CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPLICATION (EH) NO: 85557 OF 2022
(on behalf of appellant)
IN
CUSTOMS APPEAL NO: 86259 OF 2022

[Arising out of Order-in-Original No: CAO CC-PVNSB/04/2022-23Adj.(I) ACC dated 23rd May 2022 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Dinesh Bhabootmal Salecha
7 Shanti Niwas, 2nd Floor, Tara Temple Lane
Lamington Road, Mumbai - 400007 …***Appellant***

versus

Commissioner of Customs (Import)
Air Cargo Complex, Sahar Andheri (E),
Mumbai - 400099 ***…Respondent***

CUSTOMS APPLICATION (EH) NO: 85558 OF 2022
(on behalf of appellant)
IN
CUSTOMS APPEAL NO: 86260 OF 2022

[Arising out of Order-in-Original No: CAO CC-PVNSB/04/2022-23Adj.(I) ACC dated 23rd May 2022 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Dinesh Bhabootmal Salecha
7 Shanti Niwas, 2nd Floor, Tara Temple Lane
Lamington Road, Mumbai - 400007 …***Appellant***

versus

Commissioner of Customs (Import)
Air Cargo Complex, Sahar Andheri (E),
Mumbai - 400099 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the appellant

Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLEMR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85594-85595/2022

DATE OF HEARING: 14/06/2022
DATE OF DECISION: 23/06/2022

PER: C J MATHEW

Appellant has filed two appeals against order no. CAO No. CC-PVNSB/04/2022-23/Adj-(I) ACC dated 24th May 2022 of Commissioner of Customs (Import), Air Cargo Complex, Chhatrapathi Shivaji International Airport (CSIA), Mumbai by which has provisional release of goods, imported against bill of entry no. 642461/26.11.2021 of M/s Salecha Electronics Inc and no. 6414624/26.11.2021 of M/s 2000 Semiconductor, that had been seized by officers of Directorate of Revenue Intelligence (DRI) on 27th November 2011 under section 110 of Customs Act, 1962 in the reasonable belief of being liable to confiscation under section 111 of Customs Act, 1962 was declined. The appellants had requested the adjudicating authority to release the seized goods to them on appropriate terms and conditions in exercise of authority conferred by

section 110A of Customs Act, 1962. In the meanwhile, two show cause notices proposing confiscation and other detriments has been issued on 25th May 2022 by Commissioner of Customs (I), Air Cargo Complex, Mumbai and some of the goods disposed off by the Directorate of Revenue Intelligence (DRI) under the procedure prescribed in section 110(1A) of Customs Act, 1962.

2. Even as the appellate remedy was sought, the importers also filed application for 'out-of-turn hearing' under Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982 as they were apprehensive of the 'coercive steps' initiated by the investigating officers invoking enablement of 'pre-trial' disposal even before the goods had been confiscated and attended, in accordance with section 125 of Customs Act, 1962, with offer of redemption on payment of fine as there is no prohibition on the import of the impugned goods. In view of the unorthodox circumstances thus brought to our notice, the application was allowed and the appeal itself taken up for disposal as adjudication would have rendered this appeal infructuous. Under law, a person from whom goods are seized has the right to seek provisional release immediately even as adjudication proceedings takes its own course. Here too, that opportunity should not be denied as it constitutes a separate proceedings independent of adjudicatory process.

3. According to the respondent herein, the consignment pertaining to bill of entry no. 6414624/26.11.2021 declared as ‘memory cards’ of different specifications also comprised of 1826 nos. ‘iPhone 13 Pro' of different specifications and that pertaining to bill of entry no. 6414261/26.11.2021 declared as ‘memory cards’ of different specifications also comprised of 1705 nos. ‘iPhone 13 Pro' of different specifications. The failure to disclose these phones was the bone of contention in the investigation as well as in the show cause notice issued thereafter and, according to the notice, the total value of both undeclared and declared goods in the two consignments is ₹14,81,96,804.73 and ₹ 12,86,96,766.83 respectively. The duty liability, arising from ‘integrated tax’ at 18% on the declared goods and of customs duty at 20%, besides cess at 10% thereof, with integrated tax at 18% on the undeclared phones amounts to ₹5,88,19,004.85 and ₹ 5,31,71,052 respectively.

4. It is contended by Learned Counsel for the appellant that there is no justification for discriminatory treatment accorded to the impugned goods which, being freely importable, are neither prohibited not restricted for import. Even if the phones had not been declared in the bill of entry, the breach is, according to him, at worst, procedural and that they could not have declared goods that were neither ordered by them nor usable in India in the absence of any intimation from supplier until much after the bill of entry had been

filed. He submitted that the refusal of the adjudication authority to permit provisional release is blatant breach of the statute inasmuch as no reasonable ground remained for retention of seized goods in departmental custody. He also objected to the forced sale of some lots of the phones undertaken by the investigating agency without even the formality of confiscation under section 111 of Customs Act, 1962. Pointing out that the reason adduced for declining provisional release, *i.e.* the discrediting of their claim to be the owner, was built on mere assumptions, it was contended that the goods had been seized only after filing of bills of entry and they remained owners in the absence of any challenge to their title. Furthermore, he submitted that they had been placed on notice of intent to confiscate the goods seized from a consignment imported in their name and that the adjudicating authority should not be permitted the luxury of taking different stands on the status of the importer to accommodate their purposes. It was also submitted that the goods are not usable in India and, having been wrongly shipped, must be sent back to the supplier or such person assigned by him.

5. Characterizing the appeal as abuse of process to forestall further sale of seized goods, Learned Authorized Representative made several submissions that sought to justify the seizure. It was pointed out that the appellant had not been responding to summons issued by the investigation agency and that they had denied any connection with the

goods. It was further pointed out that investigations had also revealed that the ostensible supplier denied having anything to do with the goods. This, according to him, sufficed to conclude that the goods remained unclaimed and that sale had been undertaken in view of the possible deterioration should the goods remain in custody till the confiscation is finally decided upon. Highlighting the breach of faith placed in the appellant under the 'trade friendly' schemes of the Central Government, it was contended that salutary retribution is the only course of action. He urged us to uphold the decision to decline provisional release.

6. It would be appropriate to deal with these submissions in the course of examining the nature and purpose of 'provisional release' and the legality of the empowerment claimed for declining the request of the appellant. However, some of the submissions merit separate consideration as they are unorthodox. It is improper on the part of Revenue, or its representatives, to contend that recourse to appellate process in accordance with law, as settled, is abuse of process. By that logic, even applying for provisional release, adjudicated upon by the impugned order, is abuse of process. Such a proposition borders on contempt for the law which no agent of the executive can be allowed except at risk of continuation as public servant. Likewise, the plea that the appellant has not been attending to summons, and presumably in justification of declining the request for provisional release within the

framework of the law, is irrelevant to the proceedings and we can safely state that law exists for enforcing summons without having to compromise in compliance with the law offering facilitative measures.

7. The scope of appellate disposal of appeal against outcome of request for provisional release under section 110A of Customs Act, 1962 had come up before the Tribunal in *Amglo Resources Pvt Ltd v. Commissioner of Customs (NA-III), Nhava Sheva [final order no. dated 19th May 2022 disposing off customs appeal no. 86035 of 2022 against F no. S/26-Misc-411/2022-23/GR. IV/JNCH by letter dated 6th May 2022]* and it was held therein that

> *'7. At this stage, we are not concerned with the correctness of the seizure and we do not pre-empt adjudicatory jurisdiction for the Hon'ble Supreme Court, in Union of India v. Manju Goel [2015 (321) ELT 19 (SC)], has held that*
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> > *'4. It is this judgement which is the subject matter of the present appeal. It is clear from the aforesaid direction that the respondent was allowed to get the goods released on provisional basis with certain conditions. We are informed that after the passing of this aforesaid direction by the High Court, the Respondent had even got the goods released after complying with the directions of the High Court. In these circumstances, nothing survives in the present appeal. Otherwise also, there is no reason to interfere with the order in question, when the arrangement made by the High Court in the said order was only provisional one by way of interim arrangement.'*
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> *which sums of the scope of the proceedings before us. The appellant is in business and cannot be denied the cavil of the fiscal detriment arising from the terms offered by the adjudicating authority; the notice issuing authority cannot*

> *but be expected to incorporate the utmost detriment permissible by law, or even without, in framework of adjudicatory outcome. Between commercial objectivity on the one hand and administrative caution on the other, the operation of section 110 A of Customs Act, 1962 appears to have been rendered inoperable and, hence, our intervention sought to subject the terms to the test of the golden mean of responsible and responsive discharge of statutory mandate with the merit of the seizure temporarily obliviated till the notice is disposed off under appropriate provisions of Customs Act, 1962. Our determination herein has no bearing on the adjudication proceedings.'*

It is, therefore, necessary that the two issues, *viz.*, denial of provisional release and outcome of adjudication of show cause notice, be kept separate and distinct to be dealt with in accordance with the provisions of law relating to both. Or, for that matter, even justifiability of the seizure, which is not under question here, that should rightly be considered only in proceedings for confiscation.

8. In *re Its My Name Pvt Ltd*, the Hon'ble High Court of Delhi had, before it, a challenge from the customs authorities against order of the Tribunal permitting release, subject to terms, under section 110A of Customs Act, 1962 upon denial of such by the adjudicating authority in which the response of the adjudicating authority to the directions of the Hon'ble High Court that

> *'In view of the above mentioned citations on restricted and prohibited goods, it appears that it would be premature to*

arrive at any conclusion, about provisional release of seize goods, before completion of adjudication proceedings.'

was taken note of thus

'57….To us, this finding is completely inscrutable, and is, on the face of it contradictory interns. There can be no question of provisional release of season goods, after completion of adjudication proceedings. Section 110 A of the Act specifically empowers provisional release "pending the order of the adjudicating authority". It is impossible, therefore, to conceive provisional release consequent adjudication, or to understand how the ADG chose to opine that it would be "premature" to arrive at any conclusion about provisional release, before completion of adjudication proceedings. As, after conclusion of adjudication proceedings, the question of provisional release of the goods would be rendered infructuous, and, in fact, the adjudicating authority would become functus officio in that regard, in view of the specific words used in 110 A, the only conclusion, that can follow from the afore-extracted inexplicable finding of the ADG, is that he had made a press mind not to release the seized gold, gold jewellery and silver, provisionally, at any cost. We, therefore, finders is an agreement with Mr Ganesh that any remand, of the matter, to the ADG to fix the terms of provisional release, would have been an exercise in futility interest. For this reason, we are unable to hold that, in directing provisional release of gold, gold jewellery and silver, and fixing the terms thereof, the learned Tribunal exceeded the jurisdiction vested in it.'

from which we reasonably conclude that the Tribunal may, in its appellate jurisdiction, consider intervention upon denial of provisional

release and, thereafter, take up modification. Indeed, a plea for non-interference may be advanced only when release, contrary to prohibitions, has been demonstrated to have irreversible consequences. Import of mobile phones does not carry any such irreversible consequences to the law of the land.

9. Both confiscation and provisional release arise in the aftermath of seizure under section 110 of Customs Act, 1962. The scope for, and limits on, confiscation under section 111 of Customs Act, 1962, and, thereby, of redemption fine, stands settled by the decision of the Hon'ble Supreme Court in *Weston Components Ltd v. Commissioner of Customs, New Delhi [2000 (115) 278 (SC)]* and of the Hon'ble High Court of Bombay in *Commissioner of Customs v. Finesse Creation Inc. [2009 (248) ELT 122 (Bom)]*. Provisional release under section 110A of Customs Act, 1962 does not, in any way, impede completion of adjudication proceedings commenced under section 124 of Customs Act, 1962 and is to be invoked upon seizure with due acknowledgement of legislative intent to which we may now bring our attention to bear.

10. The expression 'seize', as also its grammatical variations and cognate expressions, is not defined in Customs Act, 1962; however, the Hon'ble Supreme Court, in *Gian Chand and others v. The State of Punjab [1962 AIR 496]*, noticing the necessity of elaboration in the context of submissions relevant to the issue in dispute and, in response

to the reliance on the meaning assigned in a law lexicon, observed that

> *'… This however might be the meaning in particular contexts when used in the sense of the cognate Latin expression "Seized" while in the context in which it is used in the Act in s. 178 A it means 'take possession of contrary to the wishes of the owner of the property'. No doubt, in cases where a delivery is effected by an owner of the goods in pursuance of a demand under legal right, whether oral or back by a warrant, it would certainly be a case of seizure by the idea that it is the unilateral act of the person seizing is the very essence of the concept.'*

In the light of this elucidation, it can surely be conjectured that every adjudication, and every consequent appeal, need not necessarily have been preceded by such 'unilateral act' which, as a curtain raiser in any proceedings for permanent deprivation either of the goods or of a determined monetary equivalent, is also a detriment of itself. Hence, there could be appeals in which the impugned goods had never been seized or had been restored after temporary deprivation without any major inconvenience or could not, by any stretch, be permitted to be cleared for justifiable reasons. This is an appeal against a 'unilateral' act seeking relief within the facilitative statutory enablement of conditional restoration that has been denied to them. Indeed, it is ironical that the plea of the appellant for access to the goods, even provisionally, is denied to them even as the departmental authorities have ventured upon commercial disposal of the very same goods.

11. Disposal by the empowered officer under the authority of section 110(1A) of Customs Act, 1962 is not restricted to sale and it is trite that such sale does not erase the taint of prohibition that attaches to seized goods; therefore, it is abundantly clear that the impugned goods are not prohibited, or even restricted, for import and that it is compliance with section 47 of Customs Act, 1962 that is in dispute here. The power to seize goods, and, that too, only in the reasonable belief of liability to confiscation under section 111 of Customs Act, 1962, is accorded by section 110 of Customs Act, 1962. It must necessarily be followed by proceedings initiated in show cause notice, as provided for in section 124 of Customs Act, 1962, to culminate as decision to confiscate, or otherwise, with the option to redeem confiscated goods, as provided in section 125 of Customs Act, 1962, on payment of fine or fine imposed in *lieu* of confiscation. Computation of redemption fine is within the discretionary compass of the adjudicating authority but it is considered fair and reasonable only to the extent that the commercial advantage derived from the improprieties in import stand erased; anything beyond would be in excess of jurisdiction.

12. The denial of provisional release appears not to have considered the legal framework for exercise of authority laid down in section 110 to section 126 of Customs Act, 1962 and, instead, has been sought to be justified in terms of section 150 of Customs Act, 1962. A perusal

of this provision leaves no room for doubt that section 150 of Customs Act, 1962 is a procedural enablement for distribution of sale proceeds of goods that are permitted by law to be sold; in any case, section 150 of Customs Act, 1962 does not empower sale or disposal and justification for denial of provisional release is acceptable only if in accord with the legislative intent of section 110A of Customs Act, 1962.

13. Though power to seize has inhered, and as it should, in Customs Act, 1962 from the very beginning, and, indeed, as legacy carried over from section 178 of Sea Customs Act, 1878, for close to a century and half, it was only by section 26 of Taxation Laws (Amendment) Act, 2006, incorporating section 110A in Customs Act, 1962, that ‘provisional release’ of seized goods by Commissioner of Customs pending order of the adjudicating officer found acknowledgment in law. The transition from statutorily mandated continuation of ‘unilateral’ deprivation of custody till conclusion of adjudication to that of reverting custody can only be described as facilitating. Undoubtedly, it was intended to benefit the importer but it was not at the cost of disadvantage to the State. The composition of consumer goods in the product portfolio had dwindled; with increased codification procedural breaches came to dominate offence statistics and, with unfettering of industrial oversight, raw materials and inputs took centre stage. The cost of holding such goods under seizure with

eventual redemption on payment of fine after confiscation far outweighed the economic detriment of delayed availability. The facilitative enactment in public interest may well suffice to suggest that declining to release – direct or effective – is at the cost of the public except of goods whose import is prohibited and destined to be destroyed in public interest. The law does not intend that State is enriched by fines arising from breach of the law or by substituting for the importer to trade in goods, whether seized or even confiscated. Section 110A is couched in such plain language as to give no room for controversy in interpretation or speculation of legislative intent; indeed, it does not even offer scope for discriminatory treatment among imported goods.

14. The novelty of this facilitation did not appear to have had the effect of disengaging the gears heretofore designed for perpetuating continuity of ‘unilateral’ deprivation of custody and every impediment was brought to bear on the exercise of powers under section 110A of Customs Act, 1962. Not the least of these was the refusal to submit to appellate oversight. The inevitable judicial intervention that followed prompted two significant changes therein, *viz*., substitution of ‘adjudicating officer’ and ‘Commissioner of Customs’ therein with ‘adjudicating authority’ through Finance Act, 2011 with provisional release governed, as of now, by

> *'110 A. Provisional release of goods, documents and things seized pending adjudication. -*
>
> *Any goods, documents or things seized under section 110 may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.'*

and, with the Hon'ble High Court of Madras in *AS Enterprises v. Commissioner of Customs [2016 (337) ELT 321(Mad)]*, on the plea for suspension of section 110(2) of Customs Act, 1962 owing to the provisional release, enabled by section 110A of Customs Act, 1962, having held that, notwithstanding the order of provisional release, failure to issue notice contemplated in section 124 of Customs Act, 1962 within the stipulation in section 110 of Customs Act, 1962 would have the effect of discharge from all conditions imposed for provisional release, the amended *proviso* to section 110(2) of Customs Act, 1962 through Finance Act, 2018, rendered mandate of release within six months, extendable by another six months under notice of intendment, to be inoperative upon provisional release. Despite these amendments, the tenor of the provision, bereft of any restrictive stipulations, remains unchanged.

15. The stage was, in the meanwhile, firmly set for issue of circular no. 35/2017-Cus dated 16th August 2017 of Central Board of Excise & Customs (CBEC), seemingly drawing support from the decision of the

Hon'ble High Court of Madras in *Malabar Diamond Gallery Pvt Ltd v. The Additional Director General [2016 (341) ELT65 (Mad)]* holding that breach of policy restrictions justifies continuation of seizure and from the decision of Hon'ble High Court of Delhi in *Mala Petrochemicals & Polymers v. The Additional Director General of, Directorate of Revenue Intelligence [2017 (353) ELT 446 (Del)]*, distinguishing provisional assessment under section 18 of Customs Act, 1962 and provisional release under section 110A of Customs Act, 1962, to curtail and regiment the exercise of discretion even as it was noted in *re Mala Petrochemicals & Polymers*, that

> *'22. Ultimately, each case turns on its peculiar facts. There can never be a blanket rule that in all cases of misdeclaration 100% of the duty must be asked to be deposited or that if the importer is asked to do so then he cannot be asked to furnish a BG. ….*
>
> *23. The power under Section 110A of the Act involves exercise of discretion…. That is perhaps why Section 110A has been worded in the way it has, leaving some margin to the Customs in the exercise of their discretion subject, of course, to the recognized legal limits.'*

The Hon'ble High Court of Delhi, upon being presented with the inexorable mandate of the very same circular in *Additional Director General (Adjudication) v. Its My Name Pvt Ltd [2021 (375) ELT 545 (Del.)]*, was compelled to observe that

'51.….Mr Ganesh relied on Agya Import Ltd: 2018 (362) DLT 1037 (Del), which holds that para 2 of the said Circular was merely in the nature of a "general guideline", and did not incorporate any mandate. We, having perused para 2 of Circular 35/2017-Cus supra, vis-à-vis Section 110 A of the Act, are not inclined to be so magnanimous. According to us, para 2 of Circular 35/2017-Cus is clearly contrary to Section 110 A and is, consequently, void and unenforceable at law. It is not permissible for the CBEC, by executive fiat, to incorporate limitations, on provisional release of seized goods, which find no place the parent provision, i.e. Section 110 A of the Act. Executive instructions may, the district, supplement the statute, where such supplementation is needed, but can never supplant the statutory provision. By excluding, altogether, certain categories of goods from the facility of provisional release, para 2 of Circular 35/2017-Cus supra clearly violates Section 110A, were under all goods, documents and things, are eligible for provisional release. Goods, which are eligible for provisional release under Section 110A of the Act, cannot be rendered ineligible for provisional release by virtue of the Circular. (Be it noted, here, that we refer to the "eligibility" of the goods for provisional release, as distinct from "entitlement" thereof, which has to be determined by the adjudicating authority in exercise of the discretion conferred on her, or him by Section 110 A.) Para 2 of Circular 35/2017-Cus, therefore, effectively seeks to supplant Section 110 A, to that extent, and has, therefore, to be regarded as void and unenforceable at law.

16. Furthermore, the said circular has been issued, not under the authority of empowerment under section 110A of Customs Act, 1962 but, presumably, under

> ***SECTION 151A. Instructions to officers of customs. -*** *The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon,* [22]*[or for the implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or procedure for import or export of goods] issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:*
>
> **Provided** *that no such orders, instructions or directions shall be issued –*
>
> *(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or*
>
> *(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions.'*

and the continued justification for existence of such admonitory instructions, in what has been judicially held to be adjudication proceedings, is itself questionable. The power under section 151A of Customs Act, 1962 is circumscribed by precluding disposal of a particular case in a particular manner. Considering that the exercise of power to permit provisional has been held to be 'adjudicatory', and subject to appellate oversight, the prescriptions therein are tantamount to directions on disposal of particular cases in a particular manner.

The circular traverses the boundaries envisaged in the delegated authority to issue such instructions by interfering in the exercise of discretion which must, after all, assign sufficient weightage to the facts peculiar to each case.

17. There is yet another, intended or unintended, consequence of the said circular. It is inevitable that investigations do foray into estimate of duty liability arising from non-payment or short-payment of duties of customs. The circular requires, in addition, that an estimate of fine, which is attendant only upon confiscation by lawfully constituted authority in statutorily acknowledged proceedings, and of a penalty must be undertaken as a prelude to provisional release. It is not anybody's guess as to the scope for exercise of uninfluenced assessment of facts and law in adjudication proceedings thereafter. It is not just the bar on release of some category of goods but also this guided outcome of adjudication that jeopardizes the continued authority of the circular. Moreover, as we have pointed out *supra*, the impugned goods, not being prohibited or even restricted for import, cannot draw upon the circular, such as it is, for denial of conditional access on the part of the importer.

18. Hence, it would appear that judicial approval was not forthcoming for the several strands of deployment of section 110A of Customs Act, 1962 that was manifested in ways and means of

retention of seized goods till adjudication and, upon confiscation, beyond till appellate remedy was exhausted. The implementation of the incorporation for provisional release appeared to be founded on the belief that the said mechanism for conditional restoration of possession to the owner was restrictive and a measure to safeguard revenue. That appears to have guided the contents of circular no. 35/2017 dated 16th August 2017 of Central Board of Excise & Customs banning the exercise of such authority for certain categories of imports and establishing the floor limits of bond and bank guarantee to be prescribed for allowing provisional release.

19. In the present instance, we are not concerned with such authority having been sought in the impugned order. Nonetheless, the emphasis placed by the judgement on exercise of discretion conferred by section 110 A of Customs Act, 1962 is not to be lost sight of; it is the propriety in the exercise of discretion that falls to us to examine in the appellate jurisdiction. Such exercise of discretion must not only demonstrate itself to be fair and equitable but must also be in accord with the spirit of the legislation that customs authorities have come to regard as one more weapon handed over for the purpose of safeguarding revenue. We cannot subject the exercise of discretion to scrutiny in the absence of elaboration of legislative intent.

20. Before doing so, it would be apposite for us to take note of the

decision of the Tribunal in *Pushpak Lakhani v. Commissioner of Customs (Preventive), New Delhi [final order no. 50001/2022 disposing of appeal no. 50253 of 2021 against order-in-original no. VIII (CusPrev)/Adj/Commr/JWC/27/2013/9900 dated 11th September 2020 of Principal Commissioner of Customs (Preventive), New Delhi]* which has elaborately dealt with the legal provisions of seizure, confiscation, adjudication and redemption as well as the several judicial decisions that, put together, establish the framework within which adjudicating authorities may exercise discretion after seizure. All these aspects were summarized thus:

> *'42. The following position emerges from the aforesaid decision of the Delhi High Court in Its My Name :*
>
> *i. The Tribunal is not required to adjudicate either finally or tentatively at the time of provisional release as to whether the alleged infractions committed or the consequent liability, if any, of the seized goods to confiscation under the Customs Act;*
>
> *ii. The order of provisional release is an interlocutory exercise and does not finally adjudicate on any liability;*
>
> *iii. The exercise of power under section 110A of the Customs Act to release imported goods on a provisional basis is essentially and fundamentally discretionary in nature;*
>
> *iv. Section 110A of the Customs Act contemplates release of any goods. Thus, both prohibited goods and non-prohibited goods can be released;*

v. If the goods are not per se prohibited, question of going into prohibited goods as per Om Prakash Bhatia case does not arise at the stage of provisional release;

vi. A Circular which absolutely proscribed provisional release of prohibited goods or where any provisions are contravened, is void;

vii. The Tribunal is competent to order provisional release and fix terms and there is no need for remand;

viii. While passing an order for provisional release, there is no adjudication of competing rights and liabilities;

ix. High Courts would interfere with an order passed by the Tribunal for provisional release of the goods only on grounds of perversity;

x. Allowing provisional release of the seized goods does not interfere with the adjudication of the show cause notice or with the jurisdiction of the adjudicating authority to hold that the goods were liable to confiscation and the mere fact that the goods may possibly be held liable to confiscation at a later stage cannot be a ground to refuse provisional release because in that case section 110A of the Customs Act would be rendered otiose;

xi. The reliance on the allegations made in the show cause notice for denying provisional release is improper as in every case there would be allegations of contravention and section 110A of the Customs Act would be rendered otiose; and

xii. Statements, before being admitted by following procedure under section 138B of the Customs Act, cannot be used straightaway.'

21. Consequently, those submissions that, inevitably, concern adjudication of the show cause notice are not only irrelevant to the present proceedings but it would be gravely inimical to jurisdictional restraint even to consider them in the context of the impugned order; for that is tantamount to acknowledging that the adjudication authority has been influenced by such and, thereby, compromising the adjudicatory obligation to decide upon the limited issue of provisional release of seized goods. Seizure, and its reasonableness, does not fall within the appellate competence of the Tribunal save through the first appellate authority; indeed, section 110A of Customs Act, 1962 does not offer scope for presuming that an impugned seizure is anything but valid. And yet, the opportunity for provisional release is not barred except by exercise of discretionary decision on the part of the competent authority.

22. The thrust of the argument of Learned Authorized Representative is that such acts of smuggling deserve no quarter from the beneficial provisions of law, that interests of revenue must be safeguarded and that section 110A is rendered inoperable, as far as the appellant is concerned, owing to absence of ownership. We have pointed out *supra* that for release under section 110A of Customs Act, 1962 to be influenced by the reasonableness of seizure or the ultimate fate of adjudicatory consummation is to obliviate this specific enablement of legislative mandate by insinuation of other legislative

provisions into the decision. That would certainly not be consistent with legality and propriety.

23. Learned Authorized Representative appears to have confused safeguarding the interests of revenue with safeguarding the outcome of adjudicatory exercise. An adjudication, by and large, is concerned with duty/tax liability, fine in *lieu* of confiscation and penalty. Revenue is, doubtlessly, concerned with recovery of duty/tax not paid or short-paid, Revenue is, unquestionably, concerned with prohibitions imposed under section 11 of Customs Act, 1962. It can safely be posited that, as one of the guardians of the frontier, Revenue is obligated to deter the import of any goods that the laws prohibit for preserving the health and safety of those who reside under the protection of the State. Beyond these, it is only the interest of the enforcement mechanism that is protected; for Revenue to be concerned with penalty would suggest an underlying proposition that it is of essence to the State that laws be breached just as for Revenue to be concerned with redemption fine – generally, to offset the windfall earned by the breach that prompted confiscation – suggests interest in restriction being breached.

24. It is on record that section 110(1A) of Customs Act, 1962 has been invoked for undertaking disposal of seized goods before even being vested, under the authority of section 126 of Customs Act,

1962, in the Central Government by confiscation. The substitution of the merchant-importer by the Central Government cannot legalize a beach of restrictions imposed for the security of the State or the safety of those who reside within its territorial confines; the commencement of 'pre-trial' disposal by sale admits that breach by the importer of the impugned goods has only commercial implications. There is no suggestion that any policy has been contravened in the import. The sum and substance of the alleged breach is the failure to declare the goods with intent to evade duty for which restitution lies in section 28 of Customs Act, 1962.

25. Before section 110A was incorporated in Customs Act, 1962, seized goods offered for repossession, by operation of 'common practice', could be saddled with fine in *lieu* thereof by retention of confiscatory interest. Over the years, the quantification of fine has been placed within the practical framework of offsetting the potential for windfall deriving from the breach for which the goods are confiscated. Rarely would it be the value of goods; some proportion thereof suffices. There can be no golden formula for it and it is here that the discretion of the authority is called for. Moreover, appeal against adjudication orders no longer require deposit of the full extent of the detriment laid at the door of the importer; section 129E of Customs Act, 1962 prescribes the extent of pre-deposit and it is interesting to note that this was legislatively considered to suffice as

security against confirmed demand. It is moot if a tentative estimation prior to adjudication can hold a candle to the assured accrual to the State after adjudication, subject, of course, to appellate determination. We are of the opinion that the extent of mandatory pre-deposit should, in most cases, be the benchmark for quantification of reasonable security. At least, as far as the impugned goods are concerned.

26. The goods may, ultimately, be held to be liable for confiscation and, considering the free importability, will, if available, have to be offered for redemption on payment of fine. There are, as we have elaborated *supra*, limits on discretion in quantifying the fine. It is in these circumstances that provisional release must be allowed. The only question that arises is the affording of an opportunity to the adjudicating authority to determine the terms of provisional release; however, we cannot but take notice of the observation of the Hon'ble High Court of Delhi was, in *Spirotech Heat Exchangers Pvt Ltd v. Union of India [2016 (341) ELT 110 (Del)]*, that

> *'6. The Court notices that despite the aforementioned orders of this Court and the Supreme Court, the respondents are continuing to impose harsh conditions for provisional release of goods. In the present case, apart from the exporter having to pay 100% of the differential duty it has to furnish a bank guarantee equivalent to 25% of the differential duty and execute a bond for 100% of the value of the goods. Since the respondents do not appear inclined the aforementioned orders binding orders of the Supreme Court, and are*

> *compelling exporters and importers to approach this Court everytime for relaxation of the conditions for the provisional release of the goods, the Court is of the view that relegating the petitioner to a statutory remedy would not be efficacious.'*

and we, too, see no purpose being served by remand merely owing to the obduracy demonstrated in the impugned decision that is contrary to judicial interpretation of legislative intent.

27. Sale of part of the consignment has yielded considerable sum in deposit therefrom with the customs authorities. In the circumstances of tentative determination of duty liability by the investigating authority, the interests of Revenue would be adequately safeguarded by execution of bond for the value of the goods and by deposit of a further ₹ 5,00,00,000/- as condition for release of the remaining goods to the appellant. It has been demonstrated by the respondent themselves that there is considerable risk in holding the goods and it is only appropriate that this order be implemented within seven days of its receipt subject to compliance with the conditions specified above.

28. The appellant seeks to export the goods. It has been submitted by Learned Authorized Representative that the impugned goods had never been intended by the manufacturer for use in India. Our attention was also drawn to the correspondence recovered by investigators that have been ascribed to 'cover up' of real intent to smuggle these into the country. These two submissions appear to

contradict each other. The plea of the appellant that goods had been mistakenly consigned to them, thus, bears some resemblance of verity which, in the absence of tenable evidence to the contrary, must be addressed and by the competent authority.

29. Ownership of the goods, denied by the adjudicating authority and contested by Learned Authorized Representative, is also of relevance here. The goods were seized from consignments claimed by the importer; non-inclusion in the bill of entry, out of ignorance or deliberate, cannot supplant custodial ownership with responsibility and accountability to the shipper of the goods; it is surely not the case of the respondent that goods can be 'orphaned' and, therefore, ownership is merely a matter of claim along with all the liabilities and consequences attached to ownership. Even the Disposal Manual of the Central Board of Excise & Customs (CBEC), with the same legal status as the circular referred *supra*, acknowledges that owners may affirm their claim and makes provision for delayed disposal in such cases. 'Owner' is not defined in Customs Act, 1962 but the expression has been deployed in definition of 'importer' in section 2 of Customs Act, 1962. The implication is clear: ownership is claimable at any stage and is, by default, attached to 'importer' which may be alienated by declaration but does not foreclose reassertion of ownership. It is not open to customs authorities to determine lack of ownership except in circumstances of rival claim and, that too, for the limited purpose of

clearance of goods.

30. The goods have been seized under section 110 of Customs Act, 1962 and the seizure itself is not in dispute before us. Therefore, it does not lie in our jurisdiction to set aside the seizure. However, appellant has claimed that the goods were wrongly despatched to the importers and must, therefore, be returned to the owners. It is on record that the goods are not configured for use in India. In any case, no harm would be caused to the interests of Revenue by export of goods that have not been cleared for home consumption or even after such clearance. Provisional release under section 110A of Customs Act, 1962, by adjudicatory determination or on appellate intervention, does not stand in the way of disposition as the owner deems fit. Shipping bills, filed for declaration of intent to export, is to be dealt in accordance with section 51 of Customs Act, 1962 for which responsibility vests with the supervisory establishment of the customs administration. This advisory is enunciated as a reminder that legislative intent must be adhered to at all times.

31. In accordance with the findings *supra*, the impugned order declining provisional release is modified to allow provisional release upon execution of bond for value of impugned goods and furnishing revenue deposit of ₹ 5,00,00,000 not later than seven days of service of this order. Entry for export under section 50 of Customs

Act, 1962, as and when filed, shall be disposed off expeditiously in accordance with section 51 of Customs Act, 1962. Appeals are disposed off thus.

(Order pronounced in the open court on 23/06/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*