

**CUSTOMS EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK-II R.K. PURAM, NEW DELHI-66
PRINCIPAL BENCH NEW DELHI
LARGER BENCH MATTERS
HEARINING NOTICE**

Appeal No. : C/53878/2014-CU[DB], C/53901/2014-CU[DB]

MISC Application No. : C/MISC/55748/2014, C/MISC/55749/2014, C/MISC/51755/2015

<u>Name of the Appellant</u>	
1	Suchita Aggarwal W/o Sh. Jagat Mohan Aggarwal, Jagat Roller Floor Mills, Chhotti Nahar, Malikpur Pathankot, Pathankot, Punjab.
2	Gaurav Pharma Ltd Now Known As M/s Globus Biotech Limited, 49th Km Stone, Delhi-rohtak Road, Sampla, ROHTAK, HARYANA-124501
<u>Name of the Respondent</u>	
1	C.C.-New Delhi(import & General) NEW CUSTOM HOUSE, NEAR IGI AIRPORT, NEW DELHI, DELHI.
2	C.C.E. & S.T.-Rohtak SCO NO.6 TO 8 & 10, SECTOR-1... HUDA MARKET, ROHTAK, HARYANA-124001

This issue involved in the matter is discussed in the **Interim Order No.IO/C/116-117/2015 dated 25/05/2015**. (Copy Enclosed)

The matter is now listed for hearing before Five Members **LARGER BENCH**.

You are hereby directed to make available Four sets of appeal/complete paper book to the Tribunal and one set to the Secretary, Bar Association, CESTAT, New Delhi well before the date of hearing.

Take notice that the Larger Bench case mentioned above has been fixed for hearing on **05/10/2015**, at 10:30 AM or any subsequent date thereafter as per the cause list or as may be convenient to the Tribunal before CESTAT, West Block No.2, R.K. Puram, New Delhi.

Date.17/09/2015


Assistant Registrar
Custom branch

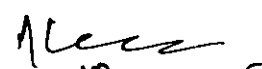
Copy to:-

1. Deputy Registrar/ Assistant Registrar, CESTAT, Mumbai, Chennai, Kolkata, Ahmadabad, Bangalore, Allahabad (Interim Order dtd.25.10.15 enclosed, display on Notice Board)
2. Secretary, Bar Association, CESTAT, New Delhi. (Interim Order dtd.25.05.15 and Miscellaneous Application enclosed) Mumbai, Chennai, Kolkata, Ahmadabad, Bangalore, Allahabad.(I.O. No.116-117/15 dtd.25.05.15 enclose)
3. SDR, CESTAT, New Delhi. (Interim Order No.IO/C/116-117/15 dtd.25.05.15 enclosed)
4. Advocate/Consult: **Just Taxes Legar**
E-28, FIRST FLOOR, BANK OF BARODA BUILDING, SAKET,
GST Consultancy and Legal Services
D-40, FIRST FLOOR, SOUTH EXTENSION PART-I, NEW DELHI-110049.

Enclosed copy of
Misc. Application
No.C/Misc/51755/15

5. Computer Section to display on Web site along with Interim Order No.IO/C/116-117/15 Dated .25. 05.15.

NOTE:- If any Party wants to submit written submission please submit it before the date of hearing.


18-9-15



**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. II**

**Application No. C/MISC/55748 & 55749/2014
Appeal No. C/53901/2014-CU [DB]**

M/s. Gaurav Pharma Ltd. ...Appellant

Vs.

C.C.E. & S.T. Rohtak ...Respondent

Shri B.K. Singh, Advocate for the Appellants
Shri Govind Dixit, DR for the Respondent

Appeal No. C/53878/2014-CU [DB]

Ms. Suchita Aggarwal ...Appellant

Vs.

C.C. New Delhi (I &G) ...Respondent

Shri M.K. Gupta & Shri Garbit Chauhan, Advocates for the
Appellants
Shri Govind Dixit & Shri Amresh Jain, DRs for the Respondent

CORAM:

**Hon'ble Shri Ashok Jindal, Member (Judicial)
Hon'ble Shri R.K. Singh, Member (Technical)**

Date of Hearing: 19.03.2015
Date of Pronouncement: 25.05.2015

INTERIM ORDER NO. 116-117/2015

Per Ashok Jindal:

The appellants are in appeal against the impugned orders
imposing harsh conditions for releasing the seized goods
provisionally under section 110(A) of the Customs Act 1962.

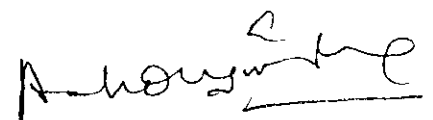
Ashok Jindal

2. Before coming to the merits of the case, the Ld. ARs appearing on behalf of the Revenue raised a preliminary objection that appeal against the order under Section 110(A) of the Customs Act 1962 does not lie before this Tribunal. Therefore, the issue before us is that whether the appeal against the order passed by the Commissioner under section 110(A) of the Customs Act 1962 lies before the Tribunal or not.

3. On behalf of the Revenue, the Id. AR submits that the issue has already been answered by the Larger Bench of this Tribunal in the case of **Akanksha Syntax Pvt. Ltd. Vs. CCE Mumbai-2013 (289) ELT 186 (Tri-Bom)** wherein it was held that against the order under section 110(A) of the Customs Act 1962 have provisionally released order that appeal is not maintainable before this Tribunal. The said order got merged in the case decided by the Hon'ble High Court reported in **2013 (296) ELT 178 (Bom)**. It is further submitted that the ratio laid down by the Larger Bench of this Tribunal in the case of **Akanksha Syntax Pvt. Ltd.** (Supra) has not been reversed by any of the following orders of Hon'ble High Court of Rajasthan and Hon'ble High Court of Delhi in the case of:

a) Gentlemen Shootings Pvt. Ltd. in writ petition no.5318/2012 Rajasthan HC

b) Giriraj Syntax Pvt. Ltd. in writ petition 4955/2012 Rajasthan HC



**c) Auto Creators Vs. UOI in writ petition (C)5600/2012
Delhi High Court.**

3.1 It is further submitted that in the case of **Amit Electronic Vs. CCE (Preventive)-2014 (309) ELT 60 (Delhi)** the Hon'ble High Court has laid down the *ratio decidendi* only on the question of law pertaining to error of jurisdiction and not on the issue of maintainability of appeal before CESTAT regarding order passed under Section 110(A) of the Customs Act 1962. It is further submitted that the decision in the case of **Candex Chemical in writ petition no.1670/2014** is not relevant as the said decision is passed in respect of Customs (Provisional Duty Assessment) Regulation 2011 and not with respect of maintainability of an appeal against provisional release order issued under section 110(A) of the Customs Act 1962. It is also submitted that the decision of this Tribunal in the case of **Akanksha Syntax Pvt. Ltd.** (Supra) is not per incuriam in the light of the judgement of the Apex Court in the case of **Rajkumar Shivhare Vs. Asst. Director, Directorate of Enforcement-2010 (253) ELT 3 (Supreme Court)**.

3.2 It is further submitted that the only ratio decidendi laid down in the orders of Hon'ble High Court are binding. Therefore, the decision of Larger Bench of this Tribunal in the case of **Akanksha Syntax Pvt. Ltd.** (Supra) is binding on this Bench in terms of principle of judicial discipline. In these terms, it is submitted that appeals are not maintainable before this Tribunal.

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3.3 It is further submitted that if the order is a speaking order under Section 110(A) of the Customs Act 1962, in that situation appeal lies before this Tribunal but if order under section 110(A) is not speaking order, then appeal does not lie before this Tribunal.

4. On the other hand, Ld. Counsel appearing on behalf of the appellants submit that the Ld. AR has raised the following issues:

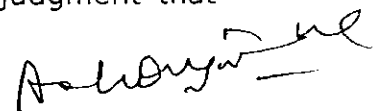
- a) Decision of Tribunal given by a bench of three members binding on a bench consisting of two members.
- b) Decision of Tribunal, in the case of difference of opinion between two members and the case is referred to 3rd member, the majority decision in that case will be considered as decision of larger Bench of this Tribunal.
- c) What are the requirements for the decision to be regarded as a precedent and therefore binding on a bench lower to it?
- d) How to ascertain ratio of the case decided by the court?

4.1. He submits that with regard to the judicial discipline that every decision contains three basic ingredients:

- a) Finding of material fact (direct and inferential);
- b) Statement of principle of law applicable to legal problem disclosed by the facts, and;
- c) Judgment based at the combined effect on the above two.

4.2. Therefore, for the doctrine of precedent legal problem disclosed by the facts is a vital element and that is ratio decidendi.

It is not everything said by a judge when giving judgment that



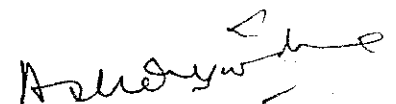
constitute precedent. The only thing in a judge's decision binding a party is a principle upon which the case is decided and for this reason it is important to analyze decision and isolate from it the ratio decidendi. It is further submitted that Ratio decidendi can be summarized as follows:

- a) Opinion of the court on an issue not necessary for deciding dispute cannot be considered as ratio of that case.
- b) Ratio of a decision as is well known must be culled out from the facts involving in the given case. The decision is an authority for what it decides and not for what can logically be deduced there from.
- c) Only thing in the judge's decision binding the party is the principle upon which the case is decided and for these reasons it is important to analyse and isolate from it the ratio decidendi.
- d) Ratio decidendi is a rule deducible from the application of law to the facts and circumstances of the case and not some conclusion based upon facts which may appear to be similar.

4.3. In these circumstances, he submits that the judgment of the Hon'ble High Court of Rajasthan in the case of **Giriraj Syntax Pvt. Ltd. (Supra)** the only fact relevant was that the order was passed by the Commissioner under section 110(A) of the Customs Act 1962 and in this case petitioners were not satisfied with the conditions imposed by the Commissioner for provisional release of the goods who approached to the Hon'ble High Court by filing writ petitions. The counsel for the Revenue raised the objection that

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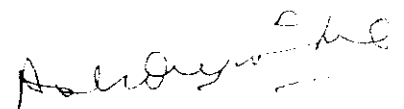
this petitioner have remedy by filing the appeal in appropriate forum under section 129 (A) of the Customs Act 1962. The legal position was admitted by both the sides to pursue the alternate remedy and the Hon'ble High Court found when there is no dispute on legal position that appeal lies before the appropriate authority under section 129 (A) of the Customs Act 1962 against the order passed by the Commissioner under section 110 (A) *ibid*. Therefore, the Hon'ble High Court decided the point of law that "the appeal against the order passed by commissioner under section 110(A) *ibid* can be filed under section 129(A)" *ibid* and that is the ratio decided by the Hon'ble High Court and the said order is binding on the Tribunal. It is further submitted that the Revenue has not shown any order of the Hon'ble High Court which has taken the different view from the view taken by the Hon'ble High court of Rajasthan. He further submits that if the provision of law is interpreted by one side in a manner which is accepted by the other side, the same cannot be considered as a concession. Therefore, decision of the Hon'ble High court of Rajasthan in the case of **Giriraj Sytex Pvt. Ltd. (Supra)** is binding precedent. It is further submitted that if the order passed by the bench of any court or Tribunal cannot be relied upon if it is proved that the said judgment is either sub silentio or per incuriam the order of Hon'ble High Court is available where the decision is contrary to the decision given by the coordinate bench which has been placed to be precedent. He further submits that against the order of Larger Bench of this Tribunal in the case of **Akanksha Syntax**



Pvt. Ltd. (Supra) a writ was filed before the Hon'ble High Court of Bombay for some concession of provisional release of goods, that doesn't mean that Hon'ble High Court has decided issue of jurisdiction in that matter and the same has not been examined. Further, in the case of **Akanksha Syntax Pvt. Ltd. (Supra)** this Tribunal failed to consider the decision of Supreme Court in the case of **Rajkumar Shivhare (Supra)**. Therefore, the said decision is per incuriam and cannot be relied upon. In these circumstances, it is prayed that appeals are entertainable by this Tribunal and conditions imposed by the Commissioner in the impugned orders are harsh and same may be relaxed by this Tribunal for provisional release of the impugned goods.

5. Heard the parties. Considered the submissions.

6. Before going to the merits of the case, first we have to decide the issue of maintainability of the appeal against the order under section 110 (A) of the Customs Act 1962. The main reliance of the Revenue is on the decision of **Akanksha Syntax Pvt. Ltd. (Supra)** of larger Bench of this Tribunal to say that appeal does not lie before this Tribunal. Therefore, we are analyzing the decision of **Akanksha Syntax Pvt. Ltd. (Supra)** wherein there was a difference of opinion before the members of this Tribunal on the issue whether the order passed by the Commissioner of customs under section 110(A) of the Customs Act 1962 can be appealed before this Tribunal. Difference of opinion arose and the reference was made to the third member.



6.1. Reference is reproduced in para 16 here under:

Difference of Opinion

"16. There is a difference of opinion between the Members, therefore, the matter be placed before the Hon'ble President to refer the matter to Third Member to decide the issue. The points on which the difference has arisen are as under:-

1) Whether Member (Judicial) is correct in reading the provisions of Section 110(A) as under:

"Section 110A. 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."

2) Whether Member (Technical) is correct by reading the provisions of Section 110A as under:-

"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 Commissioner of Customs may require."

3) Whether the amended provisions of Section 110A are applicable to the facts of this case, as held by Member(Judicial) or not.

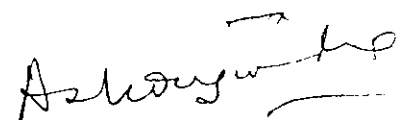
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4) Whether the appeal under Section 129A(1) of the Customs Act lies before this Tribunal against the order passed by the Adjudicating authority under section 110A or not.

5) Whether Member (Judicial) is correct in holding that the appeal against an order passed by the Adjudicating authority under section 110A is maintainable, by relying on the decisions in the case of *Dhananjay Kumar, Royal Enterprises and Swiber Offshore*.

6) Whether Member (Technical) is correct in holding that the appeal against an order passed under Section 110A is not maintainable, relying on the decision of *Navshakti Industries*."

6.2. When the third member answered reference on the issue no.1,2 & 3, the third member held that Member (Judicial) is correct and affirmed the issue in favour of Member (Judicial). But thereafter, the third Member took up the issue whether the appeal is maintainable before this Tribunal or not and hold that the provisional release order is an interim order pending order of the Adjudicating Authority and relied on the decision on ***Shanti Alloys Pvt. Ltd. Vs. Commissioner-2000 (123) ELT 643 (Tri)*** to hold that Tribunal is a creature of law and section 129 A(1) thereon clearly lays down that jurisdiction of Tribunal would only commence when order of Commissioner acting as Adjudicating Authority is agitated before it and further hold that the order of commissioner Custom is only interim order of provisional release / provisional assessment. Therefore, it was held that appeal against interim order is not maintainable before this Tribunal.



6.3. We have seen the provision of section 110A of the Customs Act 1962 which are reproduced here as under:

"Section 110A. 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."

6.4 From the above provisions of Section 110A of the Act it is a clear mandate that under section 110A the decision is to be taken by the Adjudicating Authority for imposing conditions for release of seized goods provisionally.

6.5. We have also seen the provision of section 129 A and 129 A (1) of the Customs Act 1962 also which are also reproduced here as under:

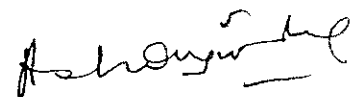
"SECTION 129A. Appeals to the Appellate Tribunal.-

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the Commissioner of Customs as an adjudicating authority

(b) an order passed by the Commissioner (Appeals) under section 128A;

(c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;



(d) an order passed by the Board or the Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day :

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) any goods imported or exported as baggage;

(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) payment of drawback as provided in Chapter X, and the rules made there under:

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where -

(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or

(ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) the amount of fine or penalty determined by such order, does not exceed fifty thousand rupees.

(1A) Every appeal against any order of the nature referred to in the

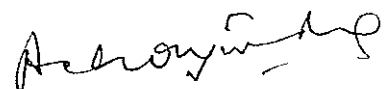
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first proviso to sub-section (1), which is pending immediately before the commencement of section 40 of the Finance Act, 1984, before the Appellate Tribunal and any matter arising out of or connected with such appeal and which is so pending shall stand transferred on such commencement to the Central Government and the Central Government shall deal with such appeal or matter under section 129DD as if such appeal or matter were an application or a matter arising out of an application made to it under that section."

6.6 The provisions of Section 129A of the Act clearly specifies that the appeal is maintainable before this Tribunal against the decision or order passed by the Adjudicating Authority.

6.7. On analyzing the above provisions of Section 110A and Section 129(A) of Customs Act, 1962 we find that any person aggrieved by decision or order passed by the Commissioner of Customs as an adjudicating authority may appeal to this Tribunal. Therefore, under section 110A the order of provisional release is being passed by Commissioner Customs as adjudicating authority and aggrieved from the said order appeal can be filed before this Tribunal under section 129 A(1) of the Act.

6.8 We also observe that the arguments of Ld. AR is not convincing that if an order passed under section 110A is a speaking order, the appeal lies before this Tribunal and if it is non-speaking order appeal does not lie before this Tribunal as section 129A of the Customs Act speaks that appeal lies before this Tribunal against the order / decisions of the Adjudicating Authority



that does not specify that appeal will not lie against non speaking order and appeal shall lie against speaking order. Therefore, the argument advanced by the Ld. AR is mis-leading only.

6.9. With these observations, we are not in agreement with the decision of the larger bench of this Tribunal in the case of **Akanksha Syntax Pvt. Ltd. (Supra)** and same is required to be reconsidered by a Larger Bench.

6.10. Further, we find that the decisions relied by the Ld. Counsel for the appellants to say that the decision of the Hon'ble High Court are binding on this Tribunal and it has been held that appeal against the said order under Section 110A of the Act lies with this Tribunal. In fact, in all the case laws relied upon by the Ld. Counsel, the Hon'ble High Courts have not examined the issue of jurisdiction of this Tribunal to entertain appeal against the order under section 110A of the Customs Act by this Tribunal and only observed that appeals lies before the appropriate form and under section 129A of the Customs Act.

6.11. From the above discussion, as we do not agree with the decision of **Akanksha Syntax Pvt. Ltd. (Supra)** and none of the Hon'ble High Courts has considered the issue of jurisdiction of this Tribunal. Therefore, following the judicial discipline it would be in the interest of justice to refer the matter to the Larger Bench of this Tribunal to decide the following issue:


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C/53901/2014-CU [DB]
C/53878/2014-CU [DB]

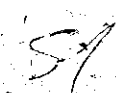
"Whether an appeal lies before this Tribunal against the order passed by Commissioner (Customs) under section 110A of the Customs Act 1962 for provisional release of the goods or not."

7. The registry is directed to place the records before the Hon'ble President for consideration and to constitute the Larger Bench of this Tribunal to decide above mentioned issue.


(Pronounced in the open court on 25.05.2015.)


(R.K. Singh)
Member (Technical)

Bhanu


(Ashok Jindal)
Member (Judicial)

प्रमाणित प्रतः / Certified True Copy


सहायक नोंदीकार/Asstt. Registrar
नोडल ऑफिस/नोडल ऑफिस (C.E.S.T.A.T.)
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R. K. P. S. New Delhi-110066