. For all the above reasons, we do not accept the order of the Tribunal, the order of the Tribunal is set aside and the order of the adjudicating authority is hereby confirmed. The learned counsel for the assessee sought for liberty to approach the authorities concerned under the provisions of FEMA. It is always open to the first respondent to avail remedies available under the FEMA Act. No costs. Consequently, connected miscellaneous petition is closed.