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

\+ CUSAA 184/2018, CM Nos.33358/2018 & 34105-06/2018

AGYA IMPORT LIMITED ..... Appellant

Through : Ms. Anjali J. Manish, Mr. Priyadarshi Manish and Ms. Nidhi Saini, Advs.

versus

COMMISSIONER OF CUSTOMS,NEW CUSTOM HOUSE, NEW DELHI. ..... Respondent

Through : Mr. Amit Bansal, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

O R D E R

% **18.09.2018**

Issue notice.

Mr. Amit Bansal, Advocate accepts notice on behalf of the respondent.

The question of law sought to be urged by the assessee/importer is that instead of deciding the appeal as to the conditions with respect to provisional release, the Customs Excise and Service Tax Appellate Tribunal (CESTAT) has relegated the matter entirely to the Commissioner, with a direction that the application should be decided in accordance with Circular No.35/2017–CUS. dated 16.08.2017. That circular first mandates that the provisional release of the seized goods should be normally considered upon a request by the owner of the goods and that the bank guarantee or security deposited should cover (para 2.2) the entire amount of duty/differential duty amount of fine to be levied in lieu of confiscation and also the nature of seized goods, duty and charges etc.

Given that the CESTAT did not even apply its mind; in the opinion of this court, the express reference to the circular in this case amounts to a direction to the Commissioner to follow paras 2.1 and 2.2 without considering the other extenuating circumstances that are outlined in para 4 of the same circular which reads as follows :

> *"4. In the above context, attention is also invited to the common order dated 19-5-2017 of the Hon'ble Delhi High Court in W.P.(C)No.3965/2017 in the case of Mala Petrochemical & Polymers v. The Add/. Director General, DR/& Anr. and WP (C) No.4123/2017 in the case of Mala Petrochemical & Polymers v. The Commissioner of Customs (Import) /CD, Tugh/akabad, New Delhi & Anr., wherein the Hon'ble High Court has inter alia held that the distinction between provisional assessment and provisional release was perhaps not acknowledged in many of the orders earlier passed by the Court. Distinguishing between cases of misdeclaration vis-a-vis cases of diversion of goods, non-adherence to conditions of notification, undervaluation and misclassification, the Hon'ble Court has observed that ultimately, each case turns on its peculiar facts and 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 bank guarantee. The Hon'ble Court has also referred to the above mentioned case of Malabar Diamond Gallery P Ltd. v. The Addl. Dir General DRI (supra) in which the Hon'ble Madras High Court has held that although the import of gold was not prohibited, if the import was in violation of the conditions attached to*

such import, it could amount to smuggling and that a prayer for provisional release could be refused. The Hon'ble Delhi High Court has further observed that the power under Section 110A of the Act involves exercise of discretion and the scope of judicial review is to examine if the discretion has been rightly exercised; that treatment of all types of wrongful imports on an equal footing might result in miscarriage of justice; and that Section 110A leaves some margin to the Customs in the exercise of their discretion subject to the recognized legal limits.

4.1 The above mentioned observations of the Hon'ble Madras High Court and Hon'ble Delhi High Court may be kept in mind while allowing provisional release of goods."

The circular expressly states in para 4.1 that the observations of this court and of the Madras High Court are to be taken into account. This obviously meant that the conditions in paras 2.1 and 2.2 are merely guidance and cannot be treated as mandatory, in all circumstances.

Having regard to the above discussion, the CESTAT is directed to consider the matter afresh and pass an appropriate order having regard to the circumstances of the case, preferably within six weeks from today.

The appeal is partly allowed in the above terms.

Order *dasti.*

S. RAVINDRA BHAT, J

SEPTEMBER 18, 2018/aj **A. K. CHAWLA, J**