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## 2009 (233) E.L.T. 260 (Tri. - Bang.)

IN THE CESTAT, SOUTH ZONAL BENCH, BANGALORE  
 Dr. S.L. Peeran, Member (J) and Shri T.K. Jayaraman, Member (T)

**BANK OF NOVA SCOTIA**

*Versus*

**COMMISSIONER OF C. EX. (ADJ.), BANGALORE**

*Final Order Nos. 748 and 749/2008, dated 3-7-2008 in Appeal Nos. C/685 & 570/2007*

**EXIM - Gold imported duty free by nominated agency - Duty liability - After warehousing gold, given to jewellers for conversion to jewellery and export thereof within stipulated time - Impugned Notification No. 80/97-Cus. not imposing any condition on nominated agency to ensure realization of exports proceeds - Plea to read such a condition on ground of harmonious construction with EXIM policy, rejected - As there was no dispute about export of jewellery using imported gold, nominated agency held not liable to pay duty - Jewellers who exported the jewellery, also found not liable to pay duty as they had fulfilled the export obligation - Customs authorities found to lack jurisdiction to take action on non-realization of sale proceeds of export obligation as it was governed by FEMA and suitable action lay with enforcement authorities and Reserve Bank of India - It was more so as no case was made out for improper removal of goods from warehouse under Section 72 of Customs Act, 1962. [paras 15, 16, 17, 18, 19]**

**Appeals allowed**

### CASES CITED

Chinku Exports v. Commissioner — [1999 \(112\) E.L.T. 400](#) (Tribunal) — *Referred*..... [Para 7]  
 Collector v. Sun Industries — [1988 \(35\) E.L.T. 241](#) (S.C.) — *Referred*..... [Para 14]  
 Commissioner v. Chinku Exports — [2005 \(184\) E.L.T. A36](#) (S.C.) — *Referred* ..... [Para 7]  
 Hillari Computer Exports Pvt. Ltd. v. Commissioner — [2006 \(199\) E.L.T. 636](#) (Tribunal) — *Referred* [Para 7]  
 Indian Aluminium Company Ltd. v. Thane Municipal Corporation — [1991 \(55\) E.L.T. 454](#) (S.C.) — *Referred* [Para 11.1]  
 Interface Connectronics Pvt. Ltd. v. Commissioner — [2004 \(164\) E.L.T. 95](#) (Tribunal)— *Referred* [Para 7]

### DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular No. 24/98-Cus., dated 20-4-1998..... [Paras 6, 7, 11.1, 12, 15, 17]

REPRESENTED BY : S/Shri B.V. Kumar and Laxminarayan, Advocates, for the Appellant.  
 Shri P.R.V. Ramanan, Counsel and Ms. Sudha Koka, SDR, for the Respondent.

**[Order per : T.K. Jayaraman, Member (T)].** - These appeals have been filed against the Order-in-Original No. 01/2007, dated 13-8-2007 passed by the Commissioner of Central Excise (Adjudication) Bangalore.

2. Shri B.V. Kumar, the learned Advocate appeared for the first appellant M/s. Bank of Nova Scotia and Shri Laxminarayan, the learned Advocate, appeared for the second appellant M/s. Rajesh Export Ltd. Shri P.R.V. Ramanan special Counsel for Revenue was assisted by Ms. Sudha Koka, the learned SDR.

3. We heard both sides.

4. The first appellant imported gold without payment of duty under the "Scheme for export against supply by Nominated Agencies". The first appellant is the nominated agency under the scheme. The nomination is done by DGFT. In terms of the scheme, the nominated agency imports gold free of duty. The said gold is given on loan/payment basis to various exporters. The idea is that the gold imported free of duty should be converted into value added products and exported. In case, the gold imported is not exported after value addition, a duty liability is cast on the nominated agency.

5. The whole scheme is governed by EXIM Policy (2002-2007), Handbook of Procedures, Foreign Exchange Management Act, 1999, Customs Act 1962 and the circulars issued in respect of imports and exports by the gem and jewellery sectors.

6. The first appellant in the instant case, imported gold bars weighing 1500 kilo grams duty free under Customs Notification 80/1997, dated 21-10-1997 and warehoused the same on the strength of a general bond executed under Section 59(2) of the Customs Act, 1962. Out of the said quantity of 1500 Kgs, 925 Kgs of gold were delivered on loan basis to the second appellant M/s. Rajesh Exports Ltd. (REL). The second appellant converted the gold to value added

products and exported the same. However the foreign exchange representing the sale proceeds has not been realized by the exporter. Hence, Revenue proceeded against the first appellant who is the nominated agency and also the second appellant who is the exporter alleging violations of (1) EXIM Policy (2) Hand Book of Procedures of EXIM Policy (3) Reserve Bank of India's Circular (4) Notification No. 57/2000-Cus., dated 8-5-2000 (5) Public Notice issued by Commissioner of Customs, Bangalore, (6) Foreign Exchange Management Act, 1999 etc. The Commissioner in the impugned order held that the 925 kgs of imported duty free gold valued at Rs. 55.60 crores are liable to confiscation under Sections 111(j) and 111(o) of the Customs Act, 1962. He imposed a redemption fine of Rs. 30 crores on the first appellant under Section 125 of the Customs Act, 1962. The benefit of exemption under the Customs Notification was denied in respect of 925 Kgs of gold. Duty was demanded on the first appellant under Section 28(1) read with Section 125 of the Customs Act, 1962. Interest was demanded under Section 28 AB of the Customs Act, 1962 read with relevant paras of Handbook of Procedures, Section 72 of the Customs Act and Board's Circular 24/98-Cus., dated 20-4-1998. A penalty of Rs. 10 crores was imposed on the first appellant under Section 112(a) of the Customs Act. Further, a penalty of Rs. 25 crores was imposed on the second appellant under Section 112(a) of the Customs Act.

7. The learned Advocate Shri B.V. Kumar urged the following points :

- (i) The impugned order has been issued without jurisdiction. A violation of the provisions of the EXIM Policy can be adjudicated by the designated authorities as notified under Section 13 of Foreign Trade (Development and Regulation) Act, 1992. Under FEMA, 1999, the Foreign Exchange Management (Adjudication Proceedings and Appeal Rules 2000) have been notified prescribing the authorities who are competent to adjudicate the cases. The Customs Authorities have not been notified. The following case-laws have been relied on :
  - (a) *Chinku Exports v. Commissioner of Customs* - [1999 \(112\) E.L.T. 400](#) (T) - affirmed by the Supreme Court as reported in [2005 \(184\) E.L.T. A36](#)
  - (b) *Hillari Computer Exports Pvt. Ltd. v. Commissioner of Customs* - [2006 \(199\) E.L.T. 636](#) (T)
- (ii) In terms of CBEC Circular dated 20-4-1998, duty liability on the appellant viz. a nominated agency arises in the event of the exporter not fulfilling his export obligation within the prescribed period. It is not the Revenue's case that the exports have not been made. In fact, exports have been made and the general bond executed by the first appellant was cancelled by Customs Authorities after the appellants produced copies of the shipping bills evidencing proof of export of gold medallions by the Exporter, viz. M/s. REL, vide Para 14.2 of the Show Cause Notice.
- (iii) In terms of Notification 57/2000-Cus., dated 8-5-2000, the importer executes a bond with the Assistant Commissioner of Customs undertaking to export either by itself or through other exporters gold jewellery or articles having gold content equivalent to the imported gold within a period of 120 days from the date of issue of gold to the Exporters. In the instant case, admittedly, the articles of gold viz. gold medallions manufactured out of 925 kgs. of gold issued by the appellants have been exported by M/s. REL of Star Jewellers and proof of export have been submitted. In such circumstances, there is no violation of the above mentioned Notification. Hence, demand of duty in terms of the bond executed by the first appellant does not arise.
- (iv) As far as the 'Bank Certificate of Export and Realization' is concerned, the same is required to be obtained by the second appellant from their Bankers and Authorized Dealers viz. ICICI Bank, Bangalore, Canara Bank, Bangalore, who are required to monitor the realization of export proceeds.
- (v) In terms of Para 4.77 of the Hand Book of Procedures, Vol-I to EXIM Policy 2002-2007, the exporters may obtain the required quantity of precious metal on loan basis subject to furnishing of Bank guarantee to the Nominated agencies for an amount as may be prescribed by the Nominated Agencies. On failure to fulfil the export obligation within the period prescribed, the Nominated Agencies shall enforce the Bank Guarantee. In the instant case, M/s. REL (second appellant) procured the gold from the first appellant on 'loan basis'. They provided an irrevocable 'stand by' Letter of credit dated 25-3-2004 issued by HDFC Bank for Rs. 15 crores and Canara Bank for Rs. 20 crores in favour of the first appellant. In addition, the second appellant furnished a Term Deposit of Rs. 21.71 crores for a period of 181 days. Thus, the first appellant had fulfilled the conditions of Para 4.77. Hence, they had not violated the above provisions.
- (vi) Section 7 and 8 of FEMA, 1999 govern the export of goods and services and their realization and repatriation of foreign exchange. It is the responsibility of the exporter to furnish a declaration containing the true and correct material particulars including the full export value of the goods exported. The exporter is responsible for realizing the foreign exchange. The above provisions are applicable only to the exporter and not to the first appellant.
- (vii) The first appellant had not violated Section 71 of the Customs Act inasmuch as the impugned gold has not been taken out of the warehouse contrary to the provisions of the Act. The impugned gold was issued to the exporter viz. M/s. REL for being converted into articles of gold for export in accordance with Paras 4.77 and 4.77A of EXIM Policy and the RBI's letter dated 31-12-1998.
- (viii) No duty can be demanded under Section 72 inasmuch as none of the circumstances mentioned in clause (a) to (d) of sub-clause (1) of the said Section 72 have occurred in the instant case. Reliance was placed on Tribunal's decision in the case of *Interface Connectronics Pvt. Ltd. v. Commissioner of Customs, Bangalore* - [2004 \(164\) E.L.T. 95](#) (Tribunal).

8. Shri Laxminarayana, learned Advocate, for the second appellant urged the following points :

The appellant (2) had procured gold from appellant (1) and paid for the same in Bangalore and utilized the same to manufacture and export jewellery. They were not concerned with the import of the material at any stage and had obtained the material locally in India on payment in Indian Rupees. The material was exported and the shipping bills were duly examined and let-export was ordered. They produced export documents to the Bank of Nova Scotia and in turn, the bank produced the proof to the customs Authorities. The Customs Authorities accepted the same and cancelled the bonds executed by Bank of Nova Scotia. As the appellants were not

concerned with the import at any stage, the levy of penalty under Section 112 is not sustainable. As the bond has been cancelled, further proceedings are not maintainable in view of various decisions of the Tribunal.

9. Shri P.R.V Ramanan, special Counsel urged that the term 'Export Obligation' is to be construed in the light of paragraphs 4.62, 4.77 and 4.79 of Hand Book of Procedures. He referred to the Para 4.62 wherein it is stipulated that the exporter has to furnish proof of exports wherever required for export of gold/silver/platinum jewellery or articles by furnishing not only the documents like EP copy of the shipping bill, Customs attested invoice, bank certificate of export in the form given in Appendix 22 showing that documents have been sent for negotiation/collection but also a declaration to the effect that no export proceeds are outstanding beyond one year. It is the contention of the learned Special Counsel that the nominated agency ought to have ensured that this declaration had been submitted by the exporter in fulfillment of export obligation. To this extent, there is a failure on the part of the first appellant and therefore it cannot be said that the conditions of exemption notification had been satisfied. In other words, he took pains by referring to the notification and the connected circular/instructions etc. to impress upon the Bench that non-realization of the export proceeds amounts to non-fulfillment of the conditions of the exemption notification. It is the first appellant who imported the gold free of duty in terms of the notification. Since, the conditions of notifications have not been fulfilled, the liability to pay Customs Duty squarely rests from the first appellant. A harmonious reading of the various provisions would show that export does not just end with physically moving the goods out of the country. The basic purpose of realization of due foreign exchange ought to have been complied with in order that the transaction can be regarded as exports, particularly when export incentive in the form of duty free input has been availed by REL.

10. Even though the export has been completed, the second appellant has not complied with Para 4.62 of the Hand Book of Procedures. The appellants had effected the exports on DP/DA basis and not against irrevocable letter of credit. Therefore, the second appellant had abetted in the commission of offence inasmuch as they had misled the Customs Department and the Bank of Nova Scotia with regard to compliance of Para 4.62.

11. There was a compelling duty cast on appellant (2) to discharge the Customs duty in the event of non-realization of the export proceeds, which has not been adhered to. Hence, the contention of the appellant that the respondent did not have jurisdiction to adjudicate or levy penalty is erroneous.

11.1 Non-execution of bond as per Board's Circular dated 20-4-1998 and not keeping a watch over realization of foreign exchange by REL constituted non-performance of a critical procedural requirement on the part of BNS. The Hon'ble Supreme Court in the case of *Indian Aluminum Co. Ltd. v. Thane Municipal Corporation - 1991 (55) E.L.T. 454* (S.C.) has held that "non-observation of even a procedural condition not to be condoned if likely to facilitate commission of fraud and introduce administrative inconveniences."

12. The Special Counsel invited our attention to Board's Circular No. 24/1998-Cus., dated 20-4-1998 Para XIII wherein it is stipulated that "wherever such proof of export is not produced within the period prescribed in the EXIM Policy, the nominated agencies shall (without waiting for its recovery from the exporters) deposit the amount of duty calculated at the effective rate leviable within seven days."

13. When the learned Counsels for the appellants referred to the provision of write-off of unrealized export bill to the extent of 5% of the average annual realization during preceding three years or 10% of export proceeds during the financial year whichever is higher, the special Counsel pointed out that the write-off facility is not available when the export transactions are under investigation. He said that in the present case, the appellants were under DRI investigation and therefore the write-off facility would not be available.

14. Shri B.V. Kumar, learned Advocate invited our attention to the decision of the Hon'ble Apex Court in the case of *Commissioner of Customs, Calcutta v. Sun Industries - 1988 (35) E.L.T. 241* (S.C.) wherein the word 'export' has been interpreted. In terms of the above decision, "export" means goods must be taken out to a place outside India. The expression 'taking out to a place outside India' would also mean a place in High Seas if it is beyond the territorial waters of India. In the light of the above interpretation, the impugned goods had indeed been exported and it cannot be said that the export obligations had not been fulfilled. Hence, he stated that the demand of duty and confiscation and redemption fine are not warranted. He also stated that there is no justification for imposition of penalty.

15. We have gone through the records of the case carefully. The Government of India brought out various schemes for the promotion of gold, silver and platinum jewellery. In terms of the scheme, the nominated agency can import gold duty free in terms of the relevant Customs Notification. The imported gold can be given on loan basis or sale to various jewellers on condition that they would export the jewellery or the value added product within a period of 120 days of the release of the gold by the nominated agency. Elaborate procedures have been devised by the department's concerned. As far as the present appeals are concerned, the following provisions are relevant.

- (a) Notification No. 57/2000-Cus., dated 8-5-2000
- (b) CBEC Circular No. 24/1998-Cus., dated 20-4-1998
- (c) Reserve Bank of India's letter DBOD No. IBS 1519/23.67.001/98-99 dated 31-12-1998 read with Circular A.D. (G.P Series) No. 7 dated 6-3-1998
- (d) Para 4.62, 4.77, 4.77.3 and 4.79 of the Hand Book of Procedures to the EXIM Policy 2002-2007
- (e) Section 8 of Foreign Exchange Management Act, 1999 and
- (f) Regulation 8, 9 & 13 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000

16. The nominated agency can import gold duty free subject to the conditions of notification 57/2000. The said condition is given in Proviso to the notification and we are reproducing the said notification.

"Provided that in the case of import of gold/silver/platinum as replenishment under the scheme for 'Export through Exhibitions/ Export Promotion Tours/Export of Branded Jewellery', the importer undertakes to fulfill the conditions of Export and Import Policy and relevant provisions of the Handbook of Procedures, Volume-1 and produces such documents as stipulated in the Export and Import Policy and the Handbook of Procedures, Volume-1 and produces such proof of exports made through exhibitions/export promotion tours etc., as may be required by the Assistant Commissioner of Customs or the Deputy Commissioner of Customs to satisfy himself with regard to eligibility of the importer for the duty free import of replenishment material."

17. A close reading of the above proviso shows that the nominated agency who is the importer, executes a bond undertaking to export the jewellery containing gold equal to the imported gold. In case, the jewellery is not exported within the stipulated period, the importer is under an obligation to pay the Customs duties foregone on the imported gold. This notification does not impose any condition on the importer to ensure realization of the foreign exchange for the jewellery exported. The fact that the gold imported free of duty was given to the second appellant is also not disputed by the Revenue. The second appellant Rajesh Exporters Ltd. had also exported the goods. There is ample evidence to show that the jewellery containing gold equal to the quantity imported had indeed been exported. This fact is also not under dispute. The learned Special Counsel was at pains to convince us that the non-realization of sale proceeds of the exported goods amounts to violation of the conditions of the notification, because the notification has to be read harmoniously along with export/import policy and also the relevant provisions of Hand Book of Procedures. We do not agree with the contentions of the learned special Counsel. On a plain reading of the notification, we do not think that non-realization of sale proceeds amounts to violation of the conditions of notification by the first appellant. There is no allegation that the first appellant colluded with the second appellant and as a result of such collusion the sale proceeds were not realized. In other words, when the notification has not stipulated any condition to the effect that the nominated agency should ensure the realization of sale proceeds of the exported goods. We cannot read such a meaning into the said notification. Consequently, we do not hold that the first appellant has violated the conditions of the notification. Therefore, in our view the first appellant is not liable to pay the Customs duty demanded in the impugned order. Further, we reproduce Para (xiii) of Circular No. 24/1998-Cus., dated 20-4-1998 :

“Wherever such proof of export is not produced within the period prescribed in the EXIM Policy the Nominated Agencies, shall (without waiting for its recovery from the exporter) deposit the amount of duty calculated at the effective rate leviable on the quantity gold/silver not exported within 7 days of expiry of the period within which the jewellery manufactured out of the said gold/silver was supposed to be exported. The duty so paid by the Nominated Agency shall be reflected in the monthly statement prescribed in Para (x) above. The Nominated Agencies will settle their claim with the exporter at their own level;”

18. A close reading of the above provision shows that nowhere it is stated that non-realization of sale proceeds will result in demand of Customs duty foregone from the nominated agency.

19. It should be borne in mind that even though the first appellant is the importer, the exporter is different. In this case, the exporter is the second appellant. All goods exported from India result in realization of foreign exchange as sale proceeds. Matters relating to foreign exchange are governed by Foreign Exchange Management Act (FEMA). The Customs Authorities are not enforcing the provisions relating to non-realization of foreign exchange. If at all there is violation of FEMA and the related regulations, the liability would be on the exporter, suitable action lies with the enforcement authorities and Reserve Bank of India. With regard to the violations of exim policy, adjudication can be done only by authorities notified under Section 13 of Foreign Trade (Development & Regulation Act) 1992. The first appellant imported the goods and warehoused the same. Duty can be demanded from the first appellant only in respect of the situations enumerated in Section 72 of the Customs Act. Revenue has not shown that there exist any of the situations contemplated in Section 72 of the Customs Act. Hence, no duty can be demanded from the first appellant under Section 72 of the Customs Act. As far as the second appellant is concerned, they are not the importers of gold. They purchased on loan basis gold from the first appellant. They had also fulfilled the export obligations. In other words, the goods have been physically exported in the light of the Apex Court's decision cited by the learned Advocate, export has taken place. The non-realization of foreign exchange will be governed by FEMA and also the circulars issued by Reserve Bank of India. There is no legal sanction for imposition of any penalty on them under Section 112 (a) of the Customs Act, 1962. In view of the above findings, we do not hold that the impugned goods are liable for confiscation under the Customs Act. The first appellant is not liable to discharge duty liability for the impugned gold. Both appellants are not liable for penalty under Section 112 (a) of the Customs Act, 1962. Hence, we allow the appeals of both the appellants with consequential relief.

(Pronounced in open Court on 3-7-2008)

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## Judicial Analysis

for

**Bank of Nova Scotia vs. Commissioner of C. Ex. (Adj.), Bangalore  
2009 (233) ELT 260 (Tri.-Bang)**

**This case was:**

- ☐ [Referred in 2018 \(364\) ELT 600 \(Tribunal Delhi\)](#)

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