



2023-DB01-7923-DB



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 05 October 2023
Judgment pronounced on: 02 November 2023

+ W.P.(C) 8347/2020 & CM APPL. 27120/2020-Int. relief
M/S. KHANDWALA FINSTOCK PRIVATE LIMITED

..... Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with
Mr. Kishore Kunal, Mr.
Runjhun Pare, Advs.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Zoheb Hossain, Sr. SC with
Mr. Vivek Gurnani, Adv. for
CBIC.
Mr. Anurag Ahluwalia, CGSC
for UOI.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J.

1. By way of the present writ petition, the petitioner questions the validity of the impugned orders dated 04 September 2020 and 07 September 2020 passed by the Principal Commissioner of Customs, the second respondent herein. By the impugned order the second respondent has rejected the classification of gold coins imported vide 27 Bills of Entry under CTH 7114 1910 as claimed by the petitioner and held that these goods are correctly classifiable under CTH 7118 9000 of the Customs Tariff Act, 1975.



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2. The petitioner seeks to invoke the jurisdiction of this Court to assail the validity of the Order-in-Original notwithstanding the existence of a statutory remedy of appeal, primarily on the ground that the same is based on a wholly erroneous understanding and appreciation of the judgement dated 14 November 2019 which was rendered *inter partes* in W.P.(C) 9225/2019 titled as **Khandwala Enterprise Private Limited vs. Union of India and Ors**¹.

3. The grievance of the petitioner essentially is that the second respondent appears to have construed the judgment rendered in *Khandwala Enterprise* as having finally determined the question of whether the articles imported by the petitioner were liable to be classified under CTH 7114 1910 or 7118 9000. According to Mr. Gulati, learned senior counsel appearing in support of the petition, the second respondent incorrectly proceeds on the assumption that this Court had conclusively held that the articles imported by the petitioner were liable to be classified under CTH 7118 9000. It was in the aforesaid backdrop that Mr. Gulati had submitted that since it was *ex facie* evident that the impugned orders had completely misconstrued the judgment rendered *inter partes*, the ends of justice would warrant an appropriate clarification being rendered by the Court in this regard whereafter the petitioner may be accorded the liberty to pursue the appellate remedy.

4. We had in this context and consequently accorded liberty to Mr. Gurnani, learned counsel appearing for the respondents, to obtain instructions. When the petition was called finally on 05 October 2023,

¹ 2019:DHC:5939-DB



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Mr. Gurnani submitted that the respondents would take the position that no clarification was warranted and that the writ petition is liable to be dismissed outrightly on the ground of alternative remedy.

5. It was in the aforesaid backdrop that we had proceeded to hear submissions addressed by respective sides on merits. Before proceeding ahead and for the purposes of appreciating the context in which the present writ petition has reached this Court, we deem it appropriate to notice the following salient facts.

6. The petitioner is stated to be engaged in the business of import and trade in gold, gold articles and assorted gold jewellery. On 07 August 2009, the Republics of India and Korea entered into a **Comprehensive Economic Partnership Agreement**² which shall hereinafter and for the sake of brevity be referred to as the “*Indo-Korean CEPA*”. The petitioner claimed exemption from payment of customs duties based on the exemption provisions as contained in the Indo-Korean CEPA. In extension of the aforesaid Agreement between the Republics of India and Korea, the Department of Revenue issued a Notification No. 152/2009-Customs dated 31 December 2009 as amended by Notification No. 66/2016-Customs dated 31 December 2016, extending the benefit of Nil **Basic Customs Duty**³ to all goods falling under CTH 711021 to 711890 subject to the production of a certificate pertaining to the country of origin. The relevant parts of the aforesaid Notification are extracted hereinbelow: -

**“Notification No. 152/2009-Customs dated 31.12.2009
Exemption of Customs duty on certain goods when imported
into India from the Republic of Korea**

² CEPA

³ BCD



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G.S.R.(E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description as specified in column (3) of the Table appended hereto and falling under the Chapter, Heading, Sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as specified in the corresponding entry in column (2) of the said Table, when imported into India from the Republic of Korea, from so much of the duty of customs leviable thereon as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the aforesaid Table:

Provided that the importer proves to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, that the goods in respect of which the benefit of this exemption is claimed are of the origin of Republic of Korea, in accordance with the provisions of the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Republic of India and the Republic of Korea) Rules, 2009, published in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 187/2009-Customs (N.T.), dated the 31st December, 2009.

2. This notification shall come into force with effect from 1st January, 2010.

Table

S.No.	Chapter, Heading, Sub-heading or Tariff Item	Description of goods	Rate
526	711021 to 711890	All Goods	0.00

7. The Department of Revenue thereafter and in terms of a Notification No. 01/2011-CE dated 01 March 2011 granted exemption from payment of excise duty beyond 01% ad valorem duty imposed on goods of specified descriptions falling under the Central Excise Tariff. Entry 89 of the aforesaid Notification and which alone is relevant for our purposes is reproduced hereinbelow:



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S.No.	Chapter or heading or sub- heading or tariff item of the First Schedule	Description of the excisable goods
89	7114	Articles, other than jewellery, of— (a) gold, (b) silver, (c) platinum, (d) palladium, (e) rhodium, (f) iridium, (g) osmium, or (h) ruthenium, manufactured or sold under a brand name. Explanation. - 1. For the purpose of this exemption, “brand name” means a brand name or trade name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to a product, for the purpose of indicating, or so to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person. 2. An identity put by a jeweller or the job worker, commonly known as ‘house-mark’ shall not be considered as brand name. 3. ‘articles’ in relation to gold shall mean anything (other than ornaments), in a finished form, made of, or manufactured from or containing, gold and includes any gold coin and broken pieces of an article of gold but does not include



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		primary gold, that is to say, gold in any unfinished or semi-finished form including ingots, bars, blocks slabs, billets, shots, pellets, rods, sheets, foils and wires.
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8. On 18 February 2015, the **Reserve Bank of India**⁴ issued A.P. (DIR Series) Circular No.79 purporting to remove the prohibition on the import of gold coins and medallions. However, it becomes pertinent to note that the permission to import gold was extended only to certain identified agencies such as Nominated Banks, Star and Premier Trading Houses. RBI also proceeded to draw up Master Directions for Import on 01 January 2016, in terms of which the import of gold coins and medallions was proposed to be regulated.

9. In August 2017, the petitioner filed 27 Bills of Entry for clearance of goods declared as gold coins (other than legal tender) of different purity (99.5% and above) stated to have been imported from South Korea. The goods were classified by the petitioners as falling under CTH 7114 1910 and on the basis thereof, it claimed benefit of Nil rate of BCD in accordance with Serial No. 526 of the Customs Notification dated 31 December 2009 (as amended) and noticed hereinabove.

10. On 25 August 2017, the Department of Commerce issued a Notification No.25/2015-2020 restricting the import of goods falling under CTH 7113, 7114, 7115 and 7118 from South Korea. The relevant parts of that Notification are reproduced hereinbelow.

“S.O.(E).- In exercise of the powers conferred by Section 3(2) of the FT(D&R)Act, 1992 as amended from time to time, read with

⁴ RBI



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paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, the Central Government hereby inserts Policy Condition No. 4 under Chapter 71 of the ITC(HS) 2017, Schedule- I (Import Policy) to read as under:-

"Imports from South Korea of articles of jewellery and parts thereof, of precious metal or of metal clad with precious metal under Exim code 7113; articles of goldsmiths' or silversmiths' wares and parts thereof, of precious metal or of metal clad with precious metal under Exim code 7114; other articles of precious metal or of metal clad with precious metal under Exim code 7115; and coins under Exim code 7118 are Restricted."

2. The facility/protection under para 1.05 of FTP shall not be available for import of the above items from the date of restriction.

3. **Effect of this Notification:** Policy Condition No. 4 restricting imports of gold and silver under Exim Codes 7113, 7114, 7115 and 7118 from South Korea is inserted in Chapter 71 of ITC(HS)"

11. Post the issuance of the aforesaid Notification, the Principal Commissioner of Customs is stated to have addressed a letter to the **Directorate General of Foreign Trade**⁵ seeking clarifications with respect to the import policy of gold and silver. While responding to the aforesaid letter, the DGFT vide its Office Memorandum dated 06 September 2017, apprised the Customs authorities of the regulatory position in the following terms: -

"F. No. 01/89/180/36/AM-11/PC-II(A)
Government of India
Ministry of Commerce & Industry
Department of Commerce
Directorate General of Foreign trade

Udyog Bhawan, New Delhi
Dated the 6th September, 2017

Office Memorandum

⁵ DGFT



Subject: Amendment in Import Policy of gold and silver under Chapter 71 of the ITC(HS) 2017-regd.

The undersigned is directed to refer to letter No. VIII(12) Import/Gr. III. IV & VI/KCPL/39/2016/1605 dated 30.08.2017 from the Commissioner (Customs) Air Cargo Complex seeking clarification on the above mentioned subject.

2. In the matter, it is clarified that date of reckoning of import is decided w.r.t. the date of shipment, as per Para 2.17 read with para 9.11 of the HBP (2015-20). Accordingly, shipments prior to 25.08.2017 may be considered for clearance by Customs. However, of late there has been an unprecedented surge in import of gold coins from South Korea under INDIA - Korea CEPA. Customs being the verifying agency for Rules of Origin (RoO) criteria of the imported goods, may like to examine these consignments of gold with due diligence to ensure that such imports have complied with the RoO under the Indo-Korea CEPA.

3. To further amplify the point, since Korea is not a gold producing Country, the point to be checked is whether the exported gold articles from Korea are complying with the 'origin criteria' of Product Specific Rules of Origin under India-Korea CEPA. It may so happen that gold coins are being imported into Korea only for export purpose without any conversion facility. This is the right time for India to undertake a physical verification exercise (of manufacturing facility/premises) in coordination with our counterpart in Korea.

4. Further, as it has been observed that consignments of gold coins are being imported under HS: 7114 from South Korea, whereas the gold coins are classified under HS: 71189000 subject to RBI guidelines. This aspect may also be examined while dealing with these consignments. In case, you find any mis-declaration, you may take appropriate action against the importer under the Customs Act.

This issues with the approval of DGFT.

Sd/-

(S.K. Mahapatra)

Dy. DGFT

Tel: 23061562 Ext: 277

E-mail: mohapatra.sk@nic.in

The Commissioner of (Customs)
Air Cargo Complex [Import]
New Customs House, New Delhi-110037.”



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12. Thereafter and on 13 September 2017, RBI in terms of the said communication, formulated guidelines relating to the import of gold and relevant parts whereof are reproduced hereunder: -

“RESERVE BANK OF INDIA

www.rbi.org.in

FED.C.O. Trade (EXD)/2456/05.31.066/2017-18

September 13, 2017

Commissioner
Office of the Principal Commissioner of Customs
Air Cargo Complex (Import)
New Custom House
New Delhi 1100037

Madam

Import of Gold Medallions

Place refer to your letter No. F. No. VIII(12)/Import/Gr. III, IV & VI/KCPL/39/2016/15453 dated August 24, 2017.

2. We wish to advise that import of gold is governed by the provisions of Foreign Trade Policy (FTP) and the guidelines of RBI are primarily for payment and reporting of import of gold. We also advise that agencies notified by DGFT under the FTP are allowed to import gold in bullion form and in the form of gold coins (finished goods). Accordingly, payment for only such import of gold is permitted under RBI guidelines. These agencies are:

- (i) Agencies nominated by DGFT
- (ii) Banks authorized by RBI and
- (iii) Star and Premier Trading Houses (STH/PTH).

3. While 2 (i) and (ii) above are permitted to import gold on consignment basis, all domestic sale of gold should be against upfront payment. STH/PTH can import gold on Document against Payment (DP) basis as per their entitlement.

4. We also wish to inform that apart from the above mentioned agencies, others entities are not permitted to import gold coins (as well as medallions). Further, sale of gold coins and medallions by banks is prohibited Since import of gold in dore form is governed by DGFT guidelines and RBI does not regulate it. We request you to kindly seek final confirmation from DGFT in the matter of import of gold in any form.



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Endt: FED C.O. Trade (EXD)/2481/US.31.066/2017-18 of date

Copy forwarded for information to Deputy Commissioner of Customs, Office of the Deputy Commissioner of Customs. Group 1-4, Air Cargo Complex, Devanahalli, Bangalore 560 300 with reference to her letter No. C. No. VII I/10/55/Gr. 1-4 BACC dated July 18, 2017

Sd/-
Assistant Manager”

13. Post the issuance of the notification dated 25 August 2017 issued by the Ministry of Commerce and the Office Memorandum dated 06 September 2017 emanating from the office of the DGFT, the respondents appear to have taken notice of the restrictions imposed on the import of gold coins. However, and significantly, the Commissioner of Customs (Imports) vide its letter dated 14 September 2017 addressed to the **Central Board of Excise and Customs**⁶ took the position that gold coins (other than legal tender), that is an article of gold struck in the form of a coin, would be covered under CTH 7114 and not CTH 7118. While arriving at that conclusion, the authority rested its view on CTH 7118 as framed along with the **Harmonized System Nomenclature**⁷ explanatory notes accompanying the said entry. It ultimately came to conclude that such gold coins were free of all restrictions at least till 24 August 2017. The aforesaid communication is extracted hereinbelow: -

“OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORTS)
NEW CUSTOM HOUSE, NEAR IGI AIRPORT, NEW DELHI –
110037

C. No. VIII/12/Import/Gr.-III, IV&VI/KCPL/39/2016/

Dated: 09.2017

⁶ CBEC

⁷ HSN



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To,

- (1) The Commissioner (Customs),
Central Board of Excise & Customs,
North Block,
New Delhi – 110001
- (2) The Joint Secretary,
Tariff Unit, Central Board of Excise & Customs,
New Delhi.

Sir,

Subject: - Amendment in import policy of gold and silver under Chapter 71 of the ITC (HS) 2017, Schedule –I (Import Policy) vide DGFT Notification No.25/2015-2020 dated 25.08.2017- reg.

Reference is made to the Notification referred above vide which a new Policy Condition No. 4 has been inserted under Chapter 71 of the ITC (HS) 2017, Schedule –I (Import Policy) whereby imports from South Korea of goods covered under CTH 7113, 7114, 7115 and 7118 have been made “Restricted”.

2. In this regard, a letter dated 30.08.2017 issued from file of even number (copy enclosed) was sent to the DGCT, New Delhi seeking clarification in respect of applicability of the aforesaid DGFT Notification. In response, Office Memorandum dated 06.09.2017 issued under F.No. 01/89/180/36/AM-11/PC-II(A) by Shri S.K. Mohaptra, Dy. DGFT has been received in this office. A copy of the said OM dated 06.09.2017 is enclosed herewith.

3. At para 4 of the said OM dated 06.09.2017 it has been stated that consignments of gold coins are being imported under HS: 7114 from South Korea, whereas the coins are classified under HS:7118 9000 subject to RBI guidelines. This office has been advised to examine this aspect while dealing with these consignments.

4. In this context, it is stated that gold coins other than legal tender are excluded from CTH 7118 as per explanation provided in HSN Explanatory Notes (copy enclosed) and therefore, the same are covered under CTH 7114. As per import policy given in ITC (HS) Schedule I for CTH 7114, policy for imports of the goods covered under the said heading is ‘Free’ without any policy conditions. Further, reference is also made to RBI Master Circular No. 17/2016-17 dated 01.01.2016 updated as on 12.01.2017 (as available on RBI website). As per para C.11.I.v of the said Master Circular, “*The import of gods coins and medallions is permitted.*”

5. In view of the above, this office is of the view that gold coins other than legal tender are covered under CTH 7114, that is an article of gold struck in the form o coin and there was no bar till



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24.08.2017 on import of such gold coins. However, the matter is being brought to your kind for necessary clarification.”

14. On 16 February 2018 the CBEC issued an Office Memorandum stating that the classification of Gold Coins ought to be under CTH 7118 9000. The relevant portion of the Office Memorandum reads as:

“F.No: 20000/5/2015-OSD(ICD)
Govt. of India
Ministry of Finance
Dept of Revenue
Central Board of Excise & Customs

Room No. 227 A North Block, New Delhi
Dated 16th Feb. 2018

Office Memorandum

Subject: Classification of Gold Coins

Kindly refer to the letter no. VIII/12/ACCI/Gr-III, IV, VI dated 6th December 2017 from Commissioner of Customs (Import) regarding the above subject.

2. In the Customs Tariff heading 7118 reads as follows:

7118	Coin	
71181000	- Coin (other than gold coin), not being legal tender	10%
71189000	- other	10%

2.1 Within this CTH, are included:

(i) coins (other than gold coin) which are "no longer legal tender" - 7118 10 00

(ii) All remaining COINs (includes all legal tender, regardless of constituent material, and Gold Coins) -7118 90 00

Accordingly, the classification of GOLD COINS ought to have been under 7118 90 00.

3. Furthermore, the communication exchanged with RBI dated 13th Sept. 2017 which has been enclosed with the subject letter, states



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that only nominated agencies can import gold coins or gold in primary forms. They have also categorically stated that other than the notified agencies/ banks/ Star & Premier Trading houses, import of gold coins and medallions is not permitted.

4. In view of the above, it appears that the issue of classification and the eligibility of the entities who imported "gold coins" during the period 1st July to 25th Aug 2017 under India-Korea FTA requires action in terms of Foreign Trade Policy.

5. This issues with the approval of the Board Chief Commissioner of Customs

Sd/-

(Mandeep Sangha)
Senior Technical Officer
New Customs House
Near 101 Airport
New Delhi.”

15. The issue of classification of articles of gold, other than legal tender, appears to have arisen for consideration of the **Customs, Excise and Service Tax Appellate Tribunal⁸** Hyderabad Bench in the matter of **Sri Exports vs. Commissioner of Customs, Hyderabad.⁹** While dealing with the aforesaid issue, CESTAT Hyderabad held as follows: -

“11. In view of the above discussions, it would be evident that as per the import policy notified by the DGFT, gold in any form, other than monetary gold, are placed under "FREE" category with policy condition subject to RBI regulations. The RBI in the master circular only prescribed regulation at Para C.11.1 for method of import and types of payment vis-à-vis credit facility by banks for gold imports by nominated agencies notified by DGFT and at Para C.11.2 for others. In fact, the RBI categorically permitted the banks to open Letters of Credit for maximum period of 90 days for importing gold in any form. Nowhere in the master circular, the RBI has notified category of persons eligible for import of gold and have not imposed any restrictions on such imports. In the present case, gold granules were neither imported on a consignment basis nor on a credit basis. The importer/appellant

⁸ CESTAT

⁹ 2019 (365) E.L.T. 934 (Tri. - Hyd.)



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paid an advance payment through bank Letter of Credit/Swift. I find that the RBI directions, at the most, are restrictions made at regulating import and export of goods in terms of restrictions on current account transactions in foreign exchange but not prohibiting import and export of goods as such. Prohibitions are actionable in terms of Section 111 (b) of the Customs Act and restrictions are actionable in terms of Section 11 (2) of Foreign Trade (Development and Regulation) Act, 1992 as held by the Hon'ble High Court of Bombay in the case of *Riddi Siddhi Bullions Ltd. v. Commissioner* [2016 (333) E.L.T. A174 (Bom.)]. Accordingly, in my considered view, gold granules are not prohibited goods within the meaning of Section 2(32) of Customs Act, 1962.

12. Further, the Customs Act, 1962 does not authorise C.B.E. & C. to impose prohibitions by way of circulars, since as submitted supra, circular is not law. Therefore, the contention of the Learned Commissioner (Appeals) that the appellants are prohibited from importing gold granules, in terms of Circular No. 34/2013-Cus., dated 4-9-2013 and Circular No. 27/2016-Cus., dated 10-6-2016 is not legally sustainable. They are only clarificatory/procedural circulars, to give effect to the exemption contained in the above notifications, with special reference to disposal and monitoring of the gold imported, duty free, by the nominated agencies, in terms of the above notifications but do not impose any prohibitions/restrictions on the import of gold by others, on payment of appropriate Customs duty and the appellants have never claimed the benefit of the said exemption, as they are not nominated agency, specified in the FTP/Notification/Circular. Therefore, the Ld. Commissioner (Appeals) holding that, in terms of the said circulars, appellant was prohibited from importing gold is farfetched and without any legal basis.

13. In view of the above discussions, I hold that the appellants are eligible to import gold granules, in terms of Para C. 11.2 of RBI's Master Direction No. 17/2016-17, dated 1-1-2016 to which the said notifications and circulars are not applicable, Accordingly, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any."

16. On 12 March 2019, the India Bullion and Jewellers Association Limited submitted a detailed representation for the consideration of the DGFT seeking to advocate a case that gold articles which are loosely or colloquially referred to as "gold coins", although they may



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not fall in the category of legal tender, are liable to be classified under CTH 7114. The Association sought to contend that the restrictive prescriptions which form part of CTH 7118 would only apply to coins which are or had been at a particular point in time been considered to be legal tender. The Association thus contended that gold coins other than legal tender could not be placed under CTH 7118.

17. In the meanwhile, and more particularly on 30 April 2019, the issue of classification of gold coins other than legal tender again arose for determination before the Bangalore Bench of the CESTAT in the matter of **Sri Exports vs. Commissioner of Customs, Bangalore**¹⁰. CESTAT on this occasion and in terms of its judgement dated 30 April 2019, held as follows: -

“6. After considering the submissions of both the parties and perusal of the material on record, I find that the only allegations of the Department is that the appellant has imported the Gold Medallion of Purity 999.9 falling under CTH 71141910 of Customs Tariff Act, 1975 and the same is not permitted because the appellant is not a Nominated Bank or Nominated Agency or a Holder of a Status of a Star/Premier Trading House. As per the RBI regulations, it is only the Nominated Bank and Nominated Agency as notified by DGFT which is permitted to import the said goods. Further, I find that it is not in dispute that the Gold Medallion of Purity 999.9 fall under CTH 71141910 of CETA 1975 and as per the Import Policy, the “Articles of Gold” are classifiable under CTH 71141910 and are freely importable and there is no restriction and in view of the decisions cited supra, Gold Medallion fall within the definition of “Articles of Gold”. Further, I find that the appellants have imported the Gold Medallion which is classified as “Articles of Gold” from Korea and vide Notification No. 152/2009 dated 31.12.2009 the BCD leviable on the import of “Articles of Gold” from Korea falling under Chapter 71141910 is Nil. Further, I find that CBEC Circular No. 27/2016-Cus. Dated 10.06.2016 relied upon by both the authorities is not applicable in the facts and the circumstances of this case because the appellant is not a Nominated Agency but it is only an individual importer who

¹⁰ 2019 (368) E.L.T. 985 (Tri-Bang.)



has imported gold against advance payment or Letter of Credit (not exceeding 90 days) for home consumption, wholesale and retail sales. Further, the Master Direction issued by the RBI is also not applicable in the present case because that instruction of the RBI only applies to Nominated Banks and Nominated Agencies as notified by DGFT. Further, I also note that in the present case, the importer has not imported gold on consignment basis and therefore, the conditions laid down by the RBI is not applicable to the appellant. Another important aspect is that with regard to the same goods, the appellant has placed on record two Bill of Entries filed at Hyderabad Airport and imported the Gold Medallion from Korea under the same Notification and the same was cleared on Nil rate of duty. Further, I note that same goods is being cleared at Delhi Airport at Nil rate of duty and the Bill of Entries have been placed on record proving the clearance at Nil rate of duty at Delhi Airport. The appellant has also relied upon the judgment of the Hyderabad CESTAT in his own case wherein the goods imported was Gold Granules of the same purity to submit that on the identical grounds the Tribunal in Appeal No. C/30812/2018 has allowed the appeal of the appellant. In view of my discussion above, I am of the considered opinion that the impugned order is not sustainable in law and therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any and direct the Customs Authorities to clear the goods free of duty.”

18. On 31 May 2019, the **Central Board of Indirect Taxes and Customs**¹¹ issued Circular No. 450/67/2019-Cus.IV stating that that the judgments of the CESTAT passed in appeals filed by *M/s Sri Exports*, were not ‘legal and proper’. The Circular read thus:

“F. NO. 450/67/2019. CUS IV
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS)

Room 227B, North Block
New Delhi, dated 31st May, 2019

To
All Principal Chief Commissioners/Chief Commissioners of

¹¹ CBIC



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Customs/Customs (Preventive)

All Principal Chief Commissioners/Chief Commissioners of Customs & Central Taxes

All Principal Commissioners/Commissioners of Customs/ Customs (Preventive)

Subject:- Import of Gold Granules by entities other than nominated agency/bank/ star house etc. reg.

Sir/ Madam,

Attention is invited to two CESTAT Judgments Sri Exports versus Commissioner of Customs. Hyderabad (Final Order No. A/31/194/2018, dated 22.11.2018 in Appeal No. C/30812/2018) and Sri Exports Versus C.C. Bangalore- Cus [arising out of No. 344/2018 dated 12.10.2018 passed by Commissioner of Customs, Bangalore-I) respectively. In the said orders passed by the Hyderabad and Bangalore benches of CESTAT, import of Gold granules has been allowed to be imported by an importer not being a nominated agency/bank/star house etc.

The said CESTAT orders have been examined in the Board. It is observed that the said orders are not legal and proper. Therefore, the Board has taken a decision that the said orders should be appealed against. Customs authorities at Hyderabad and Bangalore have been requested to take necessary action.

It is therefore, requested that any similar consignments pending clearance at the ports/airports may be dealt in terms of the FTP 2015-2020 and the Board's decision above.

Yours Sincerely

Sd/-

(Zubair Riaz)

Director (Customs)”

19. It is pertinent to note that the aforementioned circular was amended vide Circular dated 9 September 2019. The amending Circular issued by the CBIC is reproduced hereunder:

“F No. 45G/67/2019-Cus.IV.

Government of India

Ministry of Finance

Department of Revenue

(Central Board of Indirect Taxes & Customs)



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Room 227B, North Block
New Delhi, dated 9th September, 2019

To

All Principal Chief Commissioners/Chief Commissioners of
Customs/ Customs(Preventive)

All Principal Chief Commissioners/Chief Commissioners of
Customs & Central Taxes

All Principal Commissioners/Commissioners of Customs/Customs
(Preventive)

Subject: Import of Gold Granules by entities other than nominated
agency/bank/ star house etc.-reg.

Sir/ Madam,

Attention is invited to the instruction from even F. No. dated 31.5.19 on the above subject informing inter-alia that CBIC has directed respective field formations to appeal against CESTAT judgments in Sri Exports Versus Commissioner of Customs, Hyderabad [Final Order No. A/31494/2018, dated 27-11-2018 in Appeal No. C/30812/2018] and Sri Exports Versus G.G Bangalore-Cus [arising out of No. 344/2018 dated 12/10/2018 passed by Commissioner of Customs, Bangalore-I] respectively (copy enclosed).

2. As per the information received from the Principal Commissioner of Customs, Hyderabad, the said order passed by CESTAT Hyderabad has been suspended. Appeal has also been filed against the order of CESTAT, Bengaluru in the Karnataka High Court.

3. Subsequent to above Instructions. RBI vide letter dt. 18 June 2019 has stated that as per Master Direction dated July 1, 2016, it has been mentioned that Nominated banks and nominated agencies, as notified, by DGFT are permitted to import gold on consignment basis. Further, DGFT vide F. No 01/89/180/36/AM-11/PC-2 (A)/Pt.II/P-321 dated 21.6.19 has clarified that 'individual parties not falling under the category of nominated agencies are not eligible for importing gold', (copy enclosed)

4. In view of the above, last para of instruction dated 31.5.19 is modified to the effect that field formations may take suitable action **in accordance with the above instructions of RBI/relevant master circulars/ extant FTP provisions and the clarification from DGFT dated 21.6.19 cited above besides provisions of the Customs Act with regard to pending or future imports of gold**



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consignments.

Yours Sincerely
Sd/-
9.9.2019
(Zuber Riaz)
Director (Customs)”

20. Having broadly noticed the salient facts relevant to the issues that arise for our consideration, we find from the submissions which were addressed by Mr. Gulati and Mr. Gurnani that the dispute essentially revolves around the import of the judgment which was rendered *inter partes* in *Khandwala Enterprise*. The writ petition which had been preferred earlier had assailed the validity of the **Show Cause Notices**¹² as well as the Office Memorandum and Circulars issued by the CBEC/CBIC, and the DGFT noticed hereinbefore. Before proceeding further, it would be apposite to take note of the contours of the challenge in the first writ petition and which would be evident from the following recital appearing in the judgment rendered by the Division Bench :-

- “2. The writ petition seeks quashing of
- (i) Office Memorandum, dated 16th February, 2018, issued by the Central Board of Excise and Customs (CBEC),
 - (ii) Circular, dated 31st May, 2019, issued by the Central Board of Indirect Taxes and Customs (the CBEC, as rechristened after the advent of the GST regime, referred to, hereinafter, as "the CBIC"),
 - (iii) Office Memorandum, dated 6th September, 2017, issued by the Director General of Foreign Trade (DGFT),
 - (iv) Show cause notice dated 15th July, 2019, issued to the petitioner by the Commissioner of Customs, ACC Import, New Delhi (hereinafter referred to as "the Commissioner"), and
 - (v) Show cause notice dated 19th July, 2019, issued to M/s. Mink Tradecom Private Limited (hereinafter referred to as "Mink") by

¹² SCN



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the Commissioner.”

21. The Court, upon noticing the provisions of the Foreign Trade Policy and by way of a preface to the challenge which stood raised, made the following pertinent observations in paragraphs 13, 14 and 15 of the judgment:-

“13. According to the Revenue, the gold coins imported by the petitioner under the aforesaid eight BS/E were appropriately classifiable, not under sub-heading 7114 19 10, but under sub-heading 7118 90 00 of the Tariff. Tariff Heading 7118 of the Tariff, with its sub-headings, may be reproduced thus:

Tariff item	Description of goods	Unit	Rate of duty
7118	Coins		
7118 10 00	Coins (<i>other than gold coin</i>) not being legal tenders	Kg	10%
7118 90 00	Other	Kg	10%

14. Reliance has been placed, in the impugned show cause notice dated 12th July, 2019, on the Explanatory Note to Heading 7118 in the Harmonised System of Nomenclature (HSN), which provides that, "this heading applies to coins of any material (including precious metals) of officially prescribed weight and design, issued under Government control for use as legal tender". The Show Cause Notice observes that the Explanatory Note also postulates that the heading also includes coins which are no longer legal tender.

15. It may be noted, here, that the Customs Tariff, in its eight-digit avatar, which came into being with effect from 2003, is based on the HSN, and the Explanatory Notes to the HSN are treated as practically of binding value, in interpreting entries under the Customs Tariff, where the entries in the Tariff are aligned to the entries in the HSN [C.C.E. v. Wood Craft Products Ltd., 1995 (77) E.L.T. 23 (S.C.); C.C. v. Business Forms Ltd., 2002 (142) E.L.T. 18 (S.C.).”



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22. Proceeding then to firstly deal with the validity of the CBIC Circular dated 31 May 2019 and which had described the orders passed by the CESTAT Bangalore Bench in *Sri Exports* as “*not legal and proper*”, the Court held that the same was clearly objectionable and observed as under:-

“28. On going through the impugned Circular, dated 31st May, 2019, we find ourselves in agreement with Mr. Gulati. The concluding paragraph of the impugned Circular, dated 31st May, 2019, issued by the CBIC is, even on a first reading, plainly objectionable. It discloses a woeful lack of appreciation, by the author of the said Circular, of the most rudimentary principles of law and precedent. Decisions of the Tribunal are, in the absence of any rulings to the contrary, by authorities higher in the judicial echelons, binding on all field formations, as well as adjudicating authorities. Any act or decision, by an officer, lower in judicial hierarchy to the Tribunal – which would include all officers of the Department of Revenue and, in any case, every Customs or Central Excise Officer in the Government – which is contrary to the law laid down by the Tribunal, is not only *ex facie* unsustainable, but is also contemptuous of the Tribunal. The following well-known passages, from the judgment of the Supreme Court in *U.O.I. v. Kamlakshi Finance Corporation Ltd.*- 1991 (55) E.L.T. 433 (S.C.), merits reproduction, in this context:

“5. The learned Additional Solicitor General, however, submits that the learned Judges have erred in passing severe strictures against the two Assistant Collectors who had dealt with the matter. He submitted that these officers had given reasons for classifying the goods under Heading 39.19 and not 85.46 and could do no more. He submitted that they acted *bona fide* in the interests of Revenue in not accepting a claim which, they felt, was not tenable.

6. Sri Reddy is perhaps right in saying that the officers were not actuated by any *mala fides* in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual *mala fides* but with the fact *that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the*



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Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under subsection (1), where the Central Board of Excise and Customs Direct Taxes comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the



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Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assessee-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. *The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them.*"

(Emphasis and underscoring supplied)."

29. It was, therefore, completely impermissible for the CBIC to, in the impugned Circular dated 31st March, 2019, direct field formations to deal with consignments pending clearance at airports in accordance with the view of the CBIC, rather than the orders of the Tribunal in ***Sri Exports versus Commissioner of Customs, Hyderabad (Final Order No. A/31/194/2018, dated 22.11.2018 in Appeal No. C/30812/2018)*** and ***Sri Exports Versus C.C. Bangalore-Cus [arising out of No. 344/2018 dated 12.10.2018]***



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passed by Commissioner of Customs, Bangalore-I), merely because the CBIC felt that the said orders were not “legal and proper”. This direction flies in the face of two of the most fundamental principles governing adjudication, viz., firstly, that it is not open to any executive, or administrative, authority to control, in any manner, the adjudicatory process, and, secondly, that no adjudicating authority can be directed to act in conscious violation of the law. These principles are, indeed, so elementary, that we are astonished at the directions contained in the impugned circular dated 31st May, 2019. The authority issuing the said circular ought to have been aware of the fact that “dealing with” consignments pending clearance at ports and airports involves a process of adjudication, and that it was not open to any such authority, dealing with such consignments, to act in violation of binding decisions of the Tribunal. The concluding paragraph of the impugned Circular dated 31st May, 2019, issued by the CBIC, in our view, flies directly in the face of the law, as laid down by the Supreme Court in *Kamlakshi Finance Corporation Ltd.*

23. Insofar as the challenge which was raised to the CBIC Circular of 9 September 2019 is concerned, the Court in *Khandwala Enterprise* observed as follows:-

“38. Having said that, the CBIC may, quite legitimately, in exercise of the powers conferred on it by Section 151A of the Customs Act, issue circulars, or instructions, informing field formations of orders, passed by superior judicial authorities, if any, staying, setting aside, or otherwise interfering with orders passed by judicial authorities lower in the hierarchy, including the Tribunal. Indeed, this may be advisable, so that authorities, adjudicating similar cases would have, before them, the latest legal position, without having to spend time on research. Circulars issued in this regard must, however, stop there. Once the CBIC informs field formations – or adjudicating authorities – of the fact that orders passed by the Tribunal stand stayed by superior authorities, or that appeals, thereagainst, have been filed before higher fora, the decision, of whether to follow the order of the Tribunal, or not, has to be left to the adjudicating authority concerned. It is obvious that every authority, from the lowest to the highest, in the Indirect Tax echelons, would be aware of the fact that a judicial order, which stands set aside by a higher authority, has no precedential value. Whether, however, a judicial order, *which stands stayed by a superior authority*, retains, or loses, it is precedential value, is a more involved question. We do not wish to express any opinion



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thereon, essentially because the Show Cause Notices, issued to the petitioner and Mink, are pending, and we – unlike the CBIC – do not wish to place fetters on the exercise of judicial discretion, by the authorities entrusted with the task of the adjudication thereof. Suffice it to state that there is no absolute proposition, in law, that an order, of a lower judicial authority, completely loses, on its being stayed by a higher judicial authority, its entire precedential value. We prefer to rest our observations at that.”

24. The Court, however, refused to interfere with the SCN proceedings holding that interdiction of adjudicatory proceedings would clearly not be justified since the principal authority must be accorded the liberty to undertake adjudication and that the petitioners would, in any case, have the right to take recourse to appropriate remedies if they be aggrieved by any order passed in the course of disposal of the said SCNs.

25. However, since the issue of classification also appears to have been clearly raised and urged on behalf of respective parties, it went on to observe as under:-

“49. Para 4 of the aforesaid Office Memorandum, dated 6th September, 2017, issued by the DGFT, merely states that gold coins are classifiable under Heading 7118 9000 of the ITC(HS), whereas consignments of gold coins were being imported by wrongly classifying them under Heading 7114. Headings 7114 and 7118 of the ITC(HS) are completely aligned with the corresponding entries in the Tariff. A comparison of Sub-Headings 7114 and 7118 of the Tariff [or of the ITC(HS)] clearly reveals that, whereas Sub-Heading 7114 1910 of the Tariff [or of the ITC(HS)] deals with “articles of gold”, Heading 7118 9000 covers all coins which do not come within sub-heading 7118 1000, which deals with “coins (other than gold coins) not being legal tender.” All gold coins are, therefore, classifiable under sub-heading 7118 9000, of the Tariff, as well as of the ITC (HS). It is well settled that where an item is covered by an entry specific thereto, it has to be classified under the said entry and resort to all other entries would, *ex facie*, stand proscribed.



50. Gold coins being specifically classified under sub-heading 7118 9000 of the Tariff as well as of the ITC (HS), there can be no question of classifying gold coins under sub-heading 7114 1910.

51. In stating, in para 4 of the impugned Office Memorandum dated 6th September, 2017, issued by the DGFT, that gold coins fall within Heading 7118 9000 of the ITC (HS), and that, therefore, their import would be subject to RBI guidelines, the CBEC merely sets out the indisputable statutory position. We find no reason to interfere therewith.

52. At the same time, it is also settled that the manner in which an import item is described in the Bs/E, is not necessarily conclusive regarding its classifiability. It is always open to an importer to contend that an item is not exactly conforming to the description contained in the Bs/E. It is only in cases in which an assessee avails certain benefits, whether by way of exemption or otherwise, based on the manner in which it describes or classifies its goods, that, at times, courts have taken a view that the assessee cannot, having availed such benefit, seek to resile from the description, or classification, advanced by it. This, however, is not such a case. Irrespective, therefore, of the manner in which the goods in question have been described in the Bs/E filed by it, there can be no estoppel on the petitioner establishing, before the adjudicating authority, by cogent and convincing evidence, that the goods imported by it are, nevertheless, entitled to the benefit of exemption. In case such a contention is advanced, the authority, adjudicating the Show Cause Notices dated 12th July, 2019/15th July, 2019, issued to the petitioner, and 28th June, 2019/19th July, 2019, issued to Mink, would have to consider and appreciate the contention on merits, and cannot refuse to do so merely on the basis of the impugned Office Memorandum dated 6th September, 2017, issued by the DGFT, or the impugned Office Memorandum dated 16th February, 2018, issued by the CBEC.”

26. It becomes relevant to pause here and note that it is some of the observations as appearing in the passages extracted above which have been primarily read and understood by the respondents as being an authoritative and conclusive finding with respect to the imported articles being classifiable under CTH 7118 9000.

27. The Court then proceeded to render adverse comments with respect to the Office Memorandum dated 16 February 2018 issued by



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the CBIC which had alluded to the communications issued by the RBI relating to the import of gold coins and gold in primary forms only through nominated agencies as being relevant for the purposes of classification of gold coins covered under the Indo-Korean CEPA. The Division Bench found that the aforesaid Office Memorandum clearly appeared to shackle the adjudicatory exercise which authorities under the Act were obliged to undertake and consequently observed that all such adjudications would have to be undertaken without being influenced by the aforesaid Office Memorandum. This would be evident from paragraphs 55 and 56 of the judgment which are reproduced hereinbelow:-

“55. We are unable to sustain, to any extent whatsoever, the aforesaid Office Memorandum, dated 16th February, 2018, issued by the CBEC. To us, it appears obvious that this Office Memorandum is a transparent attempt, on the part of the CBEC, to shackle the impartial exercise, by the competent adjudicating authorities, of adjudication of the Show Cause Notices issued to the petitioner and to Mink – and, quite possibly, to other similarly situated importers. When the issue of classification, and entitlement to exemption, of the gold coins, imported by the petitioner, and other similarly situated importers, is at large before competent adjudicating authorities, who are *in seisin* thereof, the CBEC was completely unjustified in issuing the Office Memorandum dated 16th February, 2018. The powers of the CBEC, as conferred by Section 151A of the Customs Act, cannot extend to issuance of executive instructions, or Office Memoranda, pronouncing on the merits of issues which are pending before adjudicating authorities. Such an attempt would result in reducing the adjudicatory process to a mockery, and deserves to be deprecated.

56. If the Revenue is of the opinion that an assessee has imported goods in violation of the law, or claimed the benefit of exemption to which it is not entitled, the grounds for such an opinion are required to be contained in the Show Cause Notice issued to the assessee. It is completely impermissible for the Revenue to issue a Show Cause Notice and, thereafter, seek to support, or even supplement, the recitals in the Show Cause Notice by way of Office



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Memoranda, or executive instructions, such as the Office Memorandum dated 16th February, 2018, under challenge in these writ petitions. In this respect, the Office Memorandum, dated 16th February, 2018, issued by the CBEC, is clearly distinguishable from the Office Memorandum dated 6th September, 2017 *supra*, issued by the DGFT. While the latter Office Memorandum, dated 6th September, 2017, of the DGFT, merely recited the fact of imports from Korea possibly being made in violation of the law, requiring that such imports be properly verified and, thereafter, proceeded to reiterate the statutory position to be found in the ITC (HS), the Office Memorandum, dated 16th February, 2018, of the CBEC practically adjudicates, by executive fiat, Show Cause Notices, such as those issued to the petitioners in these writ petitions. This is completely impermissible. Being, as it is, in the nature of executive trespass on the quasi-judicial terrain, the Office Memorandum dated 16th February, 2018, must necessarily perish.”

28. The Court ultimately disposed of the writ petition in the following terms:-

“59. Resultantly, these writ petitions are disposed of, in the following terms:

(i) Circular No 450/67/2019-Cus. IV, dated 31st May, 2019, stands modified by Circular No 450/67/2019-Cus.IV, dated 9th September, 2019, issued by the Central Board of Indirect Taxes and Customs. While no orders are, therefore, required to be passed in respect of Circular dated 31st May, 2019, Circular dated 9th September, 2019, is quashed and set aside, to the extent of the directions contained therein, especially in para 4 thereof. The effect of the said Circular shall be read as limited to conveying of information, regarding the fact that Final Order No.A/31494/2018, dated 27th November, 2018, of the Hyderabad bench of the Tribunal, in Appeal No. C/30812/2018, and the Final Order, passed by the Bangalore Bench of the Tribunal against Order-in-Original No.344/2018, dated 12th October, 2018, passed by the Commissioner of Customs Bangalore-I, had been appealed against, and no more. The authorities, adjudicating the Show Cause Notices impugned in these writ petitions would be required, independently, and uninfluenced by the Circular dated 9th September, 2019, to examine, for themselves, whether such appeals have, in fact, been filed and, if so, the effect of the orders passed therein.

(ii) Para 8 of the impugned Show Cause Notices, dated
(a) 12th July, 2019/15th July, 2019, issued to the petitioner in WP(C) 9225/2019,



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(b) 28th June, 2019/19th July, 2019, issued to M/s Mink Tradecom Pvt. Ltd, and

(c) 5th July, 2019/9th July, 2019, issued to the petitioner in WP(C) 9230/2019,

are quashed and set aside. The authorities, adjudicating the said Show Cause Notices, would do so, uninfluenced by para 8 thereof, and keeping in view the directions/observations contained in this judgment.

(iii) Office Memorandum No. 01/89/180/36/AM-11/PC-II(A), dated 6th September, 2017, issued by the DGFT, is upheld, to the extent of the position in law stated therein. However, the authority, adjudicating the Show Cause Notices, impugned in these writ petitions and enumerated in (ii) *supra*, would have to assess the applicability, of this Office Memorandum, to the facts of the case of the petitioners, on merits.

(iv) Office Memorandum No. 20000/5/2015-OSD (ICD), dated 16th February, 2018, issued by the Central Board of Excise and Customs, is quashed and set aside, to the extent it seeks to opine on the classification of the gold coins imported by the petitioners, and other importers similarly situated, and of the eligibility, of such gold coins, to exemption. The Show Cause Notices, impugned in these writ petitions, would be adjudicated on their own merits, uninfluenced by the opinion conveyed by the Office Memorandum dated 16th February, 2018. It is clarified, however, it is open to the Revenue to canvass, before the adjudicating authority/authorities, the stance reflected in the Office Memorandum dated 16th February, 2018 and, if it so chooses to do, the adjudicating authority/authorities would consider the justifiability of the said stance on its own merits.

(v) The prayers, in these writ petitions, for setting aside the Show Cause Notices enumerated hereinabove, are rejected. This Court clarifies that, subject to the observations made hereinabove, it has expressed no opinion on the merits of the said Show Cause Notices, or on the allegations made therein. Needless to say, however, the adjudication of the Show Cause Notices shall abide by the findings and observations recorded herein above”

29. As would be evident from the operative directions as framed by the Court, the respondents had been called upon to dispose of the SCN proceedings uninfluenced by the Office Memorandum dated 16 February 2018. It was further and significantly observed that the Court had not intended to express any opinion on the merits of the



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proceedings as initiated or on the allegations made therein. It was additionally observed that the SCN proceedings would abide by the “findings” and “observations” forming part of the said decision.

30. The Principal Commissioner, while finalizing the aforementioned SCNs, has on a consideration of the various pleas raised by the petitioner and while dealing with the issue of classification, firstly held as under:-

“45. I find that classification under the Customs Tariff Act, 1975 (hereinafter referred to as "the CTA") is governed by the principles contained in the General Rules for Interpretation (hereinafter referred to as "the GIR"). The GIR 1 provides that the classification of goods will be determined according to the terms of the headings of the First Schedule and any relative Section or Chapter Notes of the CTA. In the event that the goods cannot be classified solely on the basis of GIR 1, and if the headings or Chapter or Section Notes to the CTA do not require otherwise, the GIR 2 to the GIR 6 will then be applied in seriatim. Thus the GIR 1 is the foremost rule of classification of goods under the CTA, Which specifies the elements that can legally be used to classify products. For legal purposes classification is determined by the terms of the headings, the Section or Chapter Notes where relevant, and, If necessary and allowable, the other GIRs. Thus where the terms of the headings and any relevant Notes leave only one heading open for consideration, or they direct either the classification or the means of classification, then only the GIR 1 is used at heading level for classification of goods under the CTA. In this background, I examine the two competing tariff entries of CTH 7114 and CTH 7118 of the First Schedule of the CTA. The relevant extract of the said two entries read as under:-

A. CTH 7114 1910 (as sought by the MINK):

Tariff item	Description of goods	Unit	Rate of duty
7114	ARTICLES OF GOLDSMITHS' OR SILVERSMITHS' WARES AND PARTS THEREOF OF		



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	PRECIOUS METAL OR OF METAL CLAD WITH PRECIOUS METAL -Of precious metal, whether or not plated or clad with precious metal. -- of silver, whether or not plated or clad with precious metal. ---Articles ---Parts --Of other precious metal, whether or not plated or clad with precious metal		
7114 11		Kg	15%
7114 11 10		Kg	15%
7114 11 20			
7114 19			
7114 19 10	---Articles of gold	Kg	15%

B . CTH 71189000 (as proposed by the department):

Tariff item	Description of goods	Unit	Rate of duty
7118	COIN		
7118 10 00	-Coin (other than gold coin), not being legal tender	Kg	15%
7118 90 00	-Other	Kg	15%

46. From the above, I find that heading 7118 covers coin of any metal. In the impugned case, goods are declared as coin, made of



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gold of 99.5% purity, not being legal tender. The goods being coin are squarely covered under CTH 7118 as the terms of the CTH 7118 under the CTA is COIN while the entry in CTH 7114 is in the nature of residuary items. Hence by application of the GIR 1, impugned goods merit classification under CTH 7118, provided it is not guided otherwise by Section Note for Section XIV and Chapter Note for Chapter 71 of the CTA which are relevant in this case. I do not find anything in the said Section Notes and Chapter Notes that excludes GOLD COIN from the CTH 7118. I also do not find any heading or sub-heading in Chapter 71 of the CTA or for that matter in any Chapter which has specific entry for "Coin" or "Gold Coin". Therefore, I find that the classification of impugned goods remains under CTH 7118. This view also finds support from GIR 3(a), as discussed hereinafter, which provides that "the heading which provides the most specific description shall be preferred to headings providing a more general description."

31. Proceeding to evaluate the issue of the relevant CTH under which gold coins, not being legal tender, are liable to be classified, it has come to record the following conclusions:-

"47. Now the issue to be decided is what would be the tariff item of gold coin, not being legal tender. From the above, it is clear that CTH 7118 covers coin made of any metal including precious metal. I find that tariff item 7118 1000 of the CTA covers Coin (other than gold coin), not being legal tender whereas tariff item 7118 9000 of the CTA refers to coin other than coin of tariff item 7118 1000 of the CTA. In other words, tariff item 7118 9000 of the CTA covers all coins which are not covered under tariff item 7118 1000 of the CTA Further, I find that the antonyms of the phrase 'not being legal tender' is "being legal tender". The logical deduction from this is that tariff item 7118 90 of the CTA would include:

- (i) Coin (other than gold coin), being legal tender;
- (ii) Gold coin, not being legal tender; and
- (iii) Gold coin, being legal tender.

Therefore, impugned goods declared as coin, made of gold of 99.5% purity, not being legal tender are to be classified under tariff item 7118 9000 of the CTA."

32. Proceeding to comment upon the purpose served by explanatory notes under the HSN, the Principal Commissioner has held as follows:-



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“51. I find that the Explanatory Notes to the Harmonised System (hereinafter referred as "the HS") are published separately by the WCO. While these notes do not form part of the legal provisions of the HS, it is important that they be consulted in case of any dispute of classification as they provide commentary on the intent and scope of provisions. However, it must be borne in mind that the Explanatory Notes are not an exhaustive, unchangeable commentary on the overall scope of the headings and subheadings of the HS but have to be read in context of entries in the Customs Tariff of member countries who have to align their Customs Tariff upto six digits of HSN and additional Chapter and Section Notes incorporated therein. Moreover, the GIRs are part of the Customs Tariff and have binding force being statutory provisions and thus take precedence over any other provision. Thus, the Explanatory Notes to the HS follow the systematic order of that instrument. They provide a commentary on the scope of each heading, giving a list of the main products included and excluded, together with technical descriptions of the goods concerned (their appearance, properties, method of production and uses) and practical guidance for their identification.”

33. On a due consideration of the explanatory note appended to CTH 7118 9000, the Principal Commissioner ultimately came to the following conclusion:-

“53. I find that Explanatory Notes explain that heading 7118: -
(i) covers coins of any metals (including precious metals) of officially prescribed weight and design, issued under government control for use as legal tender;
(ii) covers coins which are legal tender in the country of issue even if they are put up for general sale in presentation cases;
(iii) covers coins which are no longer legal tender;
(iv) covers coins which are made by stamping out blanks from sheet metal; which are then "struck" with the appropriate dies to produce simultaneously that designs on the two faces;
(v) does not cover coins which are collectors' pieces;
(vi) does not cover medals which are struck in the same way as coins;
(vii) does not cover coins mounted in brooches, tie, pins or other objects of personal adornment;
(viii) does not cover broken, cut or battered coins of a kind usable only as scraps or waste metal.

54. Thus I find that the Explanatory Notes provides that the "coins being legal tender of any metal or coins no longer legal tender" will



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be covered by this heading i.e. Heading 7118 falling under Chapter 71 of HSN for Precious Metals. The said notes does not say that gold coins which are not legal tender will not fall under this heading. In this context, I draw support from a decision of the Hon'ble CESTAT, Chennai Bench delivered in the case of ICICI Bank Ltd. vs. Commissioner of Customs (Airport-Cargo), Chennai reported at 2014 (312) ELT 366 (Tri. Chennai). In this case, the first appellant, namely, ICICI Bank Ltd. ("ICICIBL", in short), a commercial bank, imported 98 consignments of gold or silver medals during the period 01.04.2003 to 30.07.2007 and filed various Bills of Entry for clearing the consignments. The main dispute in the appeal filed by the two main appellants was the classification of the gold and silver medals imported. In this scenario, while examining the exemption under Notification No. 62/2004-Customs dated 12.05.2004 and thereafter examining the classification of gold and silver coins, the Hon'ble Tribunal has observed, in para 19 of the judgment, which is reproduced below, that: -

"19. It is clear from the explanation to the Notification and silver and the notification is issued with an understanding that these will fall under Chapter 71. However, there is lack of clarity as to the heading of Chapter 71 under which these goods will get classified. On going through the Customs Tariff and HSN explanatory Notes this issue does not get resolved very easily because each of the Headings 7108, 7113, 7114 and 7118 may not be exactly suitable for coins and medals for the following reasons:

- (i) Heading 7108 covers only unwrought gold. What was imported was gold of 999.99 purity which could not be considered as unwrought,*
- (ii) Heading 7113 covers articles of Jewellery, Coin or medal cannot be considered as an article of jewellery;*
- (iii) Heading 7114 covers articles of goldsmiths' or silversmiths' wares and gold/silver coin or medal cannot be considered as goldsmiths' ware or silversmiths' ware. However, Note (E) in HSN for this heading specifically mentions that medals and medallions are covered by this heading.*
- (v) Heading 7118 would appear to cover coins. But HSN notes explains that this heading applies to coins of any metals (including precious metals) of officially prescribed weight and design, issued under government control for use as legal tender. However, the note is to the effect that coins being legal tender of any metal will be covered by this heading falling under Chapter 71 for Precious Metals. **The note does not say that gold coins***



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which are not legal tender will not fall under this heading "

55. I fail to understand that how MINK has arrived to the conclusion that meaning of the phrase "not being legal tender" is "no longer being legal tender". This is a very self-serving interpretation of the said phrase. The phrase "not being legal tender" having very simple grammatical meaning has not been explained in the Explanatory Notes. Since it has not been explained further in the Explanatory Notes or the CTA, it would be wrong to conclude that such coins (coins not being legal tender) are not covered under the scope and ambit of heading 7118. The phrase "being legal tender" has spatial and temporal connotation. The coin being legal tender in one country is not a legal tender in other country. Similarly, a coin being legal tender in recent past may no longer be a legal tender in present time. It is in this light, I find that Explanatory Note has discussed only about legal tender. It has just attempted to amplify that coin being legal tender also includes coin no longer legal tender. I also find that Explanatory Note has specifically excluded four types of goods, namely, collectors' pieces; medal struck in form of coins; coins mounted in brooches etc and broken or battered coins of a particular kind, which is also not the case here. I also find that coins to be covered under this heading must be made by stamping out blanks from sheet metal; then "struck" with the appropriate dies to produce simultaneously the designs on the two faces; I, therefore, find that heading 7118 covers:

- (i) coin (other than gold coin), not being legal tender;
- (ii) coin (other than gold coin), being legal tender;
- (iii) coin (other than gold coin), no longer being legal tender;
- (iv) gold coin, not being legal tender;
- (v) gold coin, being legal tender; and
- (vi) gold coin, no longer being legal tender,

provided they are made by stamping out blanks from sheet metal; then "struck" with the appropriate dies to produce simultaneously the designs on the two faces."

34. Turning then to the judgment rendered in *Khandwala Enterprise*, the Principal Commissioner has observed thus:-

"57. Even otherwise, it is of paramount importance to point out here that in response to the writ petition filed by MINK as the co-competitioner, the Hon'ble High Court of Delhi [2020 (371) ELT 50 (Del)] has already clarified that all gold coins are classifiable under CTH 7118 9000 and has very clearly held that there can be no question of classifying the gold coins under CTH 7114 1910. The



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relevant extract of the said judgement is reproduced here as under:

49. A comparison of sub-headings 7114 and 7118 of the Tariff [or of the ITC (HS)] clearly reveals that, whereas sub-heading 7114 19 10 of the Tariff [or of the ITC (HS)] deals with “articles of gold”. Heading 7118 90 00 covers all coins which do not come within sub-heading 7118 10 00, which deals with “coins (other than gold coins) not being legal tender”. All gold coins are, therefore, classifiable under sub-heading 7118 90 00, of the Tariff, as well as of the ITC (HS). It is well settled that where an item is covered by an entry specific thereto, it has to be classified under the said entry and resort to all other entries would, *ex facie*, stand proscribed.

50. Gold coins being specifically classified under sub-heading 7118 90 00 of the Tariff as well as of the ITC (HS), there can be no question of classifying gold coins under sub-heading 7114 19 10.

Accordingly, the view of the department stands fortified from the above position of law which leaves no scope for any deliberation with regard to classification of all gold coins irrespective of their being legal tenders or otherwise, the main argument put forth by MINK that the goods imported by them were not gold coins as the same are not legal tenders of any country stands nullified. The undisputed fact which they cannot deny is that the goods imported by them are made up of gold and are round in shape and that i.e. why they themselves have acceded to the fact that the same can loosely be referred to as the gold coins and therefore declared the same as gold coins in the Bills of Entry filed by them”

35. It was the contention of Mr. Gurnani, learned counsel appearing for the respondents, that as would be evident from the order passed by the Principal Commissioner, the SCN has been disposed of not merely on the basis of certain observations appearing in the earlier judgment, but upon the authority having independently assessed the facts and the interpretation liable to be accorded to CTH 7118 9000 and CTH 7114 1910. It was in the aforesaid backdrop that Mr. Gurnani submitted that the petitioner must be relegated to the alternative remedy which the Act lays in place. It was his submission further that in any case, it is



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evident and manifest from the findings that were returned in *Khandwala Enterprise*, that the Court had come to the definitive conclusion that gold coins were liable to be classified as falling under CTH 7118 9000. This Mr. Gurnani submitted in light of the conclusions as they stand recorded in paragraph 50 of the judgement in *Khandwala Enterprise*.

36. Having considered the rival submissions addressed, we find that the impugned order firstly fails to bear in mind the well settled precept of the essence of a decision or its ratio being gleaned and discerned from a comprehensive reading of the facts, the issues that arose and the conclusions that the court ultimately records. We have repeatedly cautioned against any and every observation appearing in a judgment being viewed as constituting the decision of the court. It is this aspect which appears to have been overlooked by the Principal Commissioner and has led the authority to erroneously hold that Paras 49 and 50 laid the dispute raised by the petitioner to rest. This would be further borne out from the discussion which follows.

37. It becomes pertinent to note that in Paras 49 and 50 of *Khandwala Enterprise*, the Court firstly noticed the distinction between Sub-Headings 7114 and 7118 with the former pertaining to “articles of gold” while the latter being in respect of “coins”. CTH 7118 1000 and 7118 9000 were correctly recognised to subserve the requirement of segregating coins made of gold and those made of other precious metals. It was while seeking to explain the distinction between CTH 7118 1000 and 7118 9000 that the Court observed that gold coins would fall within the ambit of the latter.



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38. However Paras 49 and 50 of our decision cannot be justifiably interpreted as purporting to hold that all articles that may be ordinarily or loosely referred to as gold coins are liable to be classified as falling under CTH 7118 9000. To put it differently, when the Division Bench in *Khandwala Enterprise* observed that gold coins are liable to be classified under CTH 7118 9000, it did not mean or intend to hold that all articles of gold are liable to be classified as falling in that entry of the CTH merely because they happen to be in the shape of a coin or are colloquially referred to as such. We are also of the opinion that every round, circular or discoid article of gold, for reasons that we propose to record hereafter, would neither fall within the ambit of that entry nor can *Khandwala Enterprise* be recognised as having propounded such a principle.

39. To put things in perspective, the aforesaid aspect may be considered in light of the competing entries and the explanatory notes which stand appended thereto:-

CTH 7114

Tariff item	Description of goods	Unit	Rate of duty
7114	ARTICLES OF GOLDSMITHS' OR SILVERSMITHS' WARES AND PARTS THEREOF OF PRECIOUS METAL OR OF METAL CLAD WITH PRECIOUS METAL -Of precious metal, whether or not plated or clad with precious		



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7114 11	metal. -- of silver, whether or not plated or clad with precious metal.	Kg	15%
7114 11 10	---Articles	Kg	15%
7114 11 20	---Parts		
7114 19	--Of other precious metal, whether or not plated or clad with precious metal		
7114 19 10	---Articles of gold	Kg	15%

Explanatory Note to CTH 7114

“71.14 – ARTICLES OF GOLDSMITHS’ OR SILVERSMITHS’ WARES AND PARTS THEREOF, OF PRECIOUS METAL OR OF METAL CLAD WITH PRECIOUS METAL.

- Of precious metal whether or not plated or clad with precious metal.

7114.11 – Of silver, whether or not plated or clad with other precious metal

7114.19 – Of other precious metal, whether or not plated or clad with precious metal

7114.20 – Or base metal clad with precious metal

This heading covers articles of goldsmiths’ or silversmiths’ wares as defined in Note 10 to this Chapter wholly or partly of precious metal or metal clad with precious metal. In general these goods are larger than articles of jewellery of heading 71.13; they include:

- (A) **Articles of Tableware** Such as table knives, carving sets, spoons, forks; ladles; poultry or meat grips; trays, plates, soup or vegetable dishes and bowls; sauce-boats; fruit dishes; sugar-bowls, coffee-pots, teapots, tea or coffee cups; goblets; egg-cups, decanters; liqueur services; stands and baskets for bread, cake, fruit etc.; fish-servers; cake servers; wine cooling buckets; cruets; sugar-tongs; knife-rests, serviette rings; table bells; ornamental stoppers, etc.
- (B) **Toilet articles** such as hand mirrors; bottles and powder boxes (**Other than** those of **heading 71.13**); brush boxes, clothes



brushes, nail brushes, hair brushes, combs (other than dress combs and pocket combs – heading 71.13); jugs, etc. Scent sprays are **excluded (heading 96.16).**

- (C) **Office or desk equipment** such as ink-pots, ink-stands, book-ends, paperweights, paper-knives.
- (D) **Smokers' requisites** such as cigar or cigarette boxes, tobacco jars, ashtrays, matchbox holders, etc. **but not including** articles of **heading 96.13** or **96.14** (cigarette and other lighters, smoking pipes, cigarette holders, etc.)
- (E) **Other articles for domestic or similar use**, for example, busts, statuettes, and other figures for interior decoration; jewel cases; table centre-pieces, vases, jardinières; picture frames; lamps, candelabra, candlesticks, chandeliers; mantelpiece ornaments; decorative dishes and plates medals and medallions (**other than** those for personal adornment); sporting trophies; perfume burners, etc.
- (F) **Articles for religious use** such as reliquaries, chalices, ciboriums, monstrances, crucifixes, candlesticks, lamps.

The heading also covers **unfinished** or **incomplete articles** or goldsmiths' or silversmiths' wares and identifiable **parts** of goldsmiths' or silversmiths' wares, for example, silver handles for tableware, silver backs for toilet brushes, etc.

Like jewellery and **subject to the same reservation as regards minor constituents**, the goods of this heading **must** contain precious metal or metal clad with precious metal; they may also contain pearls (natural, cultured or imitation) precious or semi-precious stones (natural, synthetic or reconstructed), imitation stones, tortoise-shell, mother of pearl, ivory, amber (natural or agglomerated), jet or coral.

The heading excludes:

- (a) Umbrellas, walking-sticks and other articles of **heading 66.01** or **66.02** having fittings in materials or this Chapter, as well as parts, fittings and accessories of these articles, wholly or partly of these materials (**heading 66.03**).
- (b) Articles of **Chapter 90** (e.g. binoculars and telescopes).
- (c) Clocks and watches and their cases (**Chapter 91**)
- (d) Musical instruments (**Chapter 92**).
- (e) Arms and parts thereof of **Chapter 93** (side-arms, pistols, revolvers, etc.)
- (f) Scent and similar sprays of a kind used for toilet purposes, and heads therefor (**heading 96.16**).
- (g) Original statutory or sculptures (**heading 97.03**) collectors' pieces of **heading 97.05** and antiques of **heading 97.06**."



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**CTH 7118**

Tariff item	Description of goods	Unit	Rate of duty
7118	COIN		
7118 10 00	-Coin (other than gold coin), not being legal tender	Kg	15%
7118 90 00	-Other	Kg	15%

Explanatory Note to CTH 7118**“71.18 - Coin(+)**

7118.10 – Coin (other than gold coin), not being legal tender

7118.90 – Other

This heading applies to coins of any metal (including precious metals) of officially prescribed weight and design, issued under government control for use as legal tender. Consignments of individual coins or of sets of coins which are legal tender in the country of issue are classified in this heading even if they are put up for general sale in presentation cases. The heading includes coin which is no longer legal tender but it **excludes** collectors' pieces (see Explanatory Note to **heading 97.05**).

Coins are made by stamping out blanks from sheet metal; these are then “struck” with the appropriate dies to produce simultaneously the designs on the two faces.

The heading **Does not cover:**



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- (a) Medals even if 'struck' in the same way as coins; these usually fall in **heading 71.13, 71.14 or 71.17 or heading 83.06** (see corresponding Explanatory Notes).
- (b) Coins mounted in brooches, tie-pins or other objects of personal adornment (**heading 71.13 or 71.17**).
- (c) Broken, cut or battered coins of a kind usably only as scrap or waster metal.

Subheading Explanatory Note.

Subheading 7118.10.

This subheading includes:

- (1) Coins which were legal tender but have been withdrawn from circulation.
- (2) Coins struck in one country to be put into circulation in another country; at the time of crossing the frontier, they are not issued as legal tender by the competent authority."

40. CTH 7114 deals with articles of goldsmiths, silversmiths, wares and parts thereof. The aforesaid entry, namely, CTH 7114 1910 specifically speaks of articles of gold. It also brings within its ambit articles of silver and other precious metals. Both CTH 7118 1000 and CTH 7118 9000, on the other hand, are placed under the generic heading of "*Coins*". While CTH 7118 1000 deals with coins [excluding those made of gold] and not being legal tender, CTH 7118 9000 is the residuary entry and encompasses all other coins. CTH 7118 9000 being the remanent receptacle would thus include within its ambit, even gold coins. Accordingly, while 7118 1000 relates to coins (not made of gold) which have ceased to be legal tender, CTH 7118 9000 would extend to all coins whether they be of gold or any other precious material.

41. The expression 'coin', however, as appearing, must necessarily draw colour and meaning from the explanatory notes which stand placed therein. The explanatory notes which have been extracted



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hereinabove explain CTH 7118 1000 and 7118 9000 as intending to apply to coins of any metal, including precious metals, issued under “government control for use as legal tender”. While explaining CTH 7118 1000, the explanatory note provides that the aforesaid entry seeks to bring within its ambit coins which were legal tender but have since been withdrawn as well as coins which may be struck in one country to be placed in circulation in another as also those which are yet to obtain the character of legal tender. The phrase ‘*not being legal tender*’ as appearing in CTH 7118 1000 is thus liable to be construed accordingly.

42. However, the word ‘coin’ as appearing in that entry would necessarily have to answer the characteristics of having been issued under government control with the purpose of being used as legal tender. Thus, every gold coin, as that expression has come to be loosely used, would not fall within CTH 7118 1000 or 7118 9000. In order to fall within the scope of those two entries it would necessarily have to be a coin which was at some point of time used as part of a currency system and has ceased to be legal tender, coins which may still be in use for monetary transactions, those which are proposed to be introduced in another country or coins which are yet to attain the character of legal tender.

43. Thus, unless an article is found to have been issued in exercise of sovereign authority for the purposes of current or future use as legal tender or one which in the past constituted the basis for money transactions, it would not be a coin which would fall within the ambit of CTH 7118 1000 or 7118 9000.



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44. In *Khandwala Enterprise*, the Court clearly appears to have referred to gold coins as falling in CTH 7118 9000 proceeding on the premise that they were articles which were or are proposed to be used as legal tender. This Court is thus of the firm opinion that the observations as appearing in Paras 49 and 50 have been clearly misinterpreted by the respondents as the Court having held or purporting to hold that all articles of gold which may be colloquially referred to as coins would be liable to be placed under CTH 7118 9000.

45. The respondents also appear to have been unjustifiably swayed and influenced by the observation in *Khandwala Enterprise* that once gold coins have been specifically classified to fall under CTH 7118 9000, there would be no question of them being placed under CTH 7114 1000. We find that the aforesaid observation has clearly been read out of context and ignoring the significance and import which *Khandwala Enterprise* had itself placed on explanatory notes that stand appended to the different entries in the Customs Tariff. In fact, the Court had on that occasion accepted explanatory notes to the HSN as having a binding effect on the interpretation liable to be accorded.

46. When we held that “gold coins” cannot fall within CTH 7114 1910 having already been specifically placed in CTH 7118 9000 we did so bearing in mind the meaning to be ascribed to the expression “coins” as per the explanatory notes. We thus find ourselves unable to subscribe to the interpretation advocated by the respondents that the Court had conclusively held that all gold coins and which would mean all articles which are commonly or loosely referred to as such would



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fall under CTH 7118 1000 or 7118 9000. The sin qua non for an article to fall within either of those two entries would have to be it being a coin as defined in the explanatory notes.

47. Accordingly and for all the aforesaid reasons we are of the considered opinion that our observation of gold coins not being classifiable under CTH 7114 1910 was clearly misunderstood and wrongly interpreted by the Principal Commissioner. That observation, as explained above, was liable to be appreciated in the context and backdrop in which the same came to be rendered. As explained above, the said recital was entered primarily to underscore the distinction between CTH 7114 1910 on one end of the spectrum and CTH 7118 1000 and 7118 9000 on the other. While the former is concerned with articles of gold and other precious metals generally, the latter set of entries extends to currency and legal tender.

48. We also deem it pertinent to observe that if it were the intent of the Court to conclusively hold that the articles imported by the petitioner were liable to be classified either under CTH 7118 1000 or 7118 9000, there would have been no necessity or justification for the respondents being accorded the liberty to adjudicate upon the SCNs' thereafter. The view that we take in this regard is further fortified from a reading of Para 52 of our earlier decision when we held that irrespective of the description of the goods in the Bills of Entry, the petitioner could still claim exemption if they were able to establish that the imported articles were not "gold coins" falling under the umbrella of CTH 7118 1000 or 7118 9000.

49. We also bear in mind the caveat which was entered by the Court



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in *Khandwala Enterprise* when it observed that the issue of whether the articles imported by the petitioner were liable to be understood as answering the description of gold coins as contemplated under CTH 7118 9000 was specifically left open for due consideration of the respondents. We are thus of the firm opinion that the Principal Commissioner has clearly erred in proceeding on the premise that the said issue stood answered against the petitioners.

50. We also find ourselves unable to appreciate the stand taken by the Principal Commissioner when it holds that explanatory notes may be “*consulted*” in case of a dispute with respect to classification. The aforesaid finding clearly ignores the unequivocal conclusions to the contrary recorded by the Court in *Khandwala Enterprise* when it had observed that explanatory notes are of a binding character. The aforesaid conclusion also runs contrary to the well settled legal position in this regard. While the purpose and import of explanatory notes is no longer *res integra*, we deem it apposite to extract the following passages from the decision of the Supreme Court in **Collector of Central Excise, Shillong vs. Wood Craft Products Ltd.**¹³:-

“18. We are of the view that the Tribunal as well as the High Court fell into the error of overlooking the fact that the structure of the Central excise tariff is based on the internationally accepted nomenclature found in the HSN and, therefore, any dispute relating to tariff classification must, as far as possible, be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated by the Central Excise Tariff Act, 1985 itself. The definition of a term in the ISI Glossary, which has a different purpose, cannot, in case of a conflict, override the clear indication of the meaning of an identical expression in the

¹³ (1995) 3 SCC 454



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same context in the HSN. In the HSN, block board is included within the meaning of the expression “similar laminated wood” in the same context of classification of block board. Since the Central Excise Tariff Act, 1985 is enacted on the basis and pattern of the HSN, the same expression used in the Act must, as far as practicable, be construed to have the meaning which is expressly given to it in the HSN when there is no indication in the Indian tariff of a different intention.”

51. The aforesaid aspect was again underlined by the Supreme Court in **LML Limited vs. Commissioner of Customs**¹⁴, where the following observations were made:-

“13. In *CCE v. Wood Craft Products Ltd.* [(1995) 3 SCC 454] it was held by this Court that as expressly stated in the Statement of Objects and Reasons of the Central Excise Tariff Act, 1985, the Central Excise Tariffs are based on the Harmonised System of Nomenclature (HSN) and the internationally accepted nomenclature was taken into account to reduce disputes on account of tariff classification. Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the Harmonised System of Nomenclature (HSN). Although the decision in *Wood Craft Products* [(1995) 3 SCC 454] dealt with the interpretation of the provisions of the Central Excise Tariff, there can be no doubt that the HSN Explanatory Notes are a dependable guide even while interpreting the Customs Tariff.”

52. We are thus of the firm opinion that the Principal Commissioner has clearly committed a manifest error while viewing the judgment rendered in *Khandwala Enterprise* and proceeding on the assumption that the contentions raised by the petitioner already stood conclusively answered by the Court. The aforesaid premise is clearly based on an incorrect reading of that decision. The Principal Commissioner has also clearly erred in failing to appreciate the import of the explanatory notes which stand placed along with CTH 7118 9000 and ignoring the

¹⁴ (2010) 10 SCC 503



binding character of those notes.

53. While ordinarily we would have left the petitioner to assail the Order-in-Original by following the route of a statutory appeal, we were constrained to entertain the present writ petition and overrule the preliminary objection that was taken by Mr. Gurnani, in light of the conclusions which were recorded by the Principal Commissioner in Para 57 of the impugned order as well as the view that the authority has expressed with regard to explanatory notes which accompany entries in the Tariff.

54. In our considered opinion, the Principal Commissioner would thus be obliged to decide the SCN proceedings afresh bearing in mind the observations rendered hereinabove. We consequently leave it open to the said authority to duly examine whether the imported articles would fall within the ambit of CTH 7114 1910 or 7118 9000 bearing in mind our findings on the scope of those two entries as recorded hereinabove.

55. We, accordingly, and for all the aforesaid reasons, allow the instant writ petition and set aside the impugned orders dated 04 September 2020 and 07 September 2020. The matter shall stand remitted to the Principal Commissioner for decision afresh and in light of the observations made hereinabove.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

NOVEMBER 02, 2023/Neha/RW