CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85048 OF 2023

[Arising out of Order-in-Original No: C.No.VIII(Cus)25-67/SIIB/AC/2022/5751 dated 11th January 2023 passed by the Commissioner of Customs, Nagpur.]

Excellent Betelnut Products Pvt Ltd
Shop No.13, Platinum Commercial Premises CHS Ltd
C/o Shah Premchand Damji & Co, Praful Jyoti, Road No. 7,
Jawahar Lane, Ghatkopar (E), Mumbai - 400077 … ***Appellant***

versus

Commissioner of Customs
GST Bhavan, Telangkhedi Road, Civil Lines
Nagpur - 440001 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the appellant

Shri S B Hatangadi, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A / 85880 /2023

DATE OF HEARING:	02/03/2023
DATE OF DECISION:	10/05/2023

PER: C J MATHEW

In countering the claim of M/s Excellent Betelnut Products Pvt Ltd for relief against order[1] of Commissioner of Customs, Nagpur

[1] [order dated 11th January 2023 in C No. VIII(Cus)25-67/SIIB/AC/2022]

rejecting their request for provisional release of seized goods under section 110A of Customs Act, 1962, it is not the submission of Learned Authorised Representative that the Tribunal does not have jurisdiction to sit in judgement over a decision of the competent authority insofar as 'provisional release' is concerned. That, it appears, is no longer a sore point with customs authorities and, not surprisingly, in the light of the decisions that have been handed down ever since the insertion in Customs Act, 1962, with effect from 13th July 2006 in accordance with Taxation Laws (Amendment), Act, 2006, generated controversies over its implementation. Some of these decisions, and including those after the impugned provision had been amended by Finance Act, 2011 to substitute ‘adjudicating authority' therein for ‘Commissioner of Customs’ with effect from 8th April 2011, claimed initially as legislative intent to disconnect the exercise of that authority from jurisdictional oversight of the appellate hierarchy, recited in order[2] of the Tribunal, arising from rejection of application for provisional release by order[3] of the adjudicating authority, may have dissuaded from such urging on this occasion even as the saga of insistence on retaining possession of seized goods, by recourse to one ground or other, continues.

2. Neither is there a suggestion that the restrictive prescription in the Foreign Trade Policy, intended for controlling imports of

[2] [final order no. A/85594-85595/2022 dated 23rd June 2022]
[3] [order no. CA CC-PVNSB/04/2023 Adj (I) ACC dated 23rd May 2022]

'arecanuts' of heading 8002 of First Schedule to Customs Tariff Act, 1975, had been attempted to be overcome by claiming coverage of tariff item 2106 90 30 of the First Schedule to Customs Tariff Act, 1975 warranting seizure under section 110 of Customs Act, 1962 which, from ruling of Authority for Advance Rulings (Central Excise, Customs & Service Tax), on application[4] of the appellant herein under section 28-I of Customs Act, 1962, in order[5], could no longer offer shelter for continued denial of access of appellant to goods imported by them - that being the intent, and articulated unapologetically so, in refusal to entertain the request to exercise authority vested by

> *'110A. Provisional release of goods, documents and things seized pending adjudication.- Any goods, documents and things seized under section 110 may, pending the order of adjudicating officer, 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.'*

in Customs Act, 1962. However, the respondent-Commissioner has sought to charge breach of restriction on import in Foreign Trade Policy intended for the precursor produce plucked from the palm, by sleight of insinuation despite

> *'5……that the distinction between the two – 'areca nuts' and 'betel nuts' -, resting precariously on a thin edge, was, undoubtedly, responsible for adversarial stances that manifested initially as the controversy with the advantage of*

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[4] [AAR/44/Cus/21/2014]
[5] [AAR/Cus/08/2015 dated 7th August 2015]

> *prior classification favoring the importer that could be neutralized only by investigation establishing that the impugned goods varied from thar for which advance ruling, binding on both sides, had been issued….'*

in order[6] of the Tribunal, on the occasion of earlier dispute of the same appellant on the same goods over order[7] of the Principal Commissioner of Customs, Nagpur refusing to allow provisional release, took note of absence of any inclination to re-classify the goods in much the same way as the goods impugned here.

3. This time, the respondent-Commissioner has arrogated responsibility for public health and safety of persons who, unsuspectingly, may be made to ingest 'betel nuts' unfit for human consumption should the goods ever be allowed to be cleared from customs charge and that is the justification held out before us by Learned Authorised Representative for the impugned order; impliedly, we would be doing disservice to public interest should we not concur with that outcome. We, too, are conscious of our obligations to ensure these grand purposes are achieved through the instruments designed in legislation, leaving us with no option but to approach the present dispute in terms of the authority vested in Commissioner of Customs to direct, and in accordance with section 110A of Customs Act, 1962, withholding of access by owner to the goods.

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[6] [final order no. A/85233/2022 dated 29th March 2022 in customs appeal no. 85127 of 2022]
[7] [order no. VIII (Cus)25-169/SIIB/Betelnut Borkhedi/2021 dated 30th December 2021]

4. The factual matrix is undisputed: the goods, *viz*., 270 metric tons of 'API supari', imported from Indonesia in ten containers and sought to be cleared at ICD, Mihan against bill of entry no. 3060179/28.10.2022, were seized under section 110 of Customs Act, 1962 and the importer had, pending adjudication, requested the goods to be released to them. Report of test carried out by the customs laboratory at New Custom House, Mumbai on samples drawn therefrom was furnished to Superintendent of Customs (SIIB), Nagpur by communication dated 16th November 2022 along with remnant of the samples; according to the appellant, customs authorities, by letter dated 29th November 2022, suggested that the customs laboratory furnish additional details in response to the several parameters contained in the reference letter of 14th November 2022 and, apparently, by letter dated 2nd December 2022, the said laboratory intimated that the samples would need to be forwarded to FSSAI-approved or other government-approved laboratory while reporting that the samples had tested negative for presence of starch. That customs authorities had had tests conducted at two laboratories, *viz.*, the customs laboratory reporting outcome in communication of 16th November 2022 and by M/s Anacon Laboratories Pvt Ltd, Nagpur, an FSSAI-accredited laboratory, reporting result on 24th November 2022 that was brought to the notice of the appellant only from letter dated 5th December 2022 of Superintendent of Customs. According to the

appellant, the second communication, reporting absence of starch by the customs laboratory, that was withheld from them lacked several parameters, except moisture content and damage to, and pest infestation of, the nuts, that were reported on and contrarily to that of the accredited laboratory certifying that the samples, containing starch, were found to be boiled and fit for human consumption in compliance with FSSAI guidelines. It would appear that in the same letter, the appellant was informed of opportunity to seek retest at designated referral laboratory to which they responded, on 12th December 2022, seeking release of the imported goods on the basis of the report of the accredited laboratory which, according to them, was to be relied upon as *per* instruction no. 1/2020-Cus dated 12th February 2020 of Central Board of Indirect Taxes & Customs (CBIC).

5. Prompted by the seeming futility of this protracted correspondence, the appellant approached the Hon'ble High Court of Bombay in writ proceedings that culminated in order dated 22nd December 2022 directing the petition to be treated as an application under section 110A of Customs Act, 1962 for disposal by the respondent-Commissioner. Thereupon, by letter dated 30th December 2022, the appellant herein was given an opportunity for presenting their case before the Commissioner of Customs, Nagpur and also placing them on notice that the remnant samples sent to the Central Revenue Control Laboratory, New Delhi, the referral lab designated

by Central Board of Indirect Taxes & Customs (CBIC) in circular no 46/2020-Cus dated 15th October 2020, had elicited report dated 21st December 2022 concluding that the moisture content, absence of starch and damage to nuts by mould and insects had rendered the goods under seizure to be unfit for human consumption and potentially hazardous to public health and public interest.

6. By the impugned order, Commissioner of Customs, Nagpur, taking note of the prohibition in section 25 of Food Safety and Standards Act, 2006 as applying to the goods reported upon by the customs laboratory at New Delhi and of the revision, *vide* notification no. 20/2015-2020 dated 25th July 2018 of Director General of Foreign Trade (DGFT), of policy condition, in relation to goods falling under heading 0802, from ‘free’ to ‘prohibited’ to the extent that CIF value was less than ₹ 251 per kilogram that squarely applied to the impugned consignment with declared value of ₹ 105 per kilogram, declined to consider the relief sought in the writ petition that, by order of Hon’ble High Court of Bombay, was converted into request under section 110A of Customs Act, 1962.

7. There is no allegation, as yet, in the records made available to us that the declarations, of rate of duty or of value, in the bill of entry being incorrect warranted visit by ‘proper officer’ for re-computation in assessment of duties of customs. It is also not the case of the

customs authorities that the import of the goods was in breach of any restriction in, or any provision of, Customs Act, 1962 for which section 47 of Customs Act, 1962, empowering clearance for home consumption only on satisfaction of not being prohibited, would have sufficed for retention besides empowering confiscation under section 111 of Customs Act. 1962. The trigger for seizure under section 110 of Customs Act, 1962, and, thereby, circumstancing 'provisional release' under section 110A of Customs Act, 1962, is section 111 of Customs Act, 1962 which, undoubtedly, is not restricted to offence under Customs Act,1962 but extends to any other law for the time being in force. In the present instance, it is, admittedly, not the former that was cause of seizure which answer then begs the question of the law breached by this particular consignment and the gravity of breach thereof which, at this interim stage of interposing by seizure under section 110 of Customs Act, 1962 and preceding definitive conclusion afforded by adjudication, sufficed for empowering stoppage of impugned goods from reaching the intended market.

8. This is where we face the first of the difficulties in fitment within the customs law – a law that, in section 3, establishes a supervisory hierarchy but, at the same time, sequesters quasi-judicial decision-making from influence of hierarchical domination or premature determination. The 'proper officer' for assessment under section 17, or section 18, and 'proper officer' for 'out of charge' under

section 47 of Customs Act, 1962 are yet to apply their quasi-judicial authority insofar as the impugned goods are concerned which, itself, may not be overly alarming as empowerment, under section 5 of Customs Act, 1962, could be invoked for the Commissioner to function as ‘proper officer’ for these purposes. Notwithstanding the legality thereof, the subsequent discharge of these powers, consequent upon show cause notice for visiting any detriment, cannot but be influenced by the decision not to allow ‘provisional release’ envisaged in section 110A of Customs Act, 1962. More so, as such withholding is premised on legal ineligibility from some purported prohibition in other law in force and not attributed to pendency owing to investigation into valuation or classification. On the presumption that enactment of law proceeds from validly conferred authority and bears no inconsistency with existing legislation, unless deliberately intended so to create exception, the intent of inserting section 110A of Customs Act, 1962 could not have been designed to empower Commissioner of Customs to determine prohibition definitively enough at this stage of tentatively reasonable belief of possible detriment of section 111 of Customs Act, 1962 and, thereby, prejudice the judicious discharge of adjudicatory disposal of notice to be issued under section 124 of Customs Act, 1962. Therefore, it would appear to us that empowerment under section 110A of Customs Act, 1962 is limited to determination of the bond and surety values to be secured as *quid pro quo* and that, in the event of goods being prohibited, such conclusion at this stage is justified, and demonstrated, only by show cause notice under section 124 of Customs Act, 1962 setting adjudication process underway to preclude ‘provisional release’ of seized goods. To put it simply, the conclusion of impossibility of ‘provisional release’ is a conclusion of ‘confiscation that repudiates redemption’ owing to operation of prohibition in law which, in the absence of adjudicatory determination of show cause notice, is inconsistent with law.

9. According to Learned Counsel for the appellant, the impropriety of placing reliance on test reports furnished by the customs laboratories at Mumbai and Delhi despite the preeminence accorded to FSSAI-accredited laboratories in instructions of Central Board of Indirect Taxes & Customs (CBIC) exacerbated by the glossing over of the admitted lack of wherewithal to undertake required tests on food products evidenced in the report of the officials of the laboratory at Mumbai, and by other apparent discrepancies, suffices for conclusive acceptance of the report of M/s Anacon Laboratories Pvt Ltd. He also contended that ‘prohibition’ intended by the public notice of the Director General of Foreign Trade (DGFT) was not germane to the impugned goods inasmuch as the proper classification thereto had already been determined by a competent authority which the respondent-Commissioner could disregard only by stepping outside the framework

of law and judicial discipline. To that end, he pointed out none of the customs jurisdictions through which imports had been effected after the determination by the Authority for Advance Rulings Authority referred *supra* contemplated outright disobedience therefrom as the respondent-Commissioner now did. It was also submitted by him that, as determined by the Tribunal on the former occasion of dispute, the impugned goods should also be permitted to be released on furnishing of bond without any further surety.

10. According to Learned Authorized Representative, the laboratory at New Delhi is also notified by the FSSAI and the resolution of the diverging views, emanating from the tests conducted by the customs laboratory at Mumbai as well as M/s Anacon Laboratories Pvt Ltd, by the report relied upon in the impugned order is entirely proper and valid. He submitted that the two prohibitions that prompted the refusal to grant ‘provisional release’ should guide the Tribunal and that the report of the customs laboratory at Delhi, binding on the department, may be overlooked only to the detriment of public health. This, in our view, is irresponsible argument; while seeking approbation of the report of the Delhi laboratory by touting as FSSAI-approved, the lack of validity of tests undertaken by the Mumbai laboratory is impliedly admitted and, yet, the divergence of that test with that of another FSSAI-approved laboratory is touted as justification for reference to the Delhi laboratory which, from the

communication of 5th December 2022, appears to be for appellate recourse. Oddly, customs authorities resorted to this remedy reserved for those who have a stake in a final outcome though stake of customs authorities in non-revenue disputation is mighty strange indeed.

11. In the light of the impassioned plea of Learned Authorized Representative, we have thoroughly scoured Customs Act, 1962 - conferring jurisdiction upon us and, presumably, upon the respondent-Commissioner - and our eyes were unable to alight upon injury to public health as source of authority to alienate owner of the goods from possession thereto; all that we could find is contained in section 111 of Customs Act, 1962 which, as noted *supra*, is warranted only upon breach of prohibition imposed by Customs Act, 1962 or any other law for the time being in force. That no obligation imposed under Customs Act, 1962 has been breached is abundantly clear from the impugned order which has rested the refusal only on prohibitions under other laws. It, therefore, behoves us to dwell on the claim by customs authorities to be responsible for, and thereby empowered by, any and every law in force to the extent that it can be brought to bear, directly or by contrivance, upon goods brought into a customs area. An officer created by statute is, necessarily, limited by the ambit of the statute and customs officers created by section 3 of Customs Act, 1962 are, necessarily, confined to the purpose for which such legislation was enacted, *viz.*, import and export of goods. Consequently, the responsibility for, or

authority to enforce, 'any other law for the time being in force' would be contingent upon such law placing some prohibition on imports or exports; even such laws do not concede jurisdictional authority to customs officers except by, and only upon, specific conferment within such statutes. In the absence of such empowerment, not only would chaos result but ever present is potential for overreach should those lacking sufficient expertise in administering such special laws misappropriate authority to enforce. The distinction between enforcing the law and enforcing compliance with the law is not so subtle as not to appeal to reasonableness.

12. Such 'other laws' may, except in accordance with the provisions therein, prohibit import or export of goods or may merely prohibit persons subject to that law from importing or exporting. As Customs Act, 1962 is concerned with goods, laws of the former sort may justify direct intervention by customs authorities on finding that goods have breached prohibitions in force. However, special enactments that prohibit those subject to it from breaching obligations domestically also extending those obligations in cross-border transactions do not, except by specific conferment, enable jurisdiction of customs authorities to take recourse thereto. The recourse to

'25. All imports of articles of food to be subject to this Act.–

(1) No person shall import into India–

> *(i) any unsafe or misbranded or sub-standard food or food containing extraneous matter;*
>
> *(ii) any article of food for the import of which a licence is required under any Act or rules or regulations, except in accordance with the conditions of the licence; and*
>
> *(iii) any article of food in contravention of any other provision of this Act or of any rule or regulation made thereunder or any other Act. ….'*

of Food Safety and Standards Act, 2006 which, in relation to food, places restrictions on persons does not bring them under the jurisdiction of customs officers except on a finding by the designated officer that the said provision has been breached in the course of imports. The consequence of breach of the said obligation under the said statute, which does not empower customs authorities for any purpose whatsoever, is prosecution and action, including disposal thereof, that may be visited on goods, offending under the Food Safety and Standards Act, 2006, is laid out in rules and regulations framed thereunder; confiscation under Customs Act, 1962, with resultant vesting of the confiscated goods in the Central Government, would be at odds with the consequences intended by Food Safety and Standards Act, 2006. The entire regime for filtration of articles of food, including testing by FSSAI-credited laboratories and reference to FSSAI before clearance thereof, on import is founded upon this distinction in authority to invoke the framework of such legislation and, more especially, involving specialized knowledge. Customs authorities are bound by the sanction and approval accorded, under the aegis of Food Safety and Standards Act, 2006, by the designated authority therein as the sole determinant for invoking section 111 of Customs Act, 1962 insofar as articles of food are concerned. An independent ascertainment of fitness for human consumption, without reference to the statutory authority envisaged for the enforcement of Food Safety and Standards Act, 2006, is not in public interest and invocation of public health, no matter how convenient it may be for retention of goods, is no substitute for legal jurisdiction. We draw this conclusion from section 39 of Food Safety and Standards Act, 2006 which also places designated authorities under statutory accountability for wrongful action and the lack of coverage of customs officers from such accountability, with the potential of overreach, should exclude autonomous determination. The designated authority under the Food Safety and Standards Act, 2006, as the proper enforcement agency, can always be relied upon by customs authorities for binding advice on public health interest.

13. It is not from an academic point of view that we consider it necessary to examine ‘any other law for the time being in force’ for invoking of section 111 of Customs Act, 1962 but from the evident overreach by the respondent-Commissioner, in disregarding the binding nature of classification determined by the Authority for Advance Rulings to invoke ‘prohibition’ under Foreign Trade (Development & Regulation) Act, 1992 intended for imported goods

covered by an entirely different classification, that, in the nature of things, may be addictive. The integration of the Harmonised System of Nomenclature (HSN) for enforcement of fiscal and trade policies at the point of import has been in place for too long a time to accord benefit of doubt to the respondent-Commissioner as proceeding from lack of familiarity in seeking to transpose classification-determined consequence without touching upon misdeclaration of material particular, enunciated in section 111 (m) of Customs Act, 1962, as prompting seizure or pending for investigation to foreclose 'provisional release' under section 110A of Customs Act, 1962. Even if that were so, the decision[8] of the Tribunal in the dispute of this very appellant, *viz.*, *Excellent Betelnut Products Private Ltd v. Principal Commissioner of Customs* holding that

> *'20. This is a classification dispute and, being a classification dispute, denial of provisional release would be disproportionate determinant. The appellant is a regular importer and differential duty, if any, arising upon conclusion of proceedings should be recoverable without difficulty. Breach of policy prohibition, should that be determined, is also rectifiable for such is the authority to relax vested in the Director General of Foreign Trade and, hence, not warranting denial of provisional release….'*

is no less applicable to the facts before us.

14. The 'prohibition' in the notification cited in the impugned order

[8] [final order no. A/85472/2022 dated 11th May 2022 in customs appeal no. 85127 of 2022]

cannot be made applicable to the impugned goods except by invoking provisions of Customs Act, 1962 attracting consequence of mis-classification; there is no whiff of such intent. The conclusion that the impugned goods are 'unfit for human consumption' is beyond the scope of jurisdiction conferred by Customs Act, 1962 on the respondent-Commissioner in the absence of determination by the designated authority under the Food Safety and Standards Act, 2006 whose actions are validated by the circumscribing responsibility devolving on such authority - a validation that no customs authority can lay claim to. The grounds evinced for discarding the request for 'provisional release' under section 110A of Customs Act, 1962 are not legally tenable.

15. It may also be inferred that provisional release is a facilitative measure. 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 implied continuation of 'unilateral' deprivation of custody till conclusion of adjudication to that of reverting custody by statutory recourse can only be described as facilitating. Undoubtedly, it was intended to

benefit the importer but not to the disadvantage of 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 access. 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.

16. A harmonious construction of chapter XIII and chapter XIV of Customs Act, 1962 can lead to no other conclusion than to infer the intent of the amendment as not for provisioning but to substitute whimsicality with uniformity. Approval of withholding of ‘provisional release’ except in circumstances of justification that it is not mere reasonable belief that has prompted so but that there are

reasons to believe that goods are ‘prohibited’ would only weaponize whimsicality that the enactment intended to eliminate.

17. In these circumstances, the past offers no expectation that the respondent-Commissioner would be sensible to the limits of the legal authority conferred by Customs Act, 1962 or that our elaboration *supra* would persuade, not only about the extent of our appellate oversight over exercise of quasi-judicial powers, but also of the limits of the statutory authority vested in the Commissioner.

18. At this stage, we do not propose to intervene in the seizure under section 110 of Customs Act, 1962 and restrict ourselves to the remit of the Hon’ble High Court of Bombay to consider ‘provisional release’ under section 110A of Customs Act, 1962. We, therefore, direct that the impugned goods be ‘provisionally released’ on furnishing of bond to the extent of value of the goods and subject to the procedural safeguards implicit in section 47 of Customs Act, 1962 within ten days of receipt of this order.

19. Appeal is, accordingly, disposed off.

(Order pronounced in the open court on 10/05/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*