

Gold or Platinum Alloy – An Alloy of Flawed Policy and Faulty Drafting



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There's a common saying, "All that Glitters is not gold". The same goes true with the gold importers these days. The Customs Department have recently started obstructing all the imports of alloy containing gold and platinum across the country and have created a ruckus in the industry since these are sensitive items whose rates fluctuate on a daily basis. This is being done for a reason that importers import an alloy containing gold and platinum declaring it as platinum wherein the content of gold is 96% and platinum is 4%. Before, we proceed further to understand our beloved Finance Ministry's and DGFT's current legal position on this which leads to the complete mess (as always), it is important to understand the correct classification as per law, whether it stands to classify as an alloy of gold or an alloy of platinum.

Chapter Note 5 and Note 6 of Chapter 71 of the Customs Tariff Act which is aligned with the Harmonised System of Nomenclature (HSN) enumerates about the constitution of precious metal content in a product and classifies it accordingly, the said chapter note is produced below:

"5. For the purposes of this Chapter, any alloy (including a sintered mixture and an inter-metallic compound) containing precious metal is to be treated as an alloy of precious metal if any one precious metal constitutes as much as 2% by weight, of the alloy. Alloys of precious metal are to be classified according to the following rules:

- (a) an alloy containing 2% or more, by weight, of platinum is to be treated as an alloy of platinum;*
- (b) an alloy containing 2% or more, by weight, of gold but not platinum, or less than 2% by weight, of platinum, is to be treated as an alloy of gold;*

6. Except where the context otherwise requires, any reference in this Schedule to precious metal or to any particular precious metal includes a reference to alloys treated as alloys of precious metal or of the particular metal in accordance with the rules in Note 5 above, but not to metal clad with precious metal or to base metal or non-metals plated with precious metal"

As per rule(a) above, **an alloy of two precious metals containing 2% or more of platinum is to be treated as an alloy of platinum.**

Further rule (b) **provides an alloy of gold and platinum containing 2% or more of gold but where platinum is less than 2% to be treated as an alloy of gold.**

On harmonious reading of rule(a) and (b), **an alloy containing 2% or more of platinum will qualify as an alloy of platinum and an alloy containing 2% or more of gold, but not containing 2% or**

more of platinum shall be treated as an alloy of gold.

In support of this, there are World Customs Organisation (WCO) Explanatory Notes along with various WCO cross rulings as well as domestic decisions even by the Supreme Court which are unambiguously clear regarding the classification of an alloy of gold and platinum where the content of platinum is more than 2% and gold is less than 98% to be classified as platinum. There is absolutely no doubt on that. I am not reproducing those for the sake of brevity since we need to discuss the issue in detail and find out who's fault is there and the possible harsh outcomes. This is the classification law set by the WCO to which India is a member and must mandatorily follow this classification which have been accordingly incorporated in our domestic law as well. The importer has no role to play in it, in fact India itself has no role to play since it is prescribed by WCO.

Now, there are two departments involved i.e. the Customs department (Finance Ministry) and Director General of Foreign Trade (Ministry of Commerce), where the issues arise and the mischief lies. Let's come to the law now as is in effect. The DGFT has prescribed the import of gold as "restricted" which requires license for import of gold whereas the import of platinum is free. The Finance Ministry has prescribed the effective rate of customs duty on import of gold as 15% and gold dore bar as 11.85% whereas the effective rate of customs duty on platinum is 10% on import of platinum. These have been recently done. Therefore, if a person imports gold, he will have to pay customs duty at a higher rate along with the strict condition of procuring the license for import. Whereas, if a person imports platinum, then there is a lower rate of duty along with no requirement of obtaining the license. This is the law set by Finance Ministry and Ministry of Commerce where the importer has no role to play.

To sum up, the importers started importing the alloy of gold and platinum as "platinum" in terms of classification as referred above. Further, our import-export policy is also completely aligned with HSN. Therefore, under the import-export policy also, the same will be classified as "platinum" and will be accordingly treated.

I was already well versed with this legal and factual position, but then to my surprise, I read a headline in a business newspaper today saying "gold cloaked as platinum for duty gains" which caught my attention. On the *prima-facie* view, the news item appeared to have treated the importers as wrong doers as if they have done some misrepresentation and that the law is ambiguous, and importers have taken a wrong interpretation. The news item also says that government is in the process of issuing a fresh notification. In fact, many consignments have been cleared also by the customs authorities in the past.

Whatever be, it would be really important to see whether there is any violation of law actually done by the importers. For me, the answer is plain and simple, "No". This is because the importers had classified the goods according to the prescribed WCO classification which is the correct classification which even the department is accepting. In fact, had they classified such alloys as gold alloy, then it would have been mis-classified and mis-declared. Secondly, whether on import of platinum alloy, the importer has violated any law of customs or DGFT, the answer is no, since when he is importing, he is paying according to the prescribed rate and following the prescribed procedure. Then the question arises, where lies the fault/problem. The problem here is that correct interpretation and correct legal application of law is leading to a "not so accepting" situation by the department since the goods are being imported at a lower rate of duty without any license.

Therefore, the importers might face the following problems despite following the law correctly:

- Non clearance of goods at the port leading to high demurrage charges and problems for the

importers, goods being sensitive to price item

- DRI harassing the importers who have already cleared the goods
- Blockage of funds
- Litigations for future

The news item also mentions that the government is in the process of issuing a notification. I believe, there can be no change in the classification since it is bound by HSN and cannot be changed unilaterally by India itself. Now the ball lies in the Finance Ministry and the Commerce Ministry where they can increase the duty of platinum or impose restrictions on platinum as well so there is no mischief being played by the importers in the guise of following the law.

The importers whose goods are stuck at customs port should approach the High Court for such release since the department will not release the goods as it is not a mere case of underpayment of duty but also involves importing a "restricted" item as per department for which there is no license in place. Hope the issues get settled by the Courts.

This is one of the classic examples where the importer would be penalised for following the correct law since that is not correct according to the government and the government had never intended the same. Not only this, but many times, we see that there are so many drafting errors by the statesman, that it is ultimately the assessee or the importer or exporter who complies with law and pays taxes and duties who has to suffer. Thus, government should introspect and devise the law with good set of drafting skills which clearly depicts the intent. We all need to understand that in the above case, there has been big gap and loophole in law for which the importers will be made the scapegoat. If a benefit is being given under the law, the assessee would have every right to avail it subject to the fulfilment of conditions if any. If such situation is leading to absurdity, the government needs to tighten its policies with good drafting to plug the loopholes, but importer should not be punished.

