

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL No. 70210 OF 2020

(Arising out of Order-in-Appeal No. 110-CUS/APPL/LKO/2020 dated 10 June, 2020 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow)

Commissioner of Customs (Preventive)

.....Appellant

5th Floor Kendriya Bhawan, Sector-H
Aliganj
Lucknow

Versus

Bushrah Export House

.....Respondent

4/19, Vikas Khand, Gomti Nagar
Lucknow

APPEARANCE:

Shri Sunil Kumar, Authorised Representative of the Respondent
Shri Vishwajit Singh, Advocate, for the Appellant

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. 51626/2020

Date of hearing: 05.11.2020
Date of decision: 10.11.2020

JUSTICE DILIP GUPTA :

This Appeal has been filed by the Commissioner of Customs (Preventive), Lucknow¹, to assail the order dated June 10, 2020 that was passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow². The said order of the Commissioner (Appeals) sets aside the order dated June 03, 2020

1. the Appellant
2. the Commissioner (Appeals)

passed by the Superintendent, Customs, ICD, Panki, Kanpur³, seizing the goods under section 110(1) of the Customs Act, 1962⁴.

2. The Appeal was filed before a Bench of the Appellate Tribunal at Allahabad on June 22, 2020. It has been transferred to the Principal Bench of the Tribunal at Delhi by judgment and order dated October 15, 2020 of the Supreme Court. The operative portion of the judgment of the Supreme Court is reproduced below :

"The appeal which has been filed by the Chief Commissioner Customs [Appeal Diary No 70226/2020] is pending before the CESTAT, Prayagraj. Mr N Venkataraman, learned Additional Solicitor General appearing with Ms Nisha Bagchi, learned counsel on behalf of the respondents apprised the Court of the fact that presently the Bench of the Tribunal at Prayagraj is not functional due to the existence of vacancies.

2. There is a need for an early resolution of the appeal or, in any event, the application for stay that has been filed by the Customs Department. Hence, the ends of justice would be served if the appeal is transferred to the Principal Bench of the Tribunal at New Delhi so that the appeal or, as the case may be, the application for stay can be taken up expeditiously. Mr Vishwajit singh, learned counsel appearing on behalf of the petitioner has no objection to this course of action to facilitate an early resolution of the dispute.

3. We accordingly transfer Appeal Diary No 70226/2020 from the CESTAT, Prayagraj to the Principal Bench at New Delhi. We request the Chairperson of the CESTAT to take up the appeal upon transfer to New Delhi expeditiously and, in the event that it is not possible to dispose of the appeal in its entirety, to take up the application for stay on an expeditious basis. The Tribunal would endeavor to dispose of at least the application for stay within a period of two weeks of the receipt of the papers on transfer.

4. The Special Leave Petition is disposed of. Liberty is granted to the learned counsel appearing on behalf of the contesting parties to move this Court for further directions, should it become necessary.

3. the Superintendent

4. the Customs Act

5. Pending applications, if any, stand disposed of.”

3. The papers of the Appeal were received at the Principal Bench of the Tribunal at Delhi on October 23, 2020 and after due intimation to the parties, the Appeal was listed on October 26, 2020. However, as learned Counsel for the Respondent stated that the Appeal may be listed after four days so as to enable the Respondent to file a reply, the Appeal was directed to be listed for final hearing on November 04, 2020.

4. The records indicate that the export cargo presented by M/s Bushrah Export House⁵ through two shipping bills bearing numbers 2807972 and 2808169 dated May 23, 2020 were examined by the Officers of Customs at Kanpur on June 1, 2020 and on examination of the goods, it was noticed that there was a mis-match in the quantity declared in the invoice and the quantity actually found in the shipping bill bearing no. 2808169. Samples were also drawn for a market opinion regarding the value of the export goods and a panchnama was prepared on June 01, 2020.

5. On record is also a panchnama recovery memo dated June 03, 2020. It states that the panchas were called on June 03, 2020 at Indian Container Depot (ICD), Panki, Kanpur, to witness further proceedings required to be undertaken under the provisions of the Customs Act pursuant to the panchnama proceedings dated June 01, 2020. Shri Jai Prakash Yadav, 'H' Card Holder, was present as an authorised representative of the

5. the export house

Appellant in the proceedings connected with the shipping bills. Thereafter, the panchas along with the Officers of the Customs and Shri Jai Prakash Yadav reached the Customs Bonded Warehouse, where the cargo covered by the two shipping bills was kept. The panchnama gives details of the two shipping bills. It mentions the product description, the number of pieces, the prevailing market value and the drawback percentage. The panchnama also mentions that the two shipping bills had been filed claiming the benefit of drawback (DBK), Rebate of State Levies (RoSL) and Merchandise Exports from India Scheme (MEIS). The DBK and RoSL involved in the two shipping bills has been stated to be as follows :

Sl. No.	SB No. & Date Inv. No. and date	DBK Involved	ROSL Involved
01	---	1286368	1946030
02	---	1671268	2161187

6. The panchnama records that there is a short quantity of 1872 pieces in the cargo covered by one shipping bill. It also records that the export cargo was grossly over-valued 8 to 9 times for claiming undue export benefits and excess duty drawback, otherwise not admissible. This statement was based on a local market enquiry from traders/dealers of such type of garments.

7. The panchnama further mentions that the officers formed a reasonable belief that the goods were liable to confiscation under section 113(i) of the Customs Act since the

export consignment was deficient in quantity and grossly over-valued. Accordingly, the Officers seized the impugned goods under section 110(1) of the Customs Act and placed them in the Customs Bonded Warehouse of Customs ICD, Panki.

8. The relevant portion of the **‘Inventory Cum Seizure Memo dated 03-06-2020 (Case No. 01/2020-21)’** is reproduced below :

“Inventory of goods seized

“Sl. No	SB No. & Date Inv. No. and date	Product Description	No. of pieces	Value (in Rs.)
01	—	Boys Barmuda	63048	47222952/-
		Kids Check Nikker		
		Kids Skirt Top		
02	—	Boys Bermuda	75288	68645850/-
		Kids Skirt Top		
		Kids Check Nikker		
		Mens 67 Bermuda		
		Mens Round Neck Tshirt		
Total			138336	115868802/-

The goods mentioned at serial no.1 & 2 of above table have been recovered during panchnama proceedings dated 03/06/2020 **are deficient in quantity by 1872 pieces** in respect of export invoice number BEH/06/2020 **and both the consignments appears to be grossly overvalued rendering the goods liable for confiscation under Section 113(i)** of Customs Act, 1962 for contravention of Sec.50(2), Sec.75 read with Rule 3 of Customs, Central Excise Drawback Rules, 2017 and Sec.14 of Customs Act, 1962 **are seized under Sec.110 of the Customs Act, 1962.”**

(emphasis supplied)

9. It is against this aforesaid seizure memo dated June 03, 2020 issued by the Superintendent of Customs that the

Respondent-M/s Bushrah Export House, Lucknow, filed an appeal before the Commissioner (Appeals) on June 08, 2020 and made a request that the Appeal should be decided on merits without personal hearing. The Commissioner (Appeals), by order dated June 10, 2020, set aside the seizure memo and allowed the Appeal. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below :

"5. I have gone through the case record. **The consignment was seized on the ground of alleged shortage of 1872 pcs of the goods and overvaluation.** Regarding shortage, it is found that initially one carton was reported missing vide Panchnama dated 30.5.2020. However, when the appellant confronted and protested against the alleged shortage vide their letter dated 31.5.2020, the missing carton reappeared vide Panchnama dated 01.6.2020. It is also evident from record that the impugned consignment was partly examined on 30.5.2020 and partly on 01.6.2020. Thus, the impugned goods remained in the Customs warehouse in the intervening period and there is no affirmation in the Panchnama that proper arrangements were made to prevent unauthorized access to the said goods. **In these circumstances the alleged shortage of 1872 pcs itself is questionable. However, even if the said shortage is accepted, the quantum of shortage is so meagre (1.33%) that it would be ridiculous to believe that the same was intentionally done by the appellant.** In such situations, the CBEC's Customs Manual, vide Para 25 of Chapter 3, provides for amendment of Shipping Bill. The Assistant/Deputy Commissioner of the ICD was competent to permit such amendment.

6. (i) **Regarding allegation of overvaluation, it is found that the declared FOB price was straightaway compared with the local trade opinion which is grossly illegal.** As per section 14 of the said Act, the value of the export goods shall be the transaction value of such goods i.e. the price actually paid or payable for the goods when sold for export from India for delivery at the time and place of exportation. **Thus, the export price is negotiated/ determined in the course of international trade and the same cannot be directly compared with local trade opinion of Kanpur. Rule 3(1) of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 also provides that the value of export goods shall be the transaction value. Further, the transaction value can only be challenged in terms of the said Valuation Rules. It is apparent from the record that**

the declared transaction value has not been challenged in terms of the said Valuation Rules.

(ii) Further, the appellant claims to have purchased the impugned goods under proper GST Invoice where the declared price of goods are in the range of Rs 620/= to Rs 950/= per piece. This value has also been disregarded without any reason.

(iii) Hence, in presence of unchallenged transaction value and unchallenged GST paid purchase invoice value, rushing to the town for the so called "local market opinion" is arbitrary and unreasonable.

7. Hon'ble CESTAT in the case of KANAK METAL INDUSTRIES, reported at 2012 (275) ELT 115 (Tri.-Del) has clearly held that the exporter is not bound to fix FOB value at present market value. This view has been confirmed by Hon'ble Supreme Court, reported at 2013 (293) ELT A25 (SC).

8. Section 110 of the said Act, requires reasonable belief of confiscability, for seizure of any consignment. From the facts and circumstances of the case, the reasonable belief is not formable. Therefore, the impugned order of seizure is not legally sustainable and the same is set aside. The appeal is allowed."

(emphasis supplied)

10. Shri Sunil Kumar, learned Authorized Representative of the Department, made the following submissions to assail the order passed by the Commissioner (Appeals) :-

- (i) The Commissioner (Appeals) committed an illegality in setting aside the seizure memo dated June 03, 2020;
- (ii) The proper officer had reason to believe that the goods were liable to confiscation under section 113(i) of the Customs Act and, therefore, the seizure of goods under section 110(1) of the Customs Act was justified;
- (iii) The Superintendent of Customs had noted in the seizure memo dated June 03, 2020 that the goods recovered were deficient in quantity by 1872 pieces

and both the consignments appeared to be grossly over-valued so as to render them liable for confiscation under section 113(i) of the Customs Act for contravention of sections 50(2), 75 and rule 3 of Customs, and Central Excise Drawback Rules, 2017 and section 14 of the Customs Act;

- (iv) When any goods are seized under section 110(1) of the Customs Act, proceedings can be initiated by issuance of a show cause notice under section 124 of the Customs Act before the goods are confiscated. In the instant case, before such an exercise could be undertaken, the Respondent filed an Appeal before the Commissioner (Appeals) on June 08, 2020, which Appeal was allowed on June 10, 2020, without even giving any opportunity to the Department;
- (v) The goods became prohibited goods as a wrong declaration was made by the Respondent. In support of this contention, reliance has been placed upon the decision of the Supreme Court in **Om Prakash Bhatia vs Commissioner of Customs, Delhi**⁶; and
- (vi) The Commissioner (Appeals) completely misdirected himself in examining, at the stage of seizure, whether the value of the export goods would be the transaction value and whether the provisions of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007⁷ were required to be followed.

6. 2003 (155) ELT 423 (SC)

7. the Export Valuation Rules

11. Shri Vishwajit Singh, learned Counsel appearing for the Respondent supported the order passed by the Commissioner (Appeals) and made the following submissions :

- (i) The exercise of power under section 110(1) of the Customs Act was not justified in the present case as the Customs Officers have not been able to *prima facie* establish that the proper officer had reason to believe that the goods were liable to confiscation under the Customs Act. "Reason to believe" has to be based on the material available on record and cannot be arbitrary, capricious or whimsical. In support of this submission, reliance has been placed on certain decisions, to which reference shall be made at the appropriate stage;
- (ii) The allegation that the consignment appeared to be grossly over-valued, rendering the goods liable to confiscation is not correct. The Respondent had purchased the goods through proper GST invoice, where the declared price of the goods is between Rs. 620/- to Rs. 950/- and the declared price in the shipping bill is between Rs. 700/- to Rs. 1150/-. It cannot, therefore, be said that the consignment was grossly over-valued. The Customs officers have not challenged the transaction value of the goods nor made any effort to verify the GST invoices;
- (iii) The Customs Officers should have accepted the value of the export goods as the transaction value of such goods, as is contemplated under section 14(1) of the Customs Act and the value declared by the Respondent could not have been rejected, except in accordance with the procedure prescribed under

section 14 of the Customs Act and the Export Valuation Rules;

- (iv) In any view of the matter, the determination of the transaction value through a local market survey could have been adopted only as a last resort when the value of the export goods could not be determined under rules 4 and 5 of the Export Valuation Rules;
- (v) The decision of the Supreme Court in **Om Prakash Bhatia** would not be applicable as it was in connection with the interpretation of section 14 of the Customs Act as it stood prior to its amendment on October 10, 2007; and
- (vi) Initially, the Department came out with a case that one carton of the export goods was missing, but later on they came out with a case that 1872 items were missing. Actually, there was no shortage of any items and even assuming without admitting that there was a minor shortage of 1.6%, the exporter could have amended the shipping bills and the remaining items could have been cleared.

12. The submissions advanced by the learned Authorized Representative of the Department and the learned Counsel appearing for the Respondent have been considered.

13. The seizure memo dated June 03, 2020 mentions that in respect of one consignment the goods are deficient by 1872 pieces and that both the consignments appear to be grossly over-valued. The two shipping bills had been filed claiming the benefit of drawback, RoSL and MEIS, which are entirely dependent on the market price of the goods. It is for this reason that the seizure

mentions that the goods have been seized under section 110(1) of the Customs Act as they were liable to confiscation under section 113(i) of the Customs Act for contravention of sections 50(2) and 75 of the Customs Act read with rule 3 of the Customs and Central Excise Duties Drawback Rules, 2017⁸ and section 14 of the Customs Act.

14. Section 110 of the Customs Act deals with seizure of goods, documents and things. Sub-sections (1) and (2) of section 110, which are relevant for the purposes of this appeal, are reproduced below :

“110. Seizure of goods, documents and things –

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

PROVIDED that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1A)	xxx	xxx	xxx
(1B)	xxx	xxx	xxx

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

PROVIDED that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified:

8. Drawback Rules

PROVIDED FURTHER that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply. ”

15. A perusal of sub-section (1) of section 110 of the Customs Act reveals that if the proper officer has **reason to believe** that any goods are liable to confiscation under the Customs Act, he may seize such goods.

16. Section 113 of the Customs Act deals with confiscation of goods attempted to be improperly exported. Section 113(i), which is relevant, is reproduced below :

“113. Confiscation of goods attempted to be improperly exported, etc:

The following export goods shall be liable to confiscation:

- (a) to (h) xxxx xxxx xxxx
- (i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77;”

17. The clearance of exported goods is dealt with in sections 50 and 51 of the Customs Act and the relevant portions are reproduced below :

“50. Entry of goods for exportation —

(1) The exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in such form and manner as may be prescribed:

PROVIDED that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

(3) The exporter who presents a shipping bill or bill of export under this section shall ensure the following, namely:—

- (a) the accuracy and completeness of the information given therein;
- (b) the authenticity and validity of any document supporting it; and
- (c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

51. Clearance of goods for exportation—

(1) Where the proper officer is satisfied that any goods goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation:”

Provided xxx	xxxx	xxx
Provided further	xxxx	xxx
(2) xxx	xxxx	xxx “

18. It would, therefore, be seen from the aforesaid provisions of the Customs Act that the exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer a shipping bill and while presenting the shipping bill, the exporter has to make and subscribe to a declaration as to the truth of its contents. The exporter has also to ensure that the information given therein is accurate and complete. The exporter has also to ensure about the

authenticity and validity of any document supporting it and compliance with the restriction or prohibition, if any, relating to the goods under the Customs Act or under any other law for the time being in force. It is only where the proper officer is satisfied that the goods entered for export are not prohibited goods and the exporter has paid duty, that the proper officer may make an order permitting clearance and loading of the goods for exportation. Section 110(1) of the Customs Act provides that if the proper officer has **reason to believe** that any goods are liable to confiscation under the Customs Act, he may seize such goods. It is section 113 of the Customs Act that deals with confiscation of goods attempted to be improperly exported. Amongst others, it provides that any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under the Customs Act, shall be liable to confiscation.

19. In the present case, the proper officer seized the goods as he had reason to believe that the goods were liable to confiscation under the provisions of the Customs Act for the reason that the goods entered for exportation did not correspond with what was mentioned in the shipping bills. These facts have been stated in the seizure memo dated June 3, 2020. The case of the Department is that the goods had been over- valued as the two shipping bills had been filed claiming the benefit of drawback, ROSL and MEIS. The drawback involved in the two shipping bills, as is clear from the panchnama dated June 3, 2016, is Rs.

29,57,636/- while ROSL involved in the two shipping bills is to the extent of Rs. 41,07,217/-. Further, according to the Department, the goods were deficient in quantity by 1872 pieces and both the consignments appeared to have been grossly overvalued because the value declared by the appellant was in the range of Rs. 749 to Rs.1123 per piece, while the average price arrived at on the basis of opinion of the local dealers ranged from Rs. 32 to Rs. 87 per piece.

20. The Commissioner (Appeals) has set aside the seizure memo dated June 3, 2020 for the following reasons:

- i. The alleged shortage of 1872 pieces is questionable and even if the said shortage is accepted, “the quantum of shortage is so meagre’ (1.33%) that it would be ridiculous to believe that the same was intentionally done by the Appellant”;
- ii. As regards the allegation of overvaluation, the declared price was straightway compared with the local trade opinion, which is contrary to the provisions of section 14(1) of the Customs Act and rule 3(1) of the Export Valuation Rules;
- iii. The transaction value can only be challenged in terms of the Export Valuation Rules. The Department has disregarded the price of the goods purchased under proper GST invoice; and

- iv. The facts and circumstances of the case indicate that 'reasonable belief is not formable'.

21. The contention of learned Authorized Representative of the Department appearing for the appellant is that the facts and circumstances of the case clearly demonstrate that the proper officer had reason to believe that the goods were liable to confiscation and, therefore, the goods were seized. Elaborating this contention learned counsel pointed out that the goods could be confiscated under section 113(i) of the Customs Act as the export goods did not correspond in respect of the value or number with the entry made in the shipping bills. The phrase 'reason to believe' does not mean that confiscation would definitely result under section 113(i) of the Customs Act for that would be determined only when proceedings are initiated under section 124 of the Customs Act after issuance of a show cause notice and a proper opportunity is given to the exporter of making a representation in writing and of being heard in the matter, but the Commissioner (Appeals) completely misunderstood the provisions of section 110(1) of the Customs Act and proceeded to examine the seizure as if it was an order of confiscation under section 113(i) of the Customs Act.

22. Learned Counsel appearing for the respondent, however, submitted that the Department has not shown that a prima facie case existed for exercise of powers under section 110(1) of the Customs Act. The phrase 'reason to believe' means

that even though formation of opinion may be subjective, but it must be based on materials on record and it cannot be arbitrary, capricious or whimsical. Learned Counsel also submitted that the Supreme Court has time and again explained the meaning of the phrase "reason to believe".

23. In **Sheo Nath Singh v/s CIT⁹**, the Supreme Court observed that the belief must be that of an honest and reasonable person based upon reasonable grounds and the officer should act on direct or circumstantial evidence and not on mere suspicion, gossip or rumour. The relevant paragraph is reproduced below –

"10.... There can be no manner of doubt that the words 'reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect though the declaration of sufficiency of the reasons for the belief cannot be investigated by the Court."

(emphasis supplied)

24. In **Tata Chemicals Ltd. v/s Commissioner of Customs (Preventive), Jamnagar¹⁰**, the Supreme Court observed as follows:-

"15. Statutes often use expressions such as "deems it necessary", reason to believe", etc. Suffice it to say that these expressions have been held not to mean the subjective satisfaction of the officer concerned. Such power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with the restraints imposed by law. "

9. (1972) 3 SCC 234

10. (2015) 11 SCC 628

25. In **Worldline Tradex Pvt. Ltd v/s The Commissioner of Customs (Imports) & others¹¹**, the Delhi High Court observed as follows:-

"23. The power of seizure under Section 110 of the Act has to obviously be exercised for valid reasons. The proper officer has to record his reasons to believe that the goods that he proposes to seize are liable to confiscation. **The said reasons for exercise of the power have to be recorded prior to the seizure. In the present case, as already noticed, apart from the *panchnama*, there is no separate order passed under Section 110(1) of the Act by the proper officer recording the reasons to believe that the goods are liable for confiscation.** Since till date no other order exists and no such order has been communicated to the Petitioner, it is not possible to accept the plea of Mr. Agarwala, learned counsel for the DRI, that the 'detention' of the goods by the DRI was with the authority of law and in any event should be treated as a seizure in terms of Section 110(1) of the Act."

(emphasis supplied)

26. The Delhi High Court, in the above mentioned decision, referred to the decision of the Punjab and Haryana High Court rendered in **M/s Om Udyog v/s Union of India and Others¹²**. The Punjab and Haryana High Court observed as follows:-

"10. We called upon learned counsel for the respondents to show the provision of law under which the goods were detained. **It is not the case of the respondents in the reply or otherwise that power of seizure had been invoked as formation of satisfaction under Section 110 of the Act, which is condition precedent for exercise of such power, has not been shown.** As held in *Mapsas Tapes*, exercise of power of seizure requires recording of reasons before exercise of such power. Only question is whether detention could be justified pending clearance under Chapter VII of the Act. Section 47 of the Act provides for clearance of goods on payment of duty, unless goods are prohibited goods. **It is not the case of the respondents that goods are prohibited goods.** It is also not their case that duty assessed under section 17 or 18 has not been paid. **In such a situation, non clearance of goods may be justified for minimum period required for assessment. In no case, non clearance of goods for months can be justified.** Non clearance seriously affects rights of lawful importer and fair

11. (2016) 340 ELT 174 (Delhi High Court)

12. 2010 (254) ELT 547 (Punjab and Haryana High Court)

procedure being constitutional mandate, no authority can plead unlimited power of non clearance for its own incompetence as a justification beyond reasonable period. Learned counsel for the respondents submitted that the petitioners could get the goods released on furnishing requisite bond under Section 110A of the Act. This contention is misconceived as Section 110A applies only when seizure is effected under Section 110.

11. **We are of the view that while officers of Custom Department may have justification to verify whether goods were prohibited or were otherwise liable to confiscation or to assess and recover duty, they are not immune from accountability against abuse of power by detaining goods for indefinite period on the ground that they were in the process of checking the value or nature of goods.** They are under legal obligation to do so promptly and if by reason of their incompetence they are unable to do so, detention of goods beyond reasonable time cannot be allowed."

(emphasis supplied)

27. None of these decisions, which have been relied upon by the learned counsel for the Respondent, advance the case of the Respondent.

28. The power of seizure, as was held in **Tata Chemicals**, has to be exercised in accordance with the restraints imposed by the law and as held in **Sheo Nath Singh**, it can be exercised on the basis of direct or circumstantial evidence and not on mere suspicion. In **Worldline Trade**, the Delhi High Court found that apart from the panchnama there was no separate order passed under section 110(1) of the Customs Act by the proper officer recording a reason that the goods were liable to confiscation. The contention of the Department that mere 'detention' of goods should be treated as the seizure in terms of 110(1) of the Customs Act was not accepted by the High Court. In **Om Udyog**, the Punjab and Haryana High Court found that it was not the case of the Department that the goods were prohibited goods and so

non-clearance of the goods may be justified for a minimum period required for assessment. The High Court, therefore, held that while the officers of the Customs Department may be justified in verifying whether goods were prohibited or not or were otherwise liable to confiscation, but they are not immune from accountability against abuse of powers by detaining the goods for an indefinite period on the ground that they were in the process of checking the value or nature of the goods.

29. In the instant case, as noted above, the shipping bills are dated May 23, 2020. The panchnama recovery memo dated June 3, 2020 refers to the earlier panchnama proceedings June 1, 2020, wherein a shortage of 1872 pieces was detected and samples of the export product were also taken for conducting a market enquiry and obtaining opinion of traders/ dealers of such type of garments. There is no illegality in conducting a local market survey to gather the valuation of the goods for the purpose of exercising power under section 110(1) of the Customs Act. The panchnama proceedings dated June 3, 2020 record that there was a shortage of 1872 pieces and the export goods were also grossly overvalued. The value declared and the average price arrived at on the basis of the opinion of the three dealers were also indicated in the panchnama. There is on record a separate inventory cum seizure memo dated June 3, 2020 bearing case number 01/2020-21, which contains the inventory of the goods seized and also gives reasons for seizure of the goods.

30. Once the officer had detected shortage of export goods and the market survey revealed that the goods were grossly overvalued, it cannot be said that the proper officer did not have 'reason to believe' that the goods were liable to confiscation under the provisions of section 113(i) of the Customs Act. Whether they are actually confiscated or not is a matter that can be determined only in accordance with the procedure prescribed under section 124 of the Customs Act by issuing a show cause notice to the exporter and also giving him a reasonable opportunity of making a representation in writing. All that was required to be considered for exercising power under section 110 (1) of the Customs Act was whether there was a **reason to believe** that the goods are liable to confiscation.

31. Learned counsel for the Respondent submitted that the allegation in the seizure memo about overvaluation of the goods in the shipping bills is not correct. In this connection learned counsel referred to the provisions of section 14 of the Customs Act as also the Export Valuation Rules. According to the learned counsel, the value of the exports goods should have been treated as the transaction value since the export price is negotiated /determined in the course of international trade and the same cannot be compared with the local trade opinion of the market. Learned Counsel pointed out that the seizure memo records that the consignment appeared to be grossly overvalued but this is merely on the basis of the market value of the goods in the local market. This inference is not correct, more particularly

when the goods were purchased by the exporter under proper GST invoice. In this connection, the provisions of rule 3(1) of the Export Valuation Rules have also been referred to.

32. The Commissioner (Appeals) had also concluded that the proper officer straightway compared the declared price with the local trade opinion, which was illegal. The Commissioner (Appeals) also observed that the transaction value can be challenged only in accordance with the Export Valuation Rules but the procedure prescribed therein had not been followed.

33. The issue that arises for consideration is at what stage the provisions of section 14 of the Customs Act and the provisions of rule 3 of the Export Valuation Rules have to be applied. Section 110(1) of the Customs Act empowers the proper officer to seize the goods if he has reason to believe that goods are liable to confiscation. As noticed above, the goods attempted to be improperly exported are confiscated under section 113 of the Customs Act after providing an opportunity as contemplated under section 124 of the Customs Act. It is at that stage that it is determined whether the goods entered for exportation actually correspond in respect of value or in any material particular with the entry made in the shipping bill. The Commissioner (Appeals) completely failed to appreciate the provisions of section 110(1) of the Customs Act and proceeded to examine the matter as if he was examining an order of confiscation under section 113(i) of the Customs Act and not an order of seizure of goods under section

110(1) of the Customs Act, where the proper officer should only have reason to believe that the goods are liable to confiscation.

34. Thus, for both the issues relating to the valuation of the goods or shortage of 1872 pieces mentioned in the seizure memo, the exporter will get ample opportunity to put forth his case when proceedings are initiated under section 124 of the Customs Act and it is neither possible nor permissible at the stage of seizure to determine this issue.

35. The Commissioner (Appeals) therefore, committed an error in setting aside the seizure memo as a result of which the Appeal filed by the exporter was allowed.

36. It also needs to be noticed that the Appeal was filed by the exporter before the Commissioner (Appeals) on June 08, 2010 and the Appeal was allowed by the Commissioner (Appeals) on June 10, 2010. The issue as to whether the Department was required to be heard when an Appeal is filed by any person aggrieved by any decision or order passed under the Customs Act by an officer of Customs lower in rank than a Principal Commissioner or Commissioner of Customs has not been addressed in this decision for the reason that both the parties made elaborate arguments on merits. The issue as to whether an Appeal could have been filed under section 128 of the Customs Act when there was a remedy available to the exporter for provisional release of goods under 110(A) of the Customs Act has also not been examined.

37. Thus, for all the reasons stated above, the order dated June 10, 2020 passed by the Commissioner (Appeals) is set aside and the Appeal is allowed.

[Order pronounced on November 10, 2020]

(JUSTICE DILIP GUPTA)
PRESIDENT

(C L MAHAR)
MEMBER (TECHNICAL)

Rekha