

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH – COURT NO. III

CUSTOMS APPEAL NO.54918 OF 2023 WITH
CUSTOMS MISCELLANEOUS APPLICATION NO.50365 OF 2024

[Arising out of Order-in-Original No.09/Manish Saxena/Commr(Adj.)/Delhi/NCH/2022-23 dated 18.01.2023 passed by the Commissioner of Customs(Adjudication), Delhi Zone, New Delhi]

M/s.HDFC BANK LIMITED,
HDFC House, 1st Floor, CS No. 6/242,
Senapati Bapat Marg, Lower Parel,
Mumbai-400 013.

...APPELLANT

Versus

COMMISSIONER OF CUSTOMS
(ADJUDICATION),DELHI ZONE
New Customs House, Near IGI Airport, New Delhi

...RESPONDENT

WITH

C/55054/2023 WITH MISC. NO.50366/2024
C/55290/2023 WITH MISC. NO.50364/2024
C/52194/2024

APPEARANCE:

Shri B.L. Narasimhan, Shri Anurag Kapoor, Shri Kaushal Jaisalmeria, Advocates in Customs Appeal No.54918/2023, Shri Aditya Sain, Sr. Counsel, Shri Abhiram P.R., Shri Inderajit Mohanty, Shri Tarang Agarwal and Shri Ayush Khan, Advocates in Customs Appeal Nos.55054, 55290/2023 & 52194/2024) for the appellant. Shri Arjun Raghvendra, Advocate in Customs Appeal No.55054/2023 and 52194/2024. Shri Ranjan Prakash and Shri Rajesh Singh, Authorised Representatives for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOs. 51571-51574/2025

Date of Hearing: 23.07.2025
Date of Decision:09.10.2025

BINU TAMTA:

1. Challenge in the present appeals is to the Order-in-Original No.09/Manish Saxena/Commr(Adj.)/Delhi/NCH/2022-23 dated 18.01.2023, whereby the Commissioner confirmed the respective demand of Customs duty along with interest and penalty on the appellants herein.

2. Brief facts in general are:

2.1 This is a case where duty free gold imported by nominated agencies/appellants (HDFC, MMTC, DIL and SBI) was procured by M/s. P.H. Jewels/exporter¹ to export gold jewellery under the scheme of Exporters of Gems and Jewellery under Foreign Trade Policy 2015–20² was not exported but diverted into domestic market without payment of applicable customs duty which led to the violation of the conditions under the exemption Notification No.57/2000-Cus dated May 5, 2000 read with Circular No.27 of 2016–CUS dated June10, 2016 and FTP during the relevant period of export from April 27, 2016 to December 27, 2016. The Proprietor of PHJ, namely, Smt. Radhika Aggarwal entered into agreement with the various nominated agencies for obtaining duty free gold for exporting the gold jewellery within a period of 90 days from the date of purchase. Her husband, Shri Sanjay Aggarwal being the power of attorney holder of PHJ was actively participating in business activities and was looking after the day-to-day affairs of the company to negotiate with respect to the entire transaction of gold. Shri Sanjay Agarwal in fact was the mastermind being well versed in gold trading. Smt. Radhika Agarwal personally

¹ PHJ

² FTP

hand carried the export jewellery consignment by filing non-EDI (Manual) Shipping Bills. Statements of Smt. Radhika Agarwal, Shri Sanjay Aggarwal, power of attorney holders and their employees were recorded under Section 108 of the Customs Act, 1962³.

2.2. The modus operandi adopted by PHJ was that they fabricated and submitted multiple triplicate copies (Export Promotion Copy) of the same customs assessed manual shipping bills along with the corresponding invoice and packing list to MMTC, DIL, SBI and HDFC. While submitting such documents to the said nominated agencies, PHJ mentioned respective purchase references in the 'Other Reference' column of the invoice and Packing list. In other words, to suit the legal requirements, documents like Shipping Bill, Invoice, & Packing List of a single export consignment were fraudulently duplicated/triplicated and submitted to multiple nominated agencies as a proof of export for the duty free gold purchased from them. Further, PHJ intentionally printed multiple incomplete triplicate copies of shipping bills wherein the details pertaining to proof of export such as "flight number, date, time and signature of the customs officer certifying that the goods have been air shipped" were not printed, and the second page of the Triplicate copy was blank, no endorsement was received in the rear side of the triplicate shipping bill to show the proof of air shipment. The shipping bills were fabricated after the assessment by Customs with an intention to claim undue benefit. In so far as nominated agencies were concerned, they failed to verify the fraudulent claims made by PHJ. The modus operandi is further completed by diversion of gold in the domestic market wherein they sold/delivered the gold bullion to M/s J.J.

³ Act 1962

House Pvt. Ltd and M/s. Magna Projects Pvt Ltd on the basis of tax invoices, delivery challans, delivery orders and the bank account statements revealing the payment made to PHJ by these companies towards sale proceeds of duty free gold which they had received from the nominated agencies, details whereof have been given in the show cause notice along with copies as RUDs.

2.3. On the basis of the intelligence gathered by the officers of Directorate of Revenue Intelligence⁴, case was investigated against PHJ, MMTC, DIL, HDFC and SBI, for diversion of duty free gold bullion into domestic market without payment of applicable customs duties and submission of fraudulent documents to nominated agencies by PHJ. Show cause notice⁵ dated January 22, 2021 was issued by DRI to all these parties demanding customs duty under Section 28(4) of the Act, read with the relevant notification and the circular, from the appellants being the importer of duty free gold along with interest and penalty under Section 112(a) & (b) and Section 114A of the Act. Smt. Radhika Aggarwal and Sanjay Aggarwal were called upon to pay penalty under Section 112(a) & (b) and Section 114AA of the Act. The Custom House Officer, namely, Shri Manish Kumar Mishra, Shri Shantanu Das and Shri Tapan Kumar Sen were also called upon to pay penalty under Section 117 of the Act. On adjudication, the learned Commissioner passed the impugned order, confirming the demand of Customs duty on the nominated agencies being the importers along with interest and penalty of Rs1,00,00,000/- on each of them under Section 112(a) while setting aside the penalty under Section 114A of the Act. The duty free gold imported by the appellants/nominated agencies was held liable for

⁴ DRI

⁵ SCN

confiscation under Section 111(o) with redemption fine of Rs.1,00,000/- under Section 125 in lieu of confiscation. Penalty of Rs.2,00,00,000/-, each was imposed on Smt. Radhika Agarwal and Shri Sanjay Agarwal under Section 112(a) and 114AA of the Act, separately. The penalty proposed against the Custom House Officers was, however, set aside.

3. As the present four appeals have been filed by HDFC, MMTC, DIL and SBI, the scope of challenge before us is limited to the liability of the appellants to pay customs duty on the gold imported by them availing the benefit of duty exemption under the Notification to be used for export of gold jewellery with value addition and also whether penalty is leviable against them under Section 112(a) of the Act.

4. To examine the controversy, it is necessary to set out the specific facts and the involvement each of the appellants as under:-

Transactions with HDFC

4.1 Smt. Radhika Agarwal entered into an agreement with HDFC [dated 07.06.2016] for the purchase of duty free gold bullion, authorizing Shri Sanjay Agarwal for conducting the said transactions and also submitted a Power of Attorney to HDFC dated 07.06.2016 authorising Shri Sanjay Agarwal to negotiate and enter into foreign exchange contracts, sign and execute necessary contracts, deeds, documents, instruments, papers, etc on behalf of PHJ. During the period from July, 2016 to September, 2016, PHJ purchased 400 kgs.of duty free gold bullion from HDFC under Outright Purchase Scheme.

4.2 To ascertain the complete transaction details of PHJ with HDFC, statement of Shri Alok Murarka, Senior Manager, HDFC, Mumbai was recorded on 03.10.2018, wherein he, inter alia, stated that he was authorized to give statement on behalf of HDFC since their bullion operations are centrally managed for pan India; that PHJ was a bullion customer of the HDFC; that an agreement was signed by HDFC and PHJ for supply of gold bullion; that HDFC, Kolkata Branch issued bullion to PHJ; that PHJ had taken all gold for export purpose under Outright Purchase as per Exim Scheme of the Government of India; that they had issued 400 kgs of gold to PHJ from their Kolkata Branch Office only; **that PHJ had submitted cash margin through their bank account i.e. the value of gold bullion plus the customs duties; that the same was debited from their account and held with the bank till the proof of export was submitted to the bank.**

4.3 He also opined that PHJ had filed three Triplicate copies of the same Shipping Bill with three different Nominated Agencies towards proof of export for fulfillment of export obligation; that they have utilised one shipping bill with multiple references (invoice numbers of different agencies) three times to claim the export benefits. The diversion of duty free gold is established by the Bank Account Statement of PHJ revealing transactions with other bullion trading companies, i.e. M/s. J.J. House Pvt. Ltd., Kolkatta and M/s. Magna Projects Pvt. Ltd., Kolkatta.

4.4 Shri Harshad Ajmera of M/s. JJ House Pvt. Ltd., Kolkata, confirmed that Shri Sanjay Agarwal interacted with them for the sale of 364 Kgs of gold bullion purchased by PHJ from HDFC. He submitted 17 original invoices issued by PHJ, copies of authorizations from Smt.

Radhika Agarwal to M/s Brink's India Pvt. Ltd., and delivery challans issued by Brink's India. The gold bar numbers in these documents matched those on the Bills of Entry and Packing Lists of the duty-free gold imported by HDFC.

4.5 PHJ diverted the entire 400 Kgs of duty-free gold bullion valued at Rs. 114,49,38,861/-into the domestic market through sales to M/s JJ House Pvt. Ltd. and M/s Magna Projects Pvt. Ltd. The proceeds were deposited in various undisclosed bank accounts of PHJ, including ICICI Bank, Yes Bank, and SBI, which were not reported in PHJ's income tax filings.

4.6 To conceal this diversion, PHJ submitted 12 fabricated Shipping Bills to HDFC as proof of export for the 400 Kgs of duty-free gold during the period July to September 2016 (as per Worksheet-E1).

4.7 HDFC accepted incomplete Triplicate Copies of Shipping Bills lacking vital details such as flight number, date, time, and Customs Officer's endorsement of shipment. These documents only bore assessment-stage Customs signatures. Hence, they were not valid EP Copies. HDFC did not exercise due diligence in verifying the completeness of these documents before accepting them as proof of export.

4.8 Shri Kiran Rallapalli, Senior Manager, HDFC, confirmed that export documents submitted for proceeds realization were stored and accessible. However, HDFC failed to cross-verify these with the EP copies and related invoices submitted as proof of export. A comparison of the "Other Reference" column in these documents would have

revealed mismatches, as some lacked HDFC references or carried unrelated agency details. The fraud could have been detected at inception had such scrutiny been undertaken.

4.9 Since PHJ diverted the entire 400 kgs of duty-free gold bullion into the domestic market without discharging customs duty, HDFC, being the importer, is liable to pay customs duty amounting to Rs.12,06,33,497/-.

4.10 Subsequently, HDFC, under protest, deposited Rs.12,06,33,497/- towards customs duty via challan no.A134 ACC dated 21.12.2020, as communicated in their letter dated 22.12.2020.

Transactions with MMTC:

4.11 Smt. Radhika Agarwal entered into an agreement dated 05.02.2014 with MMTC Ltd. for the procurement of duty-free gold bullion. She authorized Shri Sanjay Agarwal and Shri Vinay Agarwal to execute all documentation and formalities necessary for conducting business transactions with MMTC. PHJ procured 872 Kgs. of duty-free gold bullion under the **Outright Purchase Scheme** from MMTC between February 2014 and May, 2017. PHJ submitted 14 fabricated triplicate copies of shipping bills along with invoice & packing lists to MMTC as alleged proof of export for 454.6242 kgs. of duty-free gold bullion purchased between April, 2016 and December, 2016.

4.12 MMTC accepted incomplete Triplicate Copies of Shipping Bills from PHJ, which lacked crucial air shipment details such as flight number, date, time, and endorsement of "air shipped" on the second page. MMTC

relied solely on the assessment signatures of Customs Officers without verifying the essential export endorsement, thus treating incomplete documents as valid proof of export.

On intimation of fraud by PHJ, MMTC deposited the entire duty amount of Rs.4,87,44,885/- with the Government prior to the issuance of the show cause notice, which has been adjusted against their duty liability.

Transactions with DIL

4.13 On 02.09.2015, Smt. Radhika Agarwal entered into an agreement with DIL for procurement of precious metals and authorized Shri Sanjay Agarwal to perform all acts relating to purchase, price fixation, documentation, transaction and delivery of gold. Between September 2015 and April, 2017, PHJ procured 839 kgs. of duty-free gold bullion under the Outright Purchase and 99 kgs. under the Replenishment Scheme.

4.14 PHJ submitted 9 fabricated Shipping Bills and corresponding Invoice & Packing Lists to DIL in support of alleged export of 257 Kgs of duty-free gold bullion during January, 2015 to April, 2017.

4.15 Smt. Radhika Agarwal, via letters dated 14.01.2017, 17.01.2017, and 03.02.2017, requested DIL to deposit Customs Duties on 277 Kgs of gold bullion citing spurious reasons such as poor market conditions in Dubai and non-linkage of exported jewellery to DIL bullion. In reality, PHJ had sold the duty-free bullion in the domestic market shortly after procurement. In furtherance of the cover-up, she requested return of original export documents from DIL. DIL complied

and paid Rs. 8,53,48,771/- towards duty and interest without informing Customs about the document withdrawal and references to their gold.

4.16 PHJ reused the returned export documents to obtain 99 Kgs of duty-free gold under the Replenishment Scheme. DIL subsequently paid Rs.3,01,97,473/- as Customs Duty and interest on 96 Kgs, but has not yet discharged duty liability for the remaining 3 Kgs.

4.17 DIL accepted incomplete Triplicate Copies of Shipping Bills from PHJ that lacked essential air shipment details such as flight number, date, time, and certification by the Customs Officer on the second page. DIL relied only on Customs signatures obtained during assessment and did not ensure completeness of the documents. Given DIL's stature as a premier organization for export-related transactions, this negligence reflects a serious dereliction of duty. It is further established that DIL was fully aware of the format of a complete EP Copy, as evident from a valid EP Copy submitted in another case.

4.18 Shri Nirakar Chand, CEO (Precious Metals), explained that DIL paid the Customs Duty after PHJ expressed inability to fulfil the export obligation and requested DIL to deposit the duty. He stated that when an exporter declines to claim duty exemption and offers to pay, DIL, as a Nominated Agency, prioritizes securing government revenue.

4.19 PHJ procured 377.5 Kgs of duty-free bullion from DIL (277+1.499) under Outright Purchase Scheme and 99 Kgs under Replenishment Scheme), valued at Rs.1,01,74,06,390/-, and diverted the same for domestic sale. Accordingly, DIL is liable to pay Rs.10,59,12,967/- as Customs Duty along with interest, as per

Notification No. 57/2000-Cus, FTP provisions, and the terms of the Bond executed with Customs. DIL has paid Rs.10,47,15,735/- as duty and Rs.1,08,30,502/- as interest in respect of 373 Kgs, but is yet to pay Rs.11,97,232/- and applicable interest in respect of the remaining 4.499 Kgs.

4.20 Shri Nirakar Chand expressed DIL's inability to pay the outstanding Customs Duty of Rs.11,97,232/- and interest on 4.499 Kgs. citing non-receipt of funds from PHJ.

4.21 Out of the duty-free bullion supplied by DIL, 100 Kgs was diverted and sold by PHJ to M/s. J.J. House and M/s. Magna Projects as evidenced by serial numbers of the gold bars. The proceeds of this domestic sale were received in PHJ's ICICI Bank account, which was then utilized to purchase more duty-free bullion from DIL and HDFC.

Transactions with SBI

4.22 Under an agreement, SBI supplied 20 Kgs of duty-free gold bullion to PHJ under Outright Purchase Scheme. In support of the purported export of the said gold, PHJ submitted Shipping Bill No.2324 dated 27.12.2016. However, the same Shipping Bill was also submitted in a fabricated form to MMTC. Further, the Invoice & Packing Lists attached to the Original Copy of the said Shipping Bill do not mention any purchase reference corresponding to SBI. As a result, SBI appears to be liable to pay the applicable Customs Duty and interest in respect of the 20 Kgs of duty-free gold bullion supplied to PHJ. Pursuant to this, SBI submitted Demand Draft No. 512757 dated 30.09.2019 for Rs.64,00,000/-, representing the margin money held in PHJ's account, which was deposited into the Government account vide Challan No.

A.C.C.H.C 30 dated 07.11.2019, as per SBI's communication dated 01.10.2019.

4.23 The details of date of payment of duty which is prior to the SCN dated 22.01.2021 in respect of each of the appellant is as under:-

TABLE

Appeal No.	Party Name	Duty under 28(4) (Rs. In Crore)	demand Section (Rs. In Crore)	Date of duty payment and challan Numbers
C/54918/2023	HDFC Bank	12.06		Duty paid on 21.12.2020 as per Challan No.34/ACC
C/55054/2023	Diamond India Ltd.	10.59		Duty paid on challan no.M-837 dated 25.01.2017, 16002 dated 23.01.2017, 24 dated 9.2.2018 & 2234 dt. 8.2.2019 and yet to pay the remaining amount of Rs.3,68,658/-
C/55290/2023	MMTC	14.07		Duty paid on challan No.1132 dt. 8.10.2020, 1171 dt.20.10.2020 & 1184 dt.23.10.2020
C/52194/2024	State Bank of India	0.57		Duty paid on Challan no.2234 dt.8.2.2018 & 241 dt.9.2.2018

5. Heard Shri B.L. Narasimhan, Shri Anurag Kapoor and Shri Kaushal Jaisalmeria, Advocates for the appellant (HDFC Bank Ltd.), Shri Aditya Sain, Senior Counsel, Shri Abhiram P.R., Shri Inderajit Mohanty, Shri Tarang Agarwal and Shri Ayush Khan, Advocates for the appellant in MMTC, DIL and SBI and Shri Arjun Raghuvendra, Advocate for Diamond India Ltd. and State Bank of India and Shri Ranjan Prakash and Shri Rajesh Singh, Authorised Representatives for the Department.

Submissions on behalf of the Appellants

6. Shri B. L. Narasimhan, learned Counsel opened the arguments on behalf of HDFC. At the outset he challenged the impugned order being violative of the principles of natural justice as the learned Commissioner decided the matter against the appellant without affording any opportunity of hearing. He submitted that a request for an adjournment (2 months) was made, however, the Commissioner has passed the order without hearing the appellant. One of the contentions raised by the learned counsel is that the learned Commissioner has gone beyond the scope of the show cause notice and has, thereby exceeded his powers. On merits, the learned Counsel submitted that the appellant was not under any obligation to execute the Bond for import of gold with regard to the 4 B/Es during the period between 23.06.2016 to 22.08.2016. The bonds were executed by the appellant on its own which are, therefore, without any authority of law. The submissions of the learned counsel is that the requirement of executing the Bond under 2nd proviso to Notification No.57/2000 was omitted vide Notification No.33/2015 and the same were re-inserted in Notification No.57/2000 vide Notification No.56/2015-Cus dt.3.10.2016. During the period between 15.05.2015 to 3.10.2016, there was no obligation on the Nominated Agencies to execute the Bond. Learned counsel also submitted that the export document submitted by the exporters were duly attested by the Customs Officers and hence, there was no reason to disbelieve the same. Once the documents relating to export goods have been verified and sealed by the customs officials, there is no reason to doubt those documents as forged. The invocation of the extended period has also been challenged on the ground that the impugned order itself had specifically noted that the

importers/nominated agencies had not colluded with PHJ or submitted any willful mis-statement or suppressed any facts. On that basis, the imposition of penalty under Section 114A has been dropped, consequently, the extended period of limitation under Section 28(4) would also not survive as the wordings of both the sections are identical. Challenge has also been made to the imposition of penalty under Section 112(a), levy of interest and confiscation under Section 111(o) of the Act. Learned counsel submitted that the appellant duly complied with each and every obligation under FTP, HBP and the notifications and the allegation that they failed to verify the documents submitted by the exporters and did not wait for BRCs before releasing the security deposit furnished by the exporter does not amount to collusion, willful mis-statement or suppression for invoking the extended period of limitation.

7. Shri Arjun Raghvendra, the learned Counsel for DIL and SBI adopted the arguments of Shri B.L. Narasimhan, however he emphatically stressed on the point that the appellants are not party to the fraud.

8. Shri Aditya Sain, learned Senior Counsel appearing for MMTC also made similar arguments, however, he added that the appellant has been nonsuited for lack of due diligence. In response thereto, the learned counsel submitted that MMTC has followed all the correct procedure and complied with the statutory conditions. MMTC had no reason to suspect fraud on the part of the exporter as all the documents submitted by the exporter were duly signed and attested by the custom officials.

Revenue's Submissions

9. Shri Rajesh Singh, the learned Authorised Representative for the Revenue submitted that the nominated agencies have imported duty free gold by taking benefit of export against supply by nominated agencies under notification number 57/2000 dated May 8, 2000 as amended with conditions as stipulated vide Circular No. 27/2016 dated June 10,2016, which was supplied to the exporter PHJ, who failed to export the gold jewellery made out of the duty free gold and diverted the same to the domestic market by fabricating the copy of shipping bills having fake signatures of customs officers along with fabricated copy of export invoices. Further, he submitted that the appellants having imported the gold by giving Bond and BG undertaking to export gold Jewellery either by itself or through other exporters equivalent to the gold imported within a period of 90 days. He further submitted that Bond executed by the importer clearly states that the conditions laid down in the customs notifications, if violated or not fulfilled then the importer is liable to deposit the differential duty forgone on account of the notification and therefore the demand has been rightly made against the nominated agencies. As per section 143 of the Act, the differential duty can be realised by the Department without prejudice to the right of the department to demand duty under section 28. The learned Authorised Representative justified the imposition of penalty as well as the invocation of the extended period of limitation and retreated the findings of the learned Commissioner.

Analysis On Merits

10. The settled proposition is that importation of gold would come within the purview of prohibited item within the meaning of Section 2(33) of the Act as it falls in the 'restricted' category of goods. The policy of duty free imports of gold through the nominated agencies and authorized Bank by RBI has been introduced by the Government of India, which is further regulated by the provisions of the Customs Act read with the Notifications, FTP and HBP. The purpose of appointing the 'Nominated Agencies' and prescribing the detailed procedure is to avoid divergent practices and to streamline the supply of gold/silver/platinum for exports.

11. **Notification No.57 of 2000** dated May 8, 2000 issued under the provisions of the Customs Act, exempts, silver/gold/platinum when imported into India under the Scheme for 'Export Against Supply by Nominated Agencies' from the whole of the duty of Customs provided, the importer executes a bond undertaking to export either itself or through other exporters articles of gold jewellery within 90 days from the date of issue of gold. The relevant para reads as under: -

"Provided further that **in the case of import of gold/silver/ platinum under the scheme for 'Export Against Supply by Nominated Agencies', the importer executes a bond in such form and for such sum as may be specified** by the Assistant Commissioner of Customs or Deputy Commissioner of Customs undertaking to export, either by itself or through other exporters gold/silver/platinum jewellery or articles, as the case may be, including studded articles having gold/silver/ platinum content equivalent to the imported gold/silver/ platinum within a period of 120 days from the date of issue of gold/silver/platinum to the exporters, or such extended period as the Assistant Commissioner of Customs or Deputy Commissioner of Customs, on sufficient cause being shown may allow, and **binding himself to pay on demand duty on quantity of gold/silver/platinum representing the**

difference between the quantity issued and that contained in the exported jewellery or articles.”

12. **Circular No.28/2009 dated October 14, 2009** prescribed the procedure to be followed by the nominated agencies for supplying duty-free gold imported under Notification 57/2000, which stood amended by **Circular No. 27/2016** simplifying the procedure to be followed, as under:-

“(i) the Nominated Agencies shall execute a bond to the Deputy/Assistant Commissioner of Customs binding themselves to, -

(a) maintain accounts for the gold/silver/platinum imported; and

(b) to discharge the duty in the event of the exporter not fulfilling his export obligation within the period prescribed under the foreign trade policy:

(ii) For the purpose of para (i) above, the Nominated Agencies may execute a bond for an amount equivalent to the duty involved on the import of a particular consignment, or, a general bond for an amount equivalent to the duty involved on quantity of precious metal likely to be imported over a specified period as declared by the importer;

(iii) The Nominated Agency shall, along with the bond, furnish a bank guarantee equal to 25% of the estimated amount of duty involved.

(vii) As far as exporters operating under replenishment scheme are concerned, they may be permitted to receive precious metal from the Nominated Agencies on submission of EP copy of the shipping bill. Nominated agencies shall also monitor the export proceeds realization of such shipments against which they have replenished precious metal, on the basis of Bank certificate of realization to be submitted by exporters to the nominated agencies, as a proof of having exported the jewellery.

(viii) The Nominated Agencies would supply the gold/silver/platinum for export production and would submit an exporter-wise consolidated monthly account in format enclosed by the 10th of the succeeding month to the Customs station of import;

(ix) The exporter shall furnish the EP copy of the shipping bill and Bank Realization Certificate ⁶ to the nominated agencies as a proof of having exported the jewellery made from the duty free goods released to them within the period prescribed in the Foreign Trade Policy;

(x) Wherever such proof of export is not produced within the period prescribed in the Foreign Trade Policy, the Nominated Agencies shall deposit the amount of duty calculated at the effective rate leviable on the quantity of precious metal not exported, within 7 days of expiry of the period within which the jewellery manufactured out of the said precious metal was supposed to be exported."

13. The Policy and Procedure for import of precious metal is as per the guidelines stated in FTP and the RBI Guidelines. The scheme for Exporters of Gems & Jewellery under FTP 2015-20 is applicable for export of gold jewellery in the following terms:-

Para 4.34 of FTP Procurement from Nominated Agencies - Exporters of gold/silver/platinum jewellery and articles thereof may obtain gold as an input for export product from Nominated Agency, in advance or as replenishment after export in accordance with the procedure specified in this behalf.

Para 4.41 of FTP allowed exporters to obtain gold from nominated agencies which includes MMTC Ltd, Diamond India Ltd and any authorized bank by RBI etc. Procedure for import of precious metal by Nominated Agency (other than those authorized by Reserve Bank of India and the Gems & Jewellery units operating under EOU and SEZ schemes) and the monitoring mechanism thereof shall be as per the provisions laid down in Hand Book of Procedures. A bank authorised by Reserve Bank of India is allowed to import standard gold bars as per Reserve Bank of India guidelines.

Para 4.83 allowed exporter to obtain required quantity of precious metal in advance on outright purchase basis subject to furnishing of BG/LUT to nominated agencies for an amount as may be prescribed by nominated agency. Further exports shall be effected within a maximum period of 90 days from date of outright purchase of precious metal.

⁶ BRC

14. **Chapter 4 of HBP 2015-20** sets out the procedure to be followed by the Nominated Agencies for the import of gold and other precious metals under the Scheme of Gold Import.

Para 4.77 Export Against Supply By Foreign Buyer

- (a) Before clearance of each consignment of import supplied by foreign buyer, Nominated Agency/Status Holder having Nominated Agency Certificate shall execute a bond with Customs, undertaking to export within stipulated period in contract, gold/silver/platinum jewellery or articles equivalent to entire import quantity of gold/silver/platinum, mountings and findings etc. excluding admissible wastage.**

Para 4.78 Payment of duty for quantity not exported. Nominated agency/Status Holder having Nominated Agency Certificate/exporter shall be liable to pay customs duty leviable on that quantity which is proved to have not been exported.

Para 4.78 also prescribes that Exporter may also obtain, in advance, gold/silver/platinum etc. supplied by foreign buyer by furnishing a BG/LUT for an amount equal to international price of such items plus customs duty payable thereon.

15. From the aforesaid legal framework, it is evident that the responsibility to pay the Customs duty is on the nominated agencies being the importer and to ensure the same, the nominated agencies are required to execute the Bond equivalent to the amount of customs duty involved which in turn they seek the exporters to deposit it with them by way of margin money. In conformity with the legal provisions, all the appellants had executed respective agreements with PHJ. For the sake of avoiding repetition, we would refer to the terms of the agreement as entered into by HDFC with PHJ. Under the agreement, the purchaser PHJ has agreed that they shall keep the Bank indemnified at all times, and shall pay the price as determined by the Bank, being the aggregate amount towards import of the bullion, including the landing

cost, cost of insurance incurred by the Bank, freight, customs duty, Octroi charges, if any. The relevant clause in the agreement regarding customs duty is quoted below:-

"I) The Purchaser, if an exporter, hereby undertakes to the Bank that the Purchaser shall after purchase of bullion utilize the same for manufacture of jewellery and export the same within such period as stipulated by the current Exim policy or re-enactment thereof or the extension thereof from the date of purchase of bullion. **The Purchaser acknowledges that no custom duty or other levies for the gold purchased is currently attracted for the reason that the Purchaser has represented that he/it will export the jewelry made from such gold within the time provided by the current Exim policy or re-enactment thereof or extension thereof. In the event of the Purchaser failing to export the jewellery made from the gold so imported, the Bank shall be liable to pay the customs duty and other levies (including penalties therefore) and in such event the Purchaser hereby agrees to indemnify and keep the Bank indemnified from time to time and at all times hereafter against the payment of all the customs duty penalty and other levies, expenses and charges which the Bank may suffer or to which the Bank may be put to due to the failure of the Purchaser to export the jewellery made from the gold so imported and hereby irrevocably and unconditionally authorizes the Bank to pay any customs duty or other levies to the authorities concerned without reference to the Purchaser and such payment shall be binding on the Purchaser. The Purchaser also hereby authorizes the Bank to debit his/its any account maintained with the Bank at any time for the amount so paid by the Bank by way of customs duty and other levies and such debit shall be binding on the Purchaser.** The covenants above would stand modified to be in congruence with

changes in the relevant legislation governing the sale of bullion to exporter clients by the regulatory/statutory authorities.”

The terms of the aforesaid clause are plain and simple declaring the intent of the parties that the liability to pay the customs duty in the event the purchaser fails to export the jewellery made from the gold so imported is on the Bank. At the same time, the responsibility of the Bank is secured as the purchaser is required to indemnify the Bank against the payment of all the customs duty, penalty and other expenses and charges which the Bank may be liable to pay due to the failure of the purchaser to export the gold jewellery. The mechanism is such that the government dues by way of customs duty are secured by the Bank and the Bank is also secured by the purchaser authorising them to debit any amount from their account towards customs duty. It is in these circumstances, the nominated agencies had discharged the duty liability towards the import of gold made by them. Under the agreement, the burden to discharge the customs duty is on the Bank and in respect of which they are duly indemnified. The purpose of having nominated agencies for the purposes of import of gold is not that they are to act merely as a post office, but an authority who is made responsible to secure the interest of the government and also to facilitate the export by duly complying with the procedure and following the requisite conditions and avoid any misuse.

16. Needless to mention that Customs Duty is a Charge in Rem and Not in Personam implying that incidence of customs duty is a charge on the imported goods themselves, rather than being a personal liability of a specific individual. The obligation to pay customs duty arises by virtue

of the importation of goods into India and attaches to the goods as a condition for their clearance or release for home consumption. This principle is reflected in the statutory framework, particularly in:

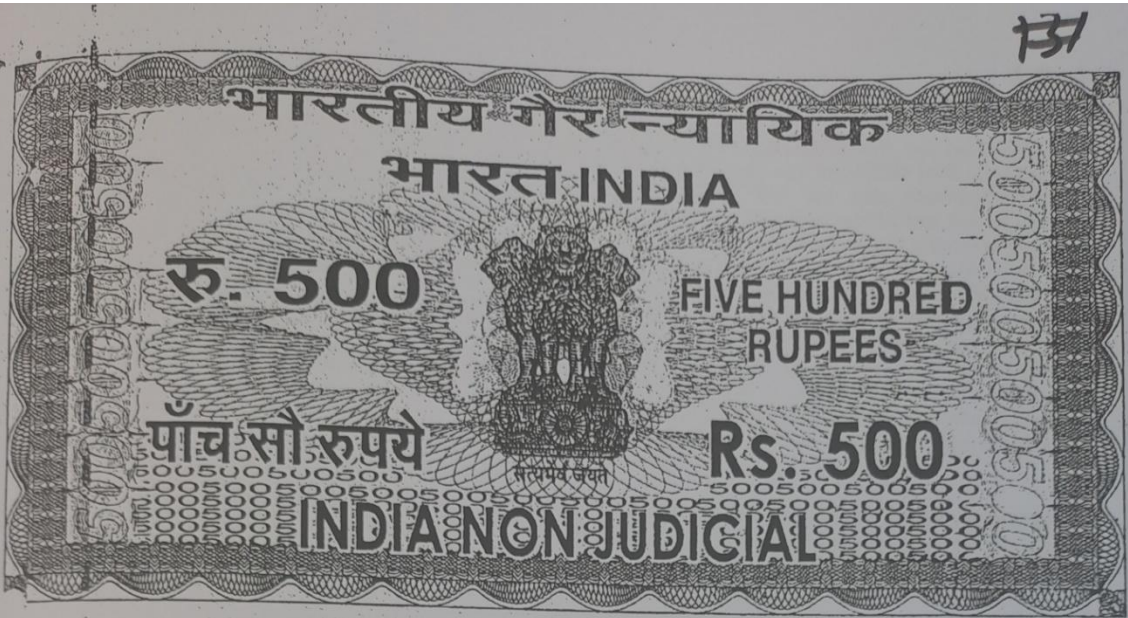
Section 12 of the Customs Act which provides that duties of customs shall be levied on goods imported into or exported from India;

Section 47 requires duty to be paid before clearance of goods for home consumption;

And **Section 2(14)** and **Section 2(23)**, which define "dutiable goods" and "import" in relation to the act of bringing goods into India.

The liability to pay duty is intrinsically linked to the goods and arises irrespective of the identity of the importer. Any person seeking to clear the goods from customs charge must pay the duty leviable, regardless of whether they are the original importer, subsequent owner, or even a third party.

17. Undisputedly appellant had executed a bond at the time of importation of impugned goods. We are referring to the bond executed by M/s HDFC which is reproduced below:-



पश्चिम बंगाल WEST BENGAL

G 994361

To,
The President of India,
Through The Commissioner of Customs,
Kolkata,
West Bengal.



BE No. _____ Dated _____

Bond No. _____ Dated _____

WE, HDFC BANK LIMITED, having our registered office at HDFC Bank House, Senapati Bapat Marg, Lower Parel (West), Mumbai-400 013 and having a branch at corporate office HDFC BANK LIMITED, STEPHEN HOUSE, 4D, BBD BAG EAST, KOLKATA 700 001 hereinafter referred to as the Obligor (which expression shall, unless repugnant to the context or meaning thereof, include our heirs, successors, executors, Administrators, liquidators, legal representatives and assignees) hereby hold and firmly bind ourselves jointly and severally unto the President of India, hereinafter referred to as the Government in the sum of Rs 3,07,04,300 /- (Rupees Three Crores Seven Lacs Four Thousand Three Hundred Only) for which payment to be well and truly made, we, the obligors, bind ourselves by these presents.

WHEREAS, we the obligors have been granted by the Reserve Bank of India the permission vide letter ref no DBR.IBD.16209/23.67.002/2015-16 Dated 27.06.2016 (Valid till the 31st March 2017) as one of the nominated agencies for import of Gold. We the obligors have decided to import Gold, without payment of duty, as prescribed under the customs notification 57/2000 dated 08th MAY 2000 as per the terms and conditions stipulated in the Board Circular No. 27/2016 dated 10.04.2016 and we the obligors have duly accepted the said terms and conditions.

Manoj Kumar Lakhmana *Satish Chandra*

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AND WHEREAS in terms of Boards circular 027/2016 dated 10th June 2016, WE, AS, NOMINATED AGENT, ARE ALLOWED TO IMPORT gold bars under notification no: 057/2000 FOR Supply to exporters for manufacture of Jewellery and export thereof. We are also exempted from warehousing the goods since exempted from duty payment and also within the meaning of chapter IX of the Customs Act. We hereby, undertake to clear the consignment imported under home consumption and not under warehousing. The imported goods will be stored at the premises at Brinks India Pvt Ltd, 18/39, Ground Floor, Ballygunge Place East, Kolkata 700 019 by us from time to time for supply of the duty free precious metal (Gold) to the Jewellery exporters, who have registered themselves with their jurisdictional Asst. Commissioner with the one-time excise certificate, as specified under Board Circular No. 27/2016 dated 10.06.2016 (Gold Jewellery export promotion & replenishment scheme) for a period of one year or till the validity of the RBI permission, as the case maybe without payment of duty on conditions specified in sub-section (1) of section 58 of the Customs Act, 1962, which conditions we the obligors hereby accept.

AND WHEREAS, we the obligors having been permitted by the Assistant Commissioner / Deputy Commissioner, Central Excise/Customs by accepting this bond permitting us to store the imported goods at Brinks India Pvt Ltd, 18/39, Ground Floor, Ballygunge Place East, Kolkata 700 019 for fulfilment of export obligations under notification 057/2000.

AND WHEREAS pursuant to sub-section (1) of section 65 of said customs act, the Assistant Commissioner / Deputy Commissioner of Customs /Central Excise has accorded sanction to us, the obligors and on prescribed conditions hereinafter set-out, which conditions we the obligors hereby, accept, in relation to the said imported goods.

NOW THE CONDITIONS OF THE ABOVE WRITTEN BOND ARE THAT:

1. We, THE Obligors shall, observe all the provisions of the Customs Act 1962, Central Excise Act, 1944 and the rules and regulations made there under in respect of the said goods.
2. We, the obligors shall, pay on or before a date specified in a notice of demand all duties, and Charges claimable on account of the said Goods under the Customs Act, 1962, Central Excise Act, 1944 and rules/regulations made there under together with interest on the same from the date so specified at the rate applicable.
3. We the obligors, shall comply all the provisions contained in Board Circular No: 027/2016 dated 10th June 2016 and Board notification No: 057/2000 and shall be wholly and solely responsible for ensuring that there shall be no pilferage during transit of the said goods when despatched from the place of import or from the warehouse to the unit or vice versa and we, the obligors shall pay the duty on pilfered goods, if any.

We as a nominated agency undertake that:

- (a) We have not defaulted in following the procedure and conditions specified by DGFT;
- (b) We have not defaulted in payment of duty within the specified period in cases where there was a default in export of jewellery by an exporter to whom the gold/silver/platinum had been supplied;
- (c) We have not been involved in any violations involving fraud or collusion or wilful misstatement or suppression of facts under relevant provisions of the Customs Act, 1962, the Central Excise Act, 1944, the Finance Act, 1994, the Foreign Trade (Development & Regulation) Act, 1992, the Foreign Exchange Management Act, 1999 and the rules made Thereunder during the last three years;

Manoj Kumar Lachhara

Satish Pr.



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4. We, the obligors, shall maintain detailed accounts of imported goods stored in the private bonded warehouse in proper form including of those remaining in stock and those sent outside under our obligation, and shall produce such accounts for inspection of the proper office/Assistant Commissioner of Customs / Central Excise or such other delegated authority as the case may be when directed By him.

5. We, the obligors shall, provide to the officer of Customs/Excise stationed at the place where goods lying for control and supervision of the goods and other operations and such amenities as may be specified by the Assistant Commissioner.

6. We, the Obligor, shall comply with the conditions and limitations stipulated in the said Foreign Trade Policy and HandBook of procedure as amended from time to time or the Assistant Commissioner of Customs/Central Excise permitting the goods imported into India for the purpose aforesaid.

7. If each and every one of the above conditions is duly complied by us as the obligors, the above written bond shall be void and of no effect. Otherwise, the same shall remain in full force and effect and virtue.

It's hereby declared by us, the obligors as follows.

1. The above written bond shall continue to be in force notwithstanding the transfer of the goods to any other person or removal of the said goods from one warehouse to another warehouse.

2. The above written bond is given for the performance of an act in which the public are interested.

3. The Government through the Commissioner of Customs/Central Excise or any other officer of Customs/Central Excise may recover the sums due from the obligors in the manner laid down in sub-section (1) of Section 142 of the Customs Act 1962 or sub-section (1) of Section 11A of the Central Excise Act. 1944.

4. I/We further declare that this bond is given under the orders of the Central Government in the Performance of an act in which the public are interested. In these presents the words importing singular only shall also include the plural and vice versa where the context so require.


IN WITNESS THEREOF these presents have been signed this day 20th day of August 2016 herein before written by the obligor(s).

PLACE: Kolkata

DATE: _____

WITNESS: 1 *[Signature]*

WITNESS: 2 *[Signature]*


 for HDFC Bank Limited
[Signature]
 (Authorised Signatories)

For and on behalf of The President of India
Assistant Commissioner of Customs (Group III)

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18. From the bond executed it is evident that the bond has been executed by the Appellant in terms of Circular No 20/2016-Cus dated 10.06.2016. Relevant extracts of the circular have been reproduced above.

19. Under the bond executed, the appellants have bonded themselves to comply with the conditions of the circular and also bond themselves to pay the duty in respect of pilferage of the imported goods. In the present case as we find that the goods have been diverted by the PH Jewels, rather than being used for production of the goods to be exported, they have been pilfered and the appellants are required to pay duty, in terms of the said condition of bond. Further we also note that as per the bond, it remains in force even after the transfer of the goods.

20. In case of **Bombay Dyeing & Manufacturing Co Ltd.**⁷ Hon'ble Supreme Court held as follows:

31. Similarly, the exposition of this Court in Metal Forgings (supra) and Hindustan National Glass & Industries Ltd. (supra) to urge that specific order was required to be passed before an assessment is treated as a provisional assessment, will be of no avail considering the execution of bonds in Form B-13 by the appellant-assessee at its own volition, which is referable to provisional assessment procedure under Rule 9B of the Rules. Once the appellant submitted itself to that procedure without any demur pending disposal of the writ petitions, it is not open to later on resile therefrom. Permitting the assessee to do so, would inevitably result in giving undue advantage and favour to the assessee, who had invoked the remedy under Article 226 of the Constitution of India and sought interim protection on offering to execute bonds in Form B-13 as is noted in the Prayer clause (a) of the civil miscellaneous petition(s). For the same reason, the circular issued by the Government of India pressed into service will be of no avail to the appellant. Further, the decisions in Kalabharati Advertising (supra) and Jagmittar Sain Bhagat (supra) will also be of no avail to the appellant. For, the appellant had voluntarily executed the bonds and also filed monthly RT-12 returns, on which endorsement had been made indicative of being a provisional assessment.

⁷ [2020 (371) ELT 11 (SC)],

32. *Taking overall view of the matter, we are of the considered opinion that the appellant cannot be allowed to approbate and reprobate - for inviting the High Court of Delhi to pass interim order stipulating that the appellant would execute bonds in Form B-13 referable to Rule 9B of the Rules and continue to file monthly RT-12 returns from time to time, on which endorsements have been made indicating that it is a case of provisional assessment. The appellant cannot now be permitted to urge that it had not submitted to the process of provisional assessment as such for lack of a specific order of the concerned authority in that behalf. The order passed by the High Court of Delhi on 10/12-3-1993, will have to be understood in proper perspective and not to give undue advantage to or bestow favour on the appellant and thereby deprive the legitimate State exchequer."*

In all the appeals before us, the appellants in terms of the bond executed were required to pay the customs duty in respect of the impugned goods/gold or which were pilfered, irrespective of the person causing the pilferage. In case of non-deposit, the action under Section 142(1) for the recovery of the dues could be initiated, and the present proceedings as initiated by the department appear to be in manner provided by the Hon'ble Supreme Court. However, we note that appellant had deposited the Customs Duty when the investigations were initiated.

21. Shri B.L. Narasimhan, learned Counsel for HDFC has taken the argument of violation of the principles of natural justice as they have not been given sufficient opportunity of personal hearing and the Adjudicating Authority has decided the case in their absence. Such an

objection has not been taken by any other party and they have no such grievance. From the impugned order, we find that HDFC on receipt of show cause notice had made written submissions on 15.04.2021 and further submission on 13.12.2022, which shows they were aware of the proceedings which have been initiated against them along with other co-noticees. The Adjudicating Authority had fixed the personal hearings for 16.12.2022, 23.12.2022, and 04.01.2023 and the notice for personal hearing were issued, mentioning the names of the respective noticees/appellants. All the parties had received the memo of hearing and appeared for personal hearing on the schedule dates and submitted their written submissions. The Revenue has pointed that the claim of HDFC that they received only the third memo for personal hearing does not seem to be *bonafide*, however, the said memo granted period of one month before the schedule date thereby providing sufficient opportunity. The submission of the Revenue is that the SCN was issued on 22.01.2021 and granting further time of two months as requested by the appellant vide their letter dated 21.12.2022 could have made the SCN beyond the period of two years granted for concluding the proceedings under Section 28(9) and, therefore, the Adjudicating Authority was right in concluding the proceedings.

22. The submissions of Shri B.L. Narasimhan that as the provisions requiring the execution of Bond were omitted during the relevant period, they were not required to execute the Bond and hence the Bond executed is not valid, is not really acceptable. Assuming that there was no requirement to execute the Bond but the fact is that the appellant had executed the Bond under the provisions of the notification read with the Circular and keeping that in view, the requisite amount of customs

duty was paid by them, may be under protest, would not really make any difference. The fact remains that they were permitted to import gold duty free under the condition of exporting the gold jewellery either by themselves or by their nominated exporters. Just because there was no requirement to execute the Bond during the relevant period does not mean that gold can be imported freely without payment of customs duty. The appellant being the importer and incidence of charge being on the import of gold, the customs duty is leviable. Also, the appellant being one of the largest and reputed bank of the country had consciously executed the Bond and during its subsistence had never challenged its validity. The argument taken at this stage on the validity of the Bond when the same stands cancelled has no force as it is something which falls under the principle of *fait accompli*.

In the case of **Principal Commissioner of Customs, Chennai-VII Vs. Sree Venkateshwara Bullion⁸**, Hon'ble Madras High Court has specifically held that Notification No 57/2000-Cus has to be read along with the Circular No 27/2016, and breach of any condition so prescribed could be proceeded against. Relevant excerpt reproduced below:

"10. *In view of the above, liberty is given to the respondent to deposit the value of the seized gold as on date/as claimed by the appellant and in the event of the respondent making such payment, the appellant shall provisionally release the seized goods to them, upon imposing any other condition(s) as may be deemed fit and necessary, if the seized gold has not been sold out or auctioned. The respondent also undertakes to comply with his export obligation of exporting gold jewellery and it is open to the appellant to take appropriate action in **the event of breach of any***

⁸ 2025 (391) ELT 338 (Mad.)

condition of Notification No. 57/2000-Cus. read with Circular No. 27/2016 including export obligation.”

23. Moreover, import of precious metals is governed and controlled by various provisions of law under the Foreign Trade Development & Regulation Act, Customs Act, the Notifications and the Circulars issued in accordance therewith, FTP and HBP which provides for ensuring the government revenue. The Bond has been issued as per the condition prescribed by the EXIM Policy and Hand Book of Procedures and in terms of the Conditions of License issued by the RBI. Para 6 of the authorization issued by the RBI clearly directs the bank to approach Custom CBEC, for getting details guidelines for the operation of the scheme. In terms of the above, CBEC has issued detailed guidelines for the nominated agencies including the Authorized banks to follow and have prescribed the Bond to be executed. If the duty free gold is found to be diverted in the local market, instead of manufacture and export of gold jewellery, it amounts to non-fulfillment of the conditions stipulated under the Customs Notification, Customs Circular and FTP/HBP, therefore, the appellant being the nominated agency for importing the gold is bound to pay duty on demand, which has been done. An important factor relevant in the present controversy is that when supplying the gold, HDFC held on to the funds of PHJ equivalent to the duty foregone as margin/security.

24. We may consider the submissions of the learned Counsel representing SBI, DIL and MMTC, who have very fairly stated in the written submissions, as well as at the time of hearing that the nominated agencies are required to pay duty only if the export is not done in 90 days as per the Notification No.57/2000, Customs Circular No.27/2016 and HBP para 4.83. The relevant paras from the written

submissions of DIL, which have also been taken by SBI are quoted below:-

"Thus, legal provisions mandate the exporter to submit proof of export within 90 days or the nominated agency would pay duty with interest for which proof of export is not submitted.

For the nominated agency, the reason for non-export is irrelevant. Either the proof of export is submitted, or the nominated agency pays duty, regardless of the reason for non-export, (whether it is difficult market as claimed by the Exporter or initiation of DRI investigation as cited by the SCN). In the instant case, the fact remains that the Exporter did not submit the proof of export and the Appellant made the duty payment suo moto & in normal course.

b. The Appellant has not availed duty exemption for 277 kgs

The Appellant has not availed duty exemption for 277 kg. It has imported duty-free gold under Notification 57/2000 under bond. It was required to submit proof of export to avail duty exemption OR pay duty with interest for the shortfall in export quantity. In case of 277 kgs, the Appellant did not avail duty exemption as proof of export was not submitted. Hence, the question of issue of SCN for wrongful availment of duty exemption does not arise.

c. Customs has cancelled the bond based on duty payment

The Appellant has made the duty payment through TR-6 challan for 277 kgs (i.e. for the quantity not exported). Customs has accounted for the said duty payment against the import quantity to cancel the bond. Thus, the duty liability for 277 kgs has been fully discharged in the books of customs and the said quantity has become a duty-paid import.

d. Duty liability is not in question. In fact, it has been duly discharged suo moto.

For the Appellant, its duty liability for 277 kgs is not in question. In fact, it has acknowledged the liability and discharged it suo motto. What is in question is the issue of SCN to claim duty for 277 kgs, (i.e to "show cause why duty will not be demanded") from the Appellant when duty is already paid for non-submission of proof of export under Circular 27/2016."

25. During the course of arguments, the learned Senior Counsel representing MMTC also categorically made a statement that the duty

paid by them shall not be recovered. The basic reason is that the amount of the customs duty involved has already been deposited by the exporters with the appellant at the time of purchase of gold. Thus all the parties had paid the customs duty much before the issuance of the show notice as they were aware that being the importer, and also in view of the legal provisions allowing such duty free import and the agreement entered with the exporter, they are liable to pay the customs duty in the event of default of the conditions of the notification. Consequently, the Bonds have been cancelled in all the cases. In fact, the matter should have ended here and there was no need for SCN as the Department had already received the entire customs duty along with interest. This is a case where no prejudice has been caused to anybody, not even the appellants as they were already in receipt of the duty amount which they now paid to the Government exchequer.

26. Before concluding the issue, we need to take note of the decision of the Tribunal in the case of **M/s. MMTC Vs. CC, ICD, TKD, Delhi**⁹, which was affirmed by the **High Court**¹⁰ but set aside by the **Apex Court**¹¹ on technical issue as the High Court did not proceed in accordance with Section 130A of the Act and accordingly, the matter was remanded to High Court, which is still pending. The Tribunal had rejected identical argument taken by MMTC that they are not liable to pay duty, holding as under:-

"7. A plain reading of the above Notification makes it clear that the benefit of exemption from payment of duty is not available to gold imported by M/s. MMTC Ltd. if conditions of the proviso to para 2 of the Notification are not complied with. It is nobody's case that gem and jewellery units fulfilled the requirement of manufacture and export of

⁹ 2001 (128) ELT 412 (Tri.-Delhi)

¹⁰ 2001 (133) ELT 310 (Del.)

¹¹ 2008 (224) ELT 516 (SC)

gold and jewellery articles from the export processing zones. Therefore, duty liability definitely arises. The only argument that is canvassed before us is that the liability cannot be fastened upon M/s. MMTC as it is not the importer but only the supplier of imported gold to Gem and Jewellery units. We see no merit in this argument. In all the cases before us, it is M/s. MMTC that filed the bill of entry for import of gold. Therefore, M/s. MMTC cannot escape the responsibility cast upon the importers and the fact that the gold was not meant for use by M/s. MMTC itself but was supplied to various units, cannot and does not alter the legal position that M/s. MMTC is the importer of the gold in question. The Scheme under which M/s. MMTC was operating yokes M/s. MMTC with the Gem and Jewellery units and fulfillment of condition of manufacture and export of jewellery/articles by the said units is necessary in order that M/s. MMTC may avail of the benefit of duty free import of gold. Under the Scheme, dual role has been assigned to M/s. MMTC namely that of importer-cum-supplier. Further, as per the provisions of Rep. Circular No. 22/98, M/s. MMTC has responsibility/continuing obligation to monitor the activities of the exporting units and to ensure export of gold/jewellery within a stipulated period of time following which M/s. MMTC has to inform the Customs authorities and to levy penalty on the unit for extension of period on expiry. M/s. MMTC was charging commission of approximately 0.88% for their services. We also notice that M/s. MMTC supplied gold on loan basis only on the strength of 'issue applications' filed by the respective units and such applications are not the documents prescribed under the Scheme for the purpose of release of fixed quantities of gold to the units. It is also significant to note that the bill of entry cited in the applications is that of M/s. MMTC and the issue applications do not refer to any other bill of entry. The Scheme provides for issue of gold by M/s. MMTC to the units only on the strength of bill of entry filed by the unit and duly assessed. M/s. MMTC had also executed bond with NEPZ Customs under the Warehousing Provisions of the Customs Act and had undertaken to satisfy the customs authorities that the gold imported by them will be utilised for export as per scheme of export of gold jewellery by units in the EPZ and they were also under an obligation to pay the Customs duty and penalty chargeable on such goods, together with interest."

The aforesaid decision is squarely applicable and is binding on us. We, accordingly hold that the appellants are liable to pay customs duty which has been rightly appropriated in view of the deposit made by the appellants.

27. We may now consider whether any penalty can be imposed on the appellants. By the impugned order, all the appellants have been levied penalty under Section 112(a), which has been challenged by them. Needless to say, the case was initiated for wrongful divergence of the duty free gold in the domestic area, however, the allegations of fraudulent diversion on the basis of the fabricated documents stands proved only as against PHJ and none of the appellants have been held to be in connivance with them. The Adjudicating Authority has specifically noted that there is no evidence that the importers colluded with PHJ or submitted any willful mis-statement or any facts. All that has been held against the appellants is that they have failed to act with due diligence in accepting the incomplete shipping bills and did not verify the documents with the custom authorities. Had they acted more diligently, the fraudulent activity could have been detected. We cannot also ignore the fact that admittedly the Customs officials had processed and the shipping bills and the export invoices and in that view, the appellants had no reason to suspect any malafide or to further verify. The appellants cannot be penalized for illegal acts of the exporter. Considering the fact that the appellants are not responsible in any manner for the fraudulent diversion of the duty free gold and as the goods are not liable to confiscation, we hold that no penalty can be imposed under Section 112(a) of the Act on the appellants. In the facts of the present case, the order of confiscation and consequent redemption fine is not sustainable.

28. The submission of the appellants as to invocation of extended period is that there is a categorical finding by the adjudicating authority that the nominated agencies are not responsible for any fraud and

therefore, the limitation shall be confined to the normal period. In the facts of the present case, it cannot be denied that the case was initiated as one of fraudulent diversion of duty free gold to the domestic market and it is only after detailed investigation that the role of the importers and the exporters was ascertained. Further, in the light of the legal provisions, the duty and responsibility of the nominated agencies in importing the gold by availing the duty exemption and without fulfilling the condition of export was evaluated. No doubt, actual export of the gold jewellery made from the duty free gold was to be effected by the exporter, however, the nominated agencies being the importer of duty free gold were responsible for ensuring the compliance of the same. On such determination, the liability of the nominated agencies towards payment of customs duty in respect of the duty free gold was imputed. Since the transaction on the part of the importer and exporter was in respect of the same gold/bullion being fraudulently diverted, common show cause notice was issued. On the contrary, the submissions of the Revenue is that the provisions of section 28(4) have been rightly invoked since the case as such was a case of fraud and, therefore, reliance was placed on the decision of the Supreme Court in **Munjal Showa Limited versus Commissioner of CUS & CEX Delhi-IV**¹², where DEPB licenses/Scrups purchased by the appellant of which the exemption benefit was availed, was found to be forged and fake as they were fraudulently procured by the predecessor. The contention raised before the Apex Court was that the department was not justified in invoking the extended period of limitation. The Apex Court observed that on the principle that fraud vitiates everything and such forged or fake DEPB licenses/scrups are void *ab initio* it cannot be said that the

¹² **2022 (382) ELT 145 (SC)**

department acted illegally in invoking the extended period of limitation. The department was absolutely justified in invoking the extended period of limitation. **The Court also noted that, "the moment, the appellant was/were informed about the fake DEPB licenses, immediately they paid the customs duty under protest to avoid any coercive action"**. The conclusion arrived at by the Apex Court was that, "be that as it may, the fact remains that the DEPB licenses/Scripts on which the exemption was availed by the appellant(s) was/were found to be forged one, and therefore, there shall be a duty liability and the same has been rightly confirmed.

28.1 Similarly, reliance has been placed by the Revenue on the decision of **Commissioner of Customs (Preventive) versus Aafloat Textiles (I) P. Ltd.**¹³ where the Apex Court dealt with the import of gold and silver by the appellant therein on the basis of fake import license purchased by them. The Court held that import licenses were not genuine documents but were forged and since fraud was involved, in the eye of law, such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was involved, and that was sufficient to extend the period of limitation. The submission of the Revenue that the principle laid down by the Apex Court in both the cases is squarely applicable to the facts of the present case as it involves fraud maybe at the behest of the exporters, but it related to the duty free gold imported by the appellants. However, we are of the opinion that since we have confirmed the findings of the Adjudicating Authority that there is no collusion on the part of the appellants in the fraud committed by the exporters and on that ground

¹³ 2009 (235) ELT 587 (SC)

we have set aside the penalty, we hold that the extended period of limitation is not required to be invoked.

29. The observations made by this Tribunal in **M/s. Tiger Logistics (India) Ltd. Vs. CST-II, Delhi**¹⁴ are relevant in the present context although the same has been passed with reference to liability of service tax and refund thereof. The relevant para reads as:-

“Secondly, if service tax is payable, the charge of tax continues to exist. The limitation of time – either normal period or extended period- apply only to the remedy available to the Revenue by issuing a demand. Efflux of time does not extinguish the underlying liability. It is like a time-barred debt. After the time limit, the charge of debt remains and only the remedy to the lender gets extinguished. If the debt is time barred and thereafter it is repaid, the borrower cannot claim refund of what has been paid on the ground that the lender could not have sued him for recovery of the debt.”

30. The learned Counsels for the appellants referred to the Order-in-Original dated February 13, 2023, passed by the Commissioner, New Delhi against the exporter, PHJ where some of the appellants herein are also parties and the demand has been dropped against the nominated agencies, and instead, the Customs duty was claimed from the exporter. Similarly, Order-in-Original dated July 21, 2023 and July 30, 2023 have been passed by Principal Commissioner, Chennai, where again the demand of customs duty against the nominated agencies have been dropped. We have considered these orders, however, since they are not binding on us, we have taken a view based on the legal provisions as enumerated above in detail and also in view of the agreement entered with PHJ where the appellants have specifically agreed that they shall be liable to pay the customs duty and other levies in the event the purchaser fails to export the jewellery made from the duty free gold.

¹⁴ Final Order No.50095/2022 dated 04.02.2022 (ST Appeal No.51370 of 2016)

31. We are re-emphasising that all the appellants have almost deposited the entire customs duty prior to the issuance of the show cause notice and as a result, the Bonds were cancelled as the said amount towards the discharge of duty liability stands appropriated. Consequently, nothing further survives in the matter.

32. We, therefore, conclude as under:

a) All the four Appellants, namely HDFC, MMTC, DIL and SBI imported gold as per para 4.34 of FTP, as nominated agency and supplied it to exporters by securing the duty amount in advance and are, therefore, liable to pay the customs duty on the duty free gold imported by them.

b) The respective amounts deposited by the appellants out of the security deposited by PHJ towards customs duty has to be appropriated against their liability to pay customs duty.

c) The order of confiscation of duty free gold under Section 111(o) of the Act is hereby set aside, resultantly the redemption fine, no longer survives.

d) The penalty imposed on the appellants under Section 112(a) of the Act is set aside.

33. The impugned order is, therefore, modified to the extent indicated above. The appeals, are accordingly, partly allowed. The Miscellaneous applications also stand disposed of.

[Order pronounced on 9th October, 2025]

(BINU TAMTA)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)