

F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA

SPEED POST



F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue: 20/5/22

Order No. 145-148/22-Cus dated 19-05-2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.CC(A)Cus/D-I/Airport/702-705/2020-21 dated 29.10.2020, passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicants : 1. Mrs. Deepika Kanda, Agra,  
2. Mr. Pankaj Kanda, Agra,  
3. Mr. Saransh Kathuria, Faridabad,  
4. Mrs. Mansi Arora, Faridabad.

Respondent : The Commissioner of Customs (Airport & General), New Delhi.

F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA

### **ORDER**

Four Revision Applications, bearing Nos. 375/03/B/2021-RA, 375/04/B/2021-RA, 375/05/B/2021-RA & 375/06/B/2021-RA all dated 15.01.2021, have been filed by Mrs. Deepika Panda, Agra (hereinafter referred to as the Applicant-1), Mr. Pankaj Kanda, Agra (hereinafter referred to as the Applicant-2), Mr. Saransh Kathuria, Faridabad (hereinafter referred to as the Applicant-3) and Mrs. Mansi Arora, Faridabad (hereinafter referred to as the Applicant-4), respectively, against the Order-in-Appeal No. CC(A)Cus/D-I/Airport/702-705/2020-21 dated 29.10.2020, Commissioner of Customs (Appeals), New Customs House, New Delhi. Commissioner (Appeals) has upheld the Order-in-Original passed by the Additional Commissioner of Customs, IGI Airport, New Delhi, bearing no. VIII(AP)10/P&I/2133-B/Arrival/2018/42519 dated 04.02.2019, wherein, gold items, collectively weighing 1464 gms and valued at Rs.39,94,451/-, were confiscated absolutely. Penalties of Rs. 2,50,000/-, Rs. 1,50,000/-, Rs. 1,40,000/- and Rs. 2,40,000/- were imposed on the Applicant No. 1, 2, 3 and 4, respectively, under Section 112 and 114AA of the Customs Act, 1962, respectively.

2. Brief facts of the case are that the Applicants arrived at IGI Airport, New Delhi, from Bangkok, on 12.08.2018. They were intercepted by the Customs officers at exit gate after passing through the green channel without submitting any declaration under Section 77 of the Customs Act, 1962. On search of their checked-in-baggage, six gold kadas, collectively weighing 477 gms, valued at Rs. 13,01,471/-; one silver colour coated gold kada, weighing 253 gms, valued at Rs. 6,90,298/-; one silver colour coated gold kada, weighing 258 gms, valued at Rs. 7,03,940/- and; six gold kadas weighing 476 gms, valued at Rs. 12,98,742/-, were recovered from the Applicant – 1, 2, 3 and 4, respectively. In their statements dated 12.08.2018, tendered under Section 108 of Customs Act, 1962, the Applicants admitted the recovery of the said gold items from them. They revealed in

F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA

their statements that the subject gold items were given to them by one Mr. Sandeep and who in return promised them air ticket along with an amount of Rs. 20,000/- at the time of their departure from Bangkok and rest of the amount of Rs. 70,000/- would be payable only after they hand over these items to his person at exit gate no. 4 of IGI Airport, New Delhi. In their subsequent statements dated 18.08.2018, the Applicants reiterated their earlier statements dated 12.08.2018. The original authority, vide the Order-in-Original dated 04.02.2019, confiscated absolutely the seized gold items. Penalties, as mentioned in Para 1 above, were also imposed on the Applicants under Section 112 and 114AA of the Customs Act, 1962. Aggrieved, the Applicants filed appeals before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected their appeals.

3. The instant revision applications have been filed, mainly, on the grounds that the Applicants are the owners of gold items; that gold is not a prohibited item, and; that the offending gold items should be released on payment of redemption fine. Penalty under Section 112 may be reduced and penalty under Section 114AA may be set aside. Written replies dated 08.02.2021 have been filed by the Respondent department.

4. Personal hearing was held on 19.05.2022, in virtual mode. Sh. S.S. Arora, Advocate, appeared for the Applicants and reiterated the contents of the revision applications. He submitted that the Applicants are the owners of the seized gold articles. Hence these may be released to them on redemption fine and duty and penalty may be reduced. Further, they were not heard by the original authority. Hence, in the alternate, the matter may be remanded. None appeared on behalf of the Respondent department nor any request for adjournment has been received. Therefore, the case is taken up for decision.

F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA

5. The Government has carefully examined the matter. It is observed that the Applicants had not declared the subject gold articles to the Customs on their arrival from Bangkok.

6. Section 123 of Customs Act 1962 reads as follows:

*"123. Burden of proof in certain cases.*

*(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—*

*(a) in a case where such seizure is made from the possession of any person,—*

*(i) on the person from whose possession the goods were seized; and*

*(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;*

*(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.*

*(2) This section shall apply to gold and manufactures thereof watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."*

Hence, in respect of the gold and manufactures thereof, the burden of proof that such goods are not smuggled is on the person, from whom goods are recovered. In the present case, the Applicants have failed to produce any evidence that the gold items recovered from them were not smuggled. The gold items were not declared by the Applicants to the custom officers, as required under Section 77 of Customs Act, 1962. Further, the Applicants' contention that they are the owners of the seized gold articles is not tenable as they had accepted in their statements that the gold was handed over to them by one Sh. Sandeep. It is also on record that the said statements were never

retracted by the Applicants. Further, the Applicants had not produced any evidence i.e. purchase invoice etc. to substantiate their claims that the gold articles were purchased by them and thus belonged to them. It is further observed that the gold articles were in the form of metal rods crudely given shape of kadas. The nature and shape of gold articles also substantiates that these were not legitimately purchased but were meant to be smuggled. The Applicants have, thus, failed to discharge the burden placed on them, in terms of Section 123; *ibid*.

7.1 It is contended on behalf of the Applicants that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicants is in the teeth of law settled by a catena of judgments of Hon'ble Supreme Court. In the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}, the Apex 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*". Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment of certain conditions. In the case of M/s 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"*. Further, 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."*

F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA

7.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(Mad.)], the Hon'ble Madras High Court has summarized the position on the issue, specifically in respect of gold, as under:

*"64. Dictum of the Hon'ble Supreme Court and High Courts makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition "prohibited goods", in Section 2 (33) of the Customs Act, 1962----."*

7.3 In this case, the conditions, subject to which gold could have been legally imported, have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. The original adjudicating authority has denied the release of offending goods on 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; 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 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' "*. Hon'ble Delhi high Court has, in the case of Raju Sharma Vs. UOI {2020(372)ELT249 (Del.)}, held that *"Exercise of discretion by judicial, or quasi-*

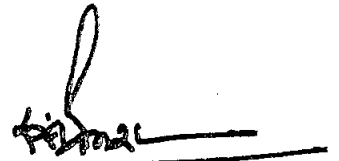
F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA

*judicial authorities, merits interference only where the exercise is perverse, or tainted by patent illegality, or is tainted by oblique motives."* In holding so, the Hon'ble High Court has relied upon the judgement of Apex Court in the case of Mangalam Organics Ltd. {2017(349)ELT369(SC)}. Thus, the Commissioner (Appeals) could have interfered with the discretion exercised by the original authority only if it would have been tainted by any of vices highlighted by the Hon'ble Courts. Such a case is not made out. Hence, the discretion exercised by the original authority does not merit intervention.

9. The Government observes that, in the facts and circumstances of the case, penalty imposed is just and fair. Further, as the Applicants had failed to make a correct declaration, in contravention of Section 77 of the Act, the penalty under Section 114AA is imposable and the contention of the Applicants to the contrary is not acceptable.

10. The original authority has decided the case without hearing the parties, as the hearing had been specifically waived by them in their statements recorded under Section 108 *ibid*. Therefore, no case for remand is also made out.

11. In view of the above, the revision applications are rejected.



(Sandeep Prakash)  
Additional Secretary to the Government of India

1. Mrs. Deepika Kanda,  
R/o - 3/22 A, Mathur Colony, Civil Lines,  
Khandari, Agra, Uttar Pradesh 282002.
2. Mr. Pankaj Kanda,  
R/o - 3/22 A, Mathur Colony, Civil Lines,  
Khandari, Agra, Uttar Pradesh 282002.

F.No. 375/03/B/2021-RA  
F.No. 375/04/B/2021-RA  
F.No. 375/05/B/2021-RA  
F.No. 375/06/B/2021-RA

3. Mr. Saransh Kathuria,  
J-140, 140, Sector 10, DLF,  
Faridabad, Haryana 121006.

4. Mrs. Mansi Arora,  
J-140, 140, Sector 10, DLF,  
Faridabad, Haryana 121006.

Order No. 145-148/22-Cus dated 19-05-2022

Copy to:

1. The Commissioner of Customs, Airport & General, IGI Airport, New Delhi-110037.
2. The Commissioner of Customs (Appeals), New Custom House, New Delhi-110037.
3. Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi-110037.
4. Sh. S.S. Arora, Advocate, B-1/71, Safdarjung Enclave, New Delhi - 110029.
5. PA to AS(RA).
6. Guard File.
7. Spare Copy

Attested  
Poonam Guggal  
(Poonam Guggal)  
Sopdt(R.A.)