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

Reserved on: 1st November, 2019

Pronounced on: 14th November, 2019

+ WP (C) 9225/2019 and CM No. 38058, 47439, 47440/2019

KHANDWALA ENTERPRISE PRIVATE LIMITED

..... Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with
Mr. Kishore Kunal and
Mr. Pratish Choudhary, Advs.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr. Ravi Prakash and
Mr. Farman Ali, Advs. for R-1

+ WP (C) 9230/2019 and CM Nos. 38071, 47442, 47443/2019

CREDENCE COMMODITIES EXPORTS Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with
Mr. Kishore Kunal and
Mr. Pratish Choudhary, Advs.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr. Ashim Sood, CGSC with
Ms. Senu Nizar, Advs. for R-1,
3 and 4

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

C. HARI SHANKAR, J

1. The dispute in these two writ petitions is identical; ergo, they are being decided by this common judgment. For the sake of convenience, reference would be made to the facts relating to M/s Khandwala Enterprises Private Limited, the petitioner in WP (C) 9225/2019.

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 the Commissioner.

3. During the pendency of these proceedings, Circular dated 9th July, 2019, was issued by the CBIC and Corrigenda dated 30th September, 2019, and 7th October, 2019, to the impugned Show Cause Notices dated 15th July, 2019, and 19th July, 2019, were issued by the Principal Commissioner of Customs (hereinafter referred to “the Principal Commissioner).

4. This writ petition assails the Show Cause Notice dated 12th July, 2019, issued to the petitioner, as well as the Show Cause Notice 28th June, 2019, issued to Mink, as the petitioner and Mink were merged in 2018. The petitioner has moved CM 47439/2019, seeking to amend the writ petition to challenge the said Circular dated 9th September, 2019, and Corrigenda dated 30th September, 2019, and 7th October, 2019. Instead of formally allowing the said amendment and going through the rigours of filing of amended writ petition, response thereof etc., we have, with consent of parties, also heard the petitioner on the changes sought to be brought in by way of the aforesaid amendment.

5. The petitioner and Mink, we may note, were merged in 2018; which is why the present writ petition, though filed by the petitioner, also assails the Show Cause Notice issued to Mink, and the Corrigendum thereto.

Facts

6. The subject matter of these proceedings is the import, by the petitioner, of goods declared as “gold coins of different purity (99.5%

and above (other than legal tenders)”, from South Korea, under eight Bills of Entry (hereinafter referred to as “Bs/E”), filed during the period 9th August, 2017 to 23rd August, 2017. The assessable value declared in respect of the said goods was ₹ 163,30,51,803/-.

7. The petitioner classified the imported gold coins under Sub-Heading 7114 1910 of the Customs Tariff (hereinafter referred to as “the Tariff”). Tariff Heading 7114 of the Tariff, with its Sub-Headings may be reproduced, for ready reference, thus:

“Tariff Item	Descriptions 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 Metal		
7114.11	-- Of Silver, Whether Or Not Plated Or Clad With Precious Metal		
7114.1110	--- Articles	Kg.	15%
7114.1120	--- Parts	Kg.	15%
7114.19	-- of other precious metal, whether or not plated or clad with precious metal		
7114.1910	--- Articles of gold	Kg.	15%”

It would be seen that Sub-Heading 7114 1910, under which the petitioner sought to clarify the gold coins imported by it, covers “articles of gold”.

8. The petitioner also claimed complete exemption, from the requirement of payment of Customs duty, on the imported gold coins, under S. No. 526 of Notification 152/2009-Cus, dated 31st December, 2009, as amended by Notification 66/2016-Cus, dated 31st December, 2016. The relevant portion of Notification 152/2009-Cus, dated 31st December, 2009, as so amended, reads thus:

“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.

Sr. No.	Chapter Heading	Description	Rate in percentage
526	711021 to 711890	All Goods	0.00”

9. Notification 152/2009-Cus *supra*, therefore, completely exempted goods classifiable under Sub-Heading 711021 to Sub-Heading 71180 of the Tariff, from the requirement of payment of customs duty, subject to the condition that

(i) the country of origin of the goods was the Republic of Korea, and

(ii) the goods were imported in accordance with 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 (hereinafter referred to as “the 2009 Rules”), notified *vide* Notification No. 187/2009-Cus(NT) dated 31st December, 2009.

10. Show Cause Notice, dated 12th July, 2019, stands issued, to the petitioner, in respect of the aforesaid gold coins imported by it. The Show Cause Notice requires the petitioner to show cause as to why

(i) the gold coins imported by the petitioner under the aforesaid eight Bs/E be not confiscated under Section 111 (d) of the Customs Act, 1962 (hereinafter referred to as “the Customs Act”), for having been imported in violation of Section 3 (3) of the Foreign Trade (Development and Regulation) Act, 1992, (hereinafter referred to as “FTDR Act”), and para 2.08 of the

Foreign Trade Policy, 2015-2020 (hereinafter referred to as “the FTP”),

(ii) the benefit of Notification 152/2009-Cus *supra*, as amended, be not denied to it,

(iii) Customs duty, already deposited by the petitioner against the aforesaid imports of gold coins, be not adjusted against the duty which would be payable consequent on denial of the claim for exemption under Notification 152/2009-Cus *supra*, and differential duty be not confirmed and demanded,

(iv) penalty be not imposed on the petitioner under Section 112 (a) of the Act, and

(v) the assessment of one of the aforesaid eight Bs/E, which was provisional, be not finalized on the above lines.

11. As we do not intend to comment on the merits of the allegations in the impugned Show Cause Notices, we refrain from entering into the specifics of the various Notifications involved therein.

12. The FTP, it may be noted, is notified under Section 5 of the FTDR Act, which reads thus:

“5. Foreign Trade Policy. – The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, and that policy:

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade

policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.”

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 1910, but under Sub-Heading 7118 9000 of the Tariff. Tariff Heading 7118 of the Tariff, with its Sub-Headings, may be reproduced thus:

“Tariff Item	Descriptions of goods	Unit	Rate of duty
7118	COINS		
7118 1000	-Coins (<i>other than gold coin</i>) not being legal tenders	Kg	10%
7118 9000	<i>Other</i>	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 official prescribed weight and designed, 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 HSN¹.

16. On the basis of the aforesaid, the Show Cause Notice alleges that Sub-Heading 7118 1000 covers coins other than gold coins, which are no longer legal tender, and Sub-Heading 7118 9000 covers all other coins, including legal tender and gold coins. It is, therefore, alleged that the gold coins imported by the petitioner were appropriately classifiable under Sub-Heading 7118 9000, rather than Sub-Heading 7114 1910, of the Tariff.

17. The reason why the alleged classifiability, of the imported gold coins, under Sub-Heading 7118 9000 of the Tariff, in preference to Sub-Heading 7114 1910, makes a difference, is to be found in Chapter 71 of the Imported Trade Control (Harmonised System) [hereinafter referred to as “ITC (HS)”], being the harmonized system of classification of imported goods for the purposes of the FTP, which is in sync, more or less, with the Tariff. The ITC (HS) is issued under Section 5 of the FTDR Act read with para 2.01 of the FTP. Section 5 of the FTDR Act, which already stands reproduced hereinabove, provides for notification of the FTP. Para 2.1 of the FTP, whereunder the ITC (HS) is notified, reads as under:

“2.01 Exports and Imports-‘Free’, unless regulated

- (a) Exports and Imports shall be ‘free’ except when regulated by way of ‘prohibition’, ‘restriction’ or

¹ *C.C.E. v. Wood Craft Products Ltd*, 1995 (77) ELT 23 (SC); *C.C. v. Business Forms Ltd*, 2002 (142) ELT 18 (SC)

‘exclusive trading through State Trading Enterprises (STEs)’ as laid down in Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports. The list of ‘Prohibited’, ‘Restricted’ and STE items can be viewed by clicking on ‘Downloads’ at <http://dgft.gov.in>.

(b) Further, there are some items which are ‘free’ for import/export, but subject to conditions stipulated in other Acts or in law for the time being in force.”

Notification 36/2015-2020, dated 17th January, 2017, whereby the DGFT notified the ITC (HS), 2017, reads thus:

“Notification No 36/2015-2020
New Delhi, Dated: 17 January, 2017

Subject: Notification of ITC (HS), 2017 – Scheduled-1 (Import Policy)

S.O. (E): In exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended from time to time) read with paragraph 2.01 of the Foreign Trade Policy, 2015-2020, the Central Government hereby notifies ‘Indian Trade Classification (Harmonised System) of Import Items, 2017 [ITC (HS), 2017] as enclosed in the Annexure to this Notification.

2. ITC (HS), 2017 contains “Schedule 1 – Import Policy”. Against each item of this schedule, the current import policy has been indicated along with policy conditions to be fulfilled, if any. The same is available in the DGFT’s website www.dgft.gov.in.

3. This shall come into force with immediate effect.

Effect of this Notification: ITC (HS) 2017 Schedule-1 Import Policy is notified.”

18. Heading 7118 of the ITC (HS), with its sub- headings, reads thus:

“Exim Code	Item Description	Policy	Policy conditions
7118	Coins		
7118 10 00	Coin (other than gold coin), not being legal tender	Free	
7118 90 00	Other	Free	Subject to RBI Regulations”

19. Under the ITC (HS), therefore, “coins (other than gold coins not being legal tender)” fall under Heading 7118 1000, and are freely importable, whereas import of other coins (which would include gold coins), which fall under Heading 7118 9000, though also free, is subject to regulations framed by the Reserve Bank of India (RBI).

20. The impugned Show Cause Notices, dated 12th July, 2019/15th July, 2019, issued to the petitioner, and 28th June, 2019/19th July, 2019, issued to Mink, allege that, as per RBI guidelines, gold coins are freely importable, provided they are imported by the following agencies:

- (i) agencies nominated by the DGFT,
- (ii) Banks authorised by the RBI, and
- (iii) Star and Premier Trading Houses

Apart from these agencies, other entities are not permitted, as per RBI guidelines, to import gold coins. The RBI, on being queried in this regard, especially with respect to the gold coins imported by the petitioner – *vide* letters dated 8th August, 2017 and 24th August, 2017, issued by the customs authorities – clarified, *vide* its letter, dated 13th

September, 2017, that the gold coins imported by the petitioner (or by Mink) were not freely importable inasmuch as they were not agencies falling within any of the aforesaid three categories, who alone were entitled to import gold coins.

21. The impugned Show Cause Notices also rely on para 2.08 of the FTP, which reads thus:

“Any goods /service, the export or import of which is ‘Restricted’ may be exported or imported only in accordance with an Authorisation / Permission or in accordance with the procedure prescribed in a Notification / Public Notice issued in this regard.”

22. On the basis of the above, the impugned Show Cause Notices allege that the gold coins imported by the petitioner and Mink, having been imported in violation of the FTP, were not entitled to the benefit of exemption under S. No. 526 of Notification. 152/2019-Cus *supra*. It is essentially on the basis of the aforesaid facts and allegations that the impugned Show Cause Notices call on the petitioner, and Mink, to show cause against confiscation of imported gold coins, demand of differential duty with interest, and imposition of penalty.

23. The petitioner claims to be particularly aggrieved by para 8 of the impugned Show Cause Notices, dated 12th July, 2019/15th July, 2019, issued to the petitioner, and 28th June, 2019/19th July, 2019, issued to Mink, which reads as under:-

“8. Further, in a case involving import of similar article viz. gold granules, CBIC vide letter F. No. 450/67/2019-Cus.IV dated 31.05.2019 has taken a stand that import of said items can only be made by a nominated agency bank/star

house etc. In this regard, CBIC has held two recent orders passed by the CESTAT in the cases of *Sri Export versus Commissioner of Customs, Hyderabad* [Final Order No.A/31494/2018, dated 27.11.2018 in Appeal No. C/30812/2018] and *Sri Export Versus CC Bangalore Cus* [arising out of No. 344/2018 dated 12.10.2018 passed by Commissioner of Customs, Bangalore-1], as not being legal and proper. In the said orders, import of Gold Granules has been allowed to be imported by an importer which was not a nominated agency bank/star house etc. It has decided by CBIC that the said orders should be appealed against. Directions have also been issued by CBIC that any similar consignments pending clearance at the port/airports may be dealt in terms of the FTP 2015-2020.”

24. We proceed to examine these challenges, *seriatim*.

Circular No. 450/67/2019-Cus.IV dated 31st May, 2019

25. Circular No. 450/67/2019-Cus.IV dated 31st May, 2019, on which the afore-extracted para 8 of the impugned Show Cause Notices, dated 12th July, 2019/15th July, 2019, issued to the petitioner, and 28th June, 2019/19th July, 2019, issued to Mink, places reliance, reads 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
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)”

(Emphasis supplied)

26. The petitioner submits that it was grossly improper, as well as *ex facie* illegal, on the part of the Director (Customs), to observe, in the afore-extracted Circular dated 31st May, 2019, that the judgments of the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as “the Tribunal”), in the Final Orders dated 12th August, 2018 and 27th November, 2018, both of which were passed in appeals filed by M/s Sri Exports, were not legal and proper. The petitioner submits that, while the right and entitlement, of the Customs authorities, to appeal against the said final orders passed by the Tribunal, could not be gainsaid, the CBIC had no authority, whatsoever, to castigate the said final orders – which were binding on all customs formations – as not being legal and proper. Neither, it is submitted, could the impugned Circular dated 31st May, 2019, direct that consignments, pending clearance at ports and airports, be dealt with in accordance with the said decision, as contained in the Circular, contrary to the decisions of the Tribunal.

27. It is submitted by Mr. Tarun Gulati, learned Senior Counsel for the petitioner, that, even on first principles, the CBIC had no jurisdiction, whatsoever, to place any fetter or control over adjudicatory proceedings, relating to imported goods. Reliance is placed, by Mr. Gulati, for this proposition, on the judgment of this Court in *Baliyan and Jewellers Associations v. U.O.I.*².

28. On going through the impugned Circular, dated 31st May, 2019, we find ourselves in agreement with Mr. Gulati. The concluding

² 2016 (335) ELT 639 (Del)

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***³, merit 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*

³ 1991 (55) ELT 433 (SC)

placed before them, one of the Collector (Appeals) and the other of the 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 sub-section (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 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 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*³.

30. The said directions also infract, directly, Section 151A of the Customs Act, which reads thus:

“151A. Instructions to officers of customs. — The Board may, if it considers it necessary or expedient so to do for the

purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, or for the implementation of any other provision of this Act or of any other law for the time being in force, in so far as they relate to any prohibition, restriction or procedure for import or export of goods issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions.”

(Emphasis supplied)

31. In directing field formations to deal with consignments pending clearance at ports and airports, in accordance with the views expressed by it, in preference to the law laid down by the Tribunal, it is clear that the CBIC has acted in direct and conscious violation of the proviso to Section 151A of the Customs Act.

32. We have no hesitation, therefore, in declaring the said diktat, as contained in the concluding paragraph of the impugned Circular dated 31st May, 2019, issued by the CBIC whereby consignments, pending clearance at ports and airports, were directed to be dealt with, “in terms of FTP 2015-2020 and the Board’s decision above” to be illegal.

Para 8 in the impugned Show Cause Notices (before amendment)

33. Para 8, in each of the impugned Show Cause Notices in this writ petition, i.e. the Show Cause Notice dated 12th July, 2019, issued to the petitioner, as well as Show Cause Notice dated 28th June, 2019, issued to Mink, invokes the aforesaid Circular, dated 31st May, 2019, issued by the CBIC. The Circular, dated 31st May, 2019, having been found by us to be in contravention of the law, the invocation of the said Circular, in para 8 of the Show Cause Notices dated 12th July, 2019 and 28th June, 2019, too, therefore, cannot be legally sustained. Neither could any authority, adjudicating the said Show Cause Notices, be bound by para 8 thereof.

Circular No. 450/67/2019-Cus. IV and Corrigenda to impugned Show Cause Notices, issued during the course of these proceedings

34. Aware of the above legal position, the respondent, in an apparent bid to salvage the situation, issued Circular dated 9th September, 2019, as well as corresponding Corrigenda dated 30th September, 2019 and 7th October, 2019, replacing para 8 in the impugned Show Cause Notices dated 12th July, 2019 (issued to the petitioner) and 28th June, 2019 (issued to Mink).

35. The Circular, dated 9th September, 2019, issued by the CBIC, reads thus:

“F No. 45G/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 9th September, 2019

To

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

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

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 DQFT 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 consignments.**

Yours Sincerely

Sd/-

9.9.2019

(Zuber Riaz)

Director (Customs)''

(Emphasis and underscoring in original)

36. Para 8, in the impugned Show Cause Notices dated 12th July, 2019/15th July, 2019 and 28th June, 2019/19th July, 2019, as amended by the said Corrigenda dated 30th September, 2019 and 7th October, 2019, reads thus:

“Further, in a case involving import of similar article viz. gold granules, CBIC vide letter F. No. 450/67/2019-Cus. IV dated 31.05.2019 has taken a stand that import of said items can only be made by a nominated agency bank/star house etc. in this regard CBIC has held 2 recent orders passed by the CESTAT in the cases of ***Sri Export versus Commissioner of Customs, Hyderabad*** [Final Order No. A/3149/2018, dated 27.11.2018 in Appeal No C/30812/2018] and ***Sri Export versus CC Bangalore Cus*** [arising out of No 344/2018 dated 12.10.2018 passed by Commissioner of Customs, Bangalore-1], as not being legal and proper. In the said orders, import of Gold Granules has been allowed to be imported by an importer which was not a nominated agency bank/star house

etc. It has been decided by CBIC that the said orders should be appealed against. Directions have also been issued by CBIC that field formations may take suitable action in accordance with the instructions of RBI/relevant master circulars/extant FTP provisions and the clarification from DSE dated 21.06.2019 besides provisions of the Customs Act with regard to pending or future imports of gold/gold coin consignments.”

Circular No. 450/67/2019-Cus. IV, dated 9th September, 2019

37. Mr. Tarun Gulati submits that the Circular, dated 9th September, 2019, does not, in any way, cure the defect in the impugned Circular dated 31st May, 2019 *supra*, and we are inclined to agree with him. No doubt, the Circular dated 31st May, 2019, was somewhat more brazen, in directing adjudication of pending consignments, at ports and airports, to be undertaken in accordance with the views of the CBIC, rather than the views of the Tribunal. By comparison, para 4 of the Circular dated 9th September, 2019, which “modifies” the directions contained in the Circular dated 31st May, 2019, does not *expressly* direct field formations to act contrary to the view expressed by the Tribunal, but, rather, directs them to “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 consignments.” In our view, however, the distinction between the concluding paragraph of the Circular dated 31st May, 2019, and paragraph 4 of the Circular dated 9th September, 2019, is merely superficial. The CBIC has, effectively, reiterated its direction, to all authorities assessing pending imports, to ignore the judgments of the Tribunal. We reiterate that this is

completely impermissible. Administrative and executive authorities, in the Indirect Tax hierarchy, are completely proscribed from directing field formations to act in violation of judicial orders. We are aware that para 2 of the Circular dated 9th September, 2019, states that “as per the information received from the Principal Commissioner of Customs, Hyderabad”, the “order passed by CESTAT Hyderabad has been suspended”. The Circular does not condescend, however, to even refer to the date of the “information received from the Principal Commissioner of Customs”, let alone the details thereof. The order, if any, of the superior judicial authority, “suspending” the order passed by the Hyderabad bench of the Tribunal, is also not disclosed. Even if it were, for the nonce, to be assumed that the order of the Tribunal had been “suspended”, that, by itself, would not justify the directions contained in para 4 of the Circular dated 9th September, 2019. The effect of such “suspension”, if any, and the issue of whether such “suspension” would eviscerate the precedential value of the order of the Tribunal, could be assessed only on perusing the order “suspending” the order of the Tribunal. Such vagueness, in a Circular issued by the CBIC, which has pan-India ramifications, is completely intolerable. We are also unable to appreciate the further recital, in para 2 of the Circular, dated 9th September, 2019, that an appeal had been filed, against the order of the Tribunal, Bangalore, in the High Court of Karnataka. Filing of an appeal against an order of a judicial authority, it is fundamental, does not even dilute, far less erode, the precedential value of the judgment appealed against.

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, its precedential value, is a more involved question. We do not wish to express any opinion 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.

39. In any event, in view of the above discussion, we are convinced that the Circular, dated 9th September, 2019 may, at best, serve as a source of information about the fact that appeals, against the orders passed by the Tribunal in the Appeals preferred by Sri Exports, before the Hyderabad and Bangalore benches of the Tribunal, are pending before higher judicial fora, and nothing more. The directions contained in para 4 of the said Circular are, in any case, *ultra vires* the powers conferred on the CBIC by Section 151A of the Customs Act, and would require to be set aside. At the same time, we clarify that, while examining, in any individual case, whether Final Order, dated 27th November, 2018, passed by the Hyderabad bench of the Tribunal, and 12th October, 2018, passed by the Bangalore Bench of the Tribunal, are required to be followed, or not, the concerned adjudicating/assessing authority may deem it appropriate to examine whether the said orders stand stayed/set aside, by any superior judicial fora and, if so, the effect of the order of such forum, staying/setting aside the decision(s) of the Tribunal..

(The amended) para 8 of the impugned Show Cause Notices

40. Subject to this clarification, para 8 of Show Cause Notice dated 12th July, 2019/15th July, 2019, issued to the petitioner, and para 8 of the Show Cause Notice dated 28th June, 2019/19th July, 2019, issued to Mink, would also be required to be set aside.

Re. merits of the Show Cause Notices

41. Proceeding further, we may note that extensive submissions have been advanced, both in the writ petition, as well by Mr. Tarun Gulati, learned Senior Counsel, during the course of submissions on behalf of the petitioner, regarding the merits of the allegations in the Show Cause Notice, and the case that has been sought to be built up, therein, against the petitioner.

42. We, however, do not propose to enter into the merits of the allegations in the Show Cause Notice. Interdiction of adjudicatory proceedings, emanating from a Show Cause Notice, issued by a competent authority under the provisions of a fiscal statute, is completely proscribed in law. The merits of the Show Cause Notice, and of the allegations contained therein, would have to be thrashed out by the petitioner before the competent adjudicating authority, against whose decision, if the petitioner is aggrieved, appropriate, and adequate, appellate, or revisional, remedies, are provided by statute. These adjudicatory, and subsequent appellate/revisional procedures, have their own sanctity, and interference, therewith, by courts, is to be scrupulously avoided.

43. It is only where a show cause notice has been issued by an authority which is incompetent to do so, that, ordinarily, a court would interfere therewith. In the present case, the petitioner does not even remotely suggest that the Commissioner was not competent to issue the impugned Show Cause Notices. The challenge of the petitioner,

qua the allegations in the Show Cause Notice, and the proposals following thereupon, are on merits.

44. Article 226 of the Constitution of India is no *akshaya patra*, in which every sort of grievance can find absolution, even where adequate and efficacious alternative remedies are available. In *Special Director v. Mohd Ghulam Ghouse*⁴, which questioned the propriety of the interference, by the High Court, with a Show Cause Notice issued by the Enforcement Directorate under the provisions of the Foreign Exchange Management Act, 1999, the Supreme Court held thus (in para 5 of the report):

“This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted.”

(Emphasis supplied)

⁴ (2004) 3 SCC 440

Similarly, in *U.O.I. v. Kunisetty Satyanarayana*⁵, the Supreme Court observed that “writ jurisdiction is discretionary jurisdiction and hence, such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet”.

45. It is not necessary to multiply references to authorities, for the principle, which may be treated as legally fossilised. Suffice it to state that we are not convinced that either of the Show Cause Notices impugned in this writ petition, namely Show Cause Notice dated 11th July, 2019/15th July, 2019, issued to the petitioner, or Show Cause Notice dated 28th June, 2019/19th July, 2019, issued to Mink, suffers from any such inherent infirmity, as would justify interdiction, by us, under Article 226 of the Constitution of India, of the adjudicatory proceedings which would follow thereupon.

Office Memorandum, dated 6th September, 2017, issued by the DGFT

46. We proceed, now, to examine the challenge , by the petitioner, to Office Memorandum, dated 6th September, 2017, issued by DGFT, Office Memorandum dated 16th February, 2018 , issued by the CBEC and Circular, dated 31st May, 2019, issued by the CBIC.

47. The Office Memorandum dated 6th September, 2017, of the DGFT, reads thus:

“F. No. 01/89/180/36/AM-II/PC-II(A)
Government of India
Ministry of Commerce & Industry

⁵ (2006) 12 SCC 28

Department of Commerce
Directorate General of Foreign trade
Udyog Bhawan, New Delhi

Dated the 6th September, 2017

Office Memorandum

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 85 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. Mohapatra)
Dy. DGFT
Tel: 23061562 Ext: 277
E-mail: mohapatra.sk@nic.in

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

48. The grievance of the petitioner, needless to say, is directed against para 4 of the aforesaid Office Memorandum dated 6th September, 2017, whereunder gold coins are held to be classifiable under Sub-Heading 7118 9000, which would, per consequence, require the import thereof to be compliant with RBI guidelines.

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.

53. In sum and substance, therefore, it is required to be clarified that the impugned Office Memorandum, dated 6th September, 2017, issued by the DGFT, and 16th February, 2018, issued by the CBEC, cannot fetter, or bind, the adjudicating authorities, adjudicating the impugned Show Cause Notices, issued to the petitioner and to Mink, in any manner. In other words, while the position, in law, enunciated in the said Office Memoranda, is correct, the extent to which the said position in law affects the cases of the petitioner, and of Mink, would have to be assessed, on their own merits, by the competent adjudicating authorities.

Office Memorandum dated 16th February, 2018, issued by the CBEC

54. Office Memorandum, dated 16th February, 2018, wherewith, too, the petitioner claims to be aggrieved, is reproduced thus:

“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	
7118 10 00	Coin (other than gold coin), not being legal tender	100%
7118 90 00	Other	100%

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 71 18 90 00.

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

Sd/-
(Mandeep Sangha)
Senior Technical Officer

Chief Commissioner of Customs
New Customs House
Near IGI Airport
New Delhi.”

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 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.

57. We say no more.

58. The above findings apply, *mutatis mutandis*, to WP (C) 9230/2019 which, too, deals with import of goods declared as “gold

coins (other than legal tender)”, from South Korea, under eight Bills of Entry.

Conclusion

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,
 - (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.

60. These writ petitions stand disposed of, in the aforesaid terms, with no orders as to costs.

C.HARI SHANKAR, J.

CHIEF JUSTICE

NOVEMBER 14, 2019

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