
(2022) 01 CESTAT CK 0002

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 50253 Of 2021

M/s Pushpak Lakhani

APPELLANT

Vs

The Commissioner Of Customs (Preventive) ? New Delhi

RESPONDENT

Date of Decision : 03-01-2022

Acts Referred:

Customs Act, 1962 — Section 28(6)(ii), 28(5), 46, 108, 110, 110A, 110(d), 110(2), 111(d), 123, 124, 125(1), 128A(1), 129B(1), 130, 132, 135, 138B, 138B(1)(a)
Central Excise Act, 1944 — Section 9D, 9D(1)
Indian Evidence Act, 1872 — Section 138

Citation : (2022) 01 CESTAT CK 0002

Hon'ble Judges : Delip Gupta, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Pushpak Lakhani, the appellant has filed this appeal to assail the order dated 11.09.2020 passed by the Principal Commissioner Customs (Preventive), the Principal Commissioner, by which the request for provisional release of the seized goods covered under the show cause notice dated 28.10.2013 has been rejected.

2. The aforesaid order was passed by the Principal Commissioner on the application filed by the appellant pursuant to the directions issued by the Delhi High Court on 25.08.2020 in Writ Petition No.4566 of 2020 filed by the appellant. The portion of the said order of the High Court relevant for the purpose of this appeal is reproduced below:

"3. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, it appears that high end wrist watches have been seized and lying with the respondent No.2/DRI since 29th October, 2012.

4. Respondent No.1 had issued a show-cause notice dated 28.10.2013, which is at Annexure P-9 to the memo of this writ petition. However, the show-cause notice was not adjudicated upon by the respondents for several months.

5. Learned Senior Counsel appearing for the petitioner has submitted that they are ready and willing to deposit the duty under protest. As per the show-cause notice issued by the respondent No.1, the duty amount mentioned is Rs.52,19,582/-. Out of this amount, Rs:27,50,669/- has already been deposited by the petitioner during the course of investigation.

6. Thus, petitioner has shown the readiness and willingness to deposit the remaining amount of Rs.24,68,913/- for the provisional release of the high end wrist watches, without prejudice to his rights and contentions in the adjudication process of the show-cause notice.

7. Learned Senior Counsel appearing for the petitioner submitted that along with high end wrist watches, gold ornaments i.e. stridhan/personal jewellery has also been seized by the respondent No.2. Similarly, cash of Rs.59 lakhs has also been seized by the respondent No.2. All these items may be provisionally released, subject to payment of the duty as stated hereinabove, which are now in custody of respondent No.1.

8. Learned Senior Counsel appearing for the petitioner has further submitted that several orders have been passed in favour of other parties, including by the Hon'ble Supreme Court, for release of the high end wrist watches. Learned Senior Counsel appearing for the petitioner submitted that in the case of Pankaj Lakhani, an order was passed for release of the wrist watches which is at 'Annexure P-3 (colly)'. Another such order is annexed at 'Annexure P-18' to the memo of this writ petition for Johnson & Johnson. The wrist watches released by the respondent No.1 are 3356 in number. Learned Senior Counsel appearing for the petitioner has further submitted that one more order for the release of high end wrist watches has been passed in the case of Purushottam Jajodia which is at 'Annexure P-16'.

9. Thus, it is submitted by the counsel for the petitioner that irrespective of the fact that whether the goods are notified or not under section 123 of the Customs Act, 1962, consistently the respondent No.1, is high end wrist watches as stated hereinabove, and that the case of the petitioner is in no circumstance different from the cases of Johnson & Johnson, Pankaj Lakhani and the case of Purushottam Jajodia.

10. Learned Sr. Standing Counsel appearing for respondent No.1 submitted that a fresh application be moved by the petitioner for provisional release of the goods stating that the petitioner is willing to deposit the balance amount of the duty demanded, and the same would be decided by the respondent authorities.

11. Looking to the above submission and the readiness shown by the petitioner to make the payment of remaining duty as stated hereinabove, and also looking to the orders which are at Annexure P-3, P-16 and P-18, and also keeping in mind the judgment and order dated 01.06.2020 passed by the Division Bench of this Court in CUSAA 229/2019, we hereby direct the respondent No.1 to decide the application for the provisional release of the goods, in accordance with law.

The petitioner shall prefer application for provisional release of goods within a period of one week from today. The respondent No.1' shall decide the provisional release application preferred by the petitioner under Section 110-A of the Customs Act, 1962 within a period of two weeks from the date of the receipt of the provisional release application from the petitioner.

12. With these observations, this writ petition is hereby disposed of."

(emphasis supplied)

3. The Principal Commissioner rejected the aforesaid application by order dated 11.09.2020 and the relevant portion of the order is reproduced below:

"20. From the language of Section 110A of the Customs Act, 1962, I find that it is apparent that the Adjudicating Authority has been bestowed with discretionary mandate decide to the application for provisional release on merit based on the facts of the Case that could be different from Case to Case as has been held by the Hon'ble Courts in the judgments as detailed below.

25. I observe that the discharge of liability of Duty, Interest and Penalty in a Case is the legal obligation on the part of Concerned Noticee. However, I hold that the offer by the said Applicant Shri Pushpak Lakhani to deposit the balance amount of Duty (Under-Protest) as a pre-condition to solicit a favourable Order for Provisional release of said Seized Goods as covered under Show Cause Notice dated 28.10.2013 is legally not sustainable in as much as the proceeding under Section 110A of the Customs Act, 1962 is discretionary at the hand of Adjudicating Authority. I observe that in a proceeding under Section 110A of the Customs Act, 1962, the Adjudicating Authority has to apply judiciously his discretionary authority vested upon him to decide the issue of Provisional release of seized Goods considering holistically of all the facts on record and keeping in view the impact thereof on the entire Case as a whole in the interest of justice and fair play. As noted above, adjudication in the case of Show Cause Notice No. 58/2017 dated 27.10.2017 has been completed and the applicant has been held liable to penalty, recovery of which is pending as on date.

31. I find that the fact of the Case under said Show Cause Notice dated 28.10.2013 are identical to that part of the Case of M/s. Its Name Pvt. Ltd. where Hon'ble High Court of Delhi under Para 87(ii) of their said Order dated 01.06.2020 did not allow provisional release of such seized Goods that were found without valid/licit documents in as much as said seized Goods as covered under Show Cause Notice dated 28.10.2013 were also found without any valid/licit import documents.

37. However, on perusal of the facts of the Case and above mentioned Judicial

verdicts I hold that the said representation dated 31.08.2020 filed by said Shri Pushpak Lakhani for provisional release of said seized Goods as covered under Said Show Cause Notice dated 28.10.2013 can also be rejected on merits of the Case in as much as (i) the said seized Goods as covered under Show Cause Notice dated 28.10.2013 are the significant evidence in the prosecution proceeding under Sections 132 and 135 of the Customs Act, 1962, (ii) said seized Goods are under the scope of Prohibited Goods' liable for confiscation under Section 111(d) of the Customs Act, 1962, (iii) on the analogy of ratio of Order dated 01.06.2020 of Hon'ble High Court of Delhi in the Case 'Its My Name Pvt. Ltd.' Supra [wherein Hon'ble Court did not allow provisional release of such seized Goods that were recovered without valid/licit documents] with the instant Case as said seized Goods as covered under Show Cause Notice dated 28.10.2013 were also recovered without any valid/licit documents and (iv) several other facts and judicial inferences as discussed in the preceding paras.

38. In view of the above facts and judicial verdicts I am of considered opinion that the request of provisional release of seized Goods as covered under said Show Cause Notice dated 28.10.2013 as made by said Shri Pushpak Lakhani(Noticee to the said Show Cause Notice dated 28.10.2013), C/o Sh. Mukesh Bellani, R/o F-82, Kirti Nagar, New Delhi-110015 vide his above said representation dated 31.08.2020 is legally not sustainable on grounds as discussed in the preceding paras and therefore, I reject the said request of said Shri Pushpal Lakhani for provisional release of said seized Goods as covered under said Show Cause Notice dated 28.10.2013."

(emphasis supplied)

4. It would be useful, before noticing the submissions advanced by Shri Tarun Gulati learned senior counsel assisted by Shri Sumit K. Batra appearing for the appellant and Shri Rakesh Kumar learned authorized representative appearing for the Department, to take notice of some essential facts.

5. On 29.10.2012, a search was carried out at the residential premises of the employees of M/s Johnson Watch Co. Pvt. Ltd., namely, Pushpak Lakhani (the Appellant), Ms. Shikha Pahwa (Store Manager), Mr. Pankaj Lakhani and Mr. Purushottam Jajodia. A Panchnama dated 29.10.2012, was prepared. The details of the recovery of high-end wrist watches and cash is as follows:

S. No.

Place

Detail

1.

Residence of Pushpak Lakhani

42 high-end wrist watches and Rs. 47 Lakhs

2.

Residence of Shikha Pahwa

53 high-end wrist watches and Rs. 2 Lakhs

3.

Bank locker of Shikha Pahwa

12 Lakhs

4.

Residence of Pankaj Lakhani

13 high-end wrist watches

5.

Bank Locker of Pankaj Lakhani

3 high-end watches

6.

Residence of Purushottam Jajodia

5 high-end watches and Rs. 10 Lakhs

6. Further searches were carried out at various showroom of M/s Johnson Watch Co. Pvt. Ltd. and the residence of its Directors on 29.10.2012 and 30.10.2012 and large number of high-end wrist watches and cash was found. The details are as follows:

S. No.

Place

Details

1.

Residence of Shri Manish Madan

1484 Watches of foreign origin were detained and cash amounting to Rs. 30,50,000/-

2.

Residence of Shri Anil Madan

119 Watches of foreign origin, cash in INR amounting to Rs.54,13,700/- and cash in foreign currency i.e. USD amounting to \$4700/-

3.

"Tag Heuer" Showroom

280 Watches of foreign origin

4.

"Omega" Showroom

280 Watches of foreign origin

5.

Showroom/Store of M/s. JWCPL

491 Watches of foreign origin

6.

Showroom/Store of M/s. Bhagwan

234 Watches of foreign origin Singh & Sons

7.

Showroom/Store of M/s. Sondhi Brothers

250 Watches of foreign origin

8.

Showroom/Store of M/s. JWCPL

253 Watches of foreign origin

9.

Showroom/Store of M/s. JWCPL

692 Watches of foreign origin

10.

Showroom/Store of M/s. JWCPL

1622 Watches of foreign origin

11.

Showroom/Store of M/s. JWCPL

585 Watches of foreign origin

12.

Showroom/Store of M/s. JWCPL

370 Watches of foreign origin

7. It needs to be noticed that the high-end wrist watches, foreign currency and

cash recovered from the premises of M/s. Johnson Watch Co. Pvt. Ltd. and the residence of its Directors were released on an undertaking submitted by the Directors of M/s. Johnson Watch Co. Pvt. Ltd. without any formal application for provisional release. The high-end watches and 50% of the recovered cash amount were also released in the case of Purshottam Jajodia and Pankaj Lakhani by orders dated 17.03.2015 and 22.07.2016 passed by the Supreme Court. However, the goods seized from the premises of the appellant and Ms. Shikha Pahwa (who had stated that all the watches and cash recovered from her place belonged to the appellant only) continue to be seized and it is these high-end wrist watches that are in dispute in this appeal.

8. On 09.01.2013, the appellant had filed an application for provisional release of the seized watches under section 110A of the Customs Act, 1962, the Customs Act. The appellant also filed Writ Petition No. 6381 of 2013 before the Delhi High Court for provisional release of the goods. This petition was disposed of on 08.10.2013 with a direction that the Writ Petition shall be treated as a representation and shall be dealt with by the authorities within three weeks from the date of the order.

9. On 28.10.2013, a show cause notice was issued to the following eleven persons, including the appellant in respect of the 116 high-end wrist watches and cash amounting to Rs.71 Lakhs with proposed customs duty of Rs. 52,19,582/- :-

- i. M/s. Johnsons Watch Company Pvt. Ltd.;
- ii. Mr. Anil Madan, Director, M/s. Johnson Watch Company Pvt. Ltd.;
- iii. Shri Rajesh Madan, Director, M/s. Johnson Watch Company Pvt. Ltd.;
- iv. Shri Manish Madan, Director, M/s. Johnson Watch Company Pvt. Ltd.;
- v. Mr. Ankit Madan, Director, M/s. Johnson Watch Company Pvt. Ltd.;
- vi. Shri Pushpak Lakhani;
- vii. Ms. Shikha Pahwa;
- viii. Shri Pankaj Lakhani;
- ix. Shri Purshottam Jajodia;
- x. Shri Nikhil Malhotra; and
- xi. Shri Shiv Kumar Lakhani.

10. Pursuant to the order dated 08.10.2013 passed by the Delhi High Court, the Deputy Director, Revenue Intelligence, disposed the representation filed by the appellant by an order dated 29.10.2013 with an observation that the issue regarding provisional release cannot be decided by the Directorate of Revenue Intelligence as a show cause notice under section 124 of the Customs Act for confiscation of the high-end wrist watches and cash recovered from Pushpak

Lakhani and Shikha Pahwa and their associates had already been issued within the prescribed time limit. The appellant was, therefore, advised to approach the concerned adjudicating authority for a decision regarding provisional release.

11. On 28.11.2013, the appellant deposited a sum of Rs. 27,50,669/- with the Department and, thereafter, filed Writ Petition No. 7535 of 2013 stating that since amount had been deposited within 30 days of the issuance of the show cause notice, the goods may be released. The appellant also stated that in case any further amount was found to be due against the appellant, the same would be deposited. This Writ Petition was disposed of by an order dated 29.10.2013, directing the respondent to treat the Writ Petition as a representation and to pass an appropriate order within two weeks. The order is reproduced below:

"Mr.C.Harishankar, learned counsel for the petitioner states that payment in terms of the show cause notice including interest amount calculated by the petitioner has been paid within thirty days.

In view of the said position, he, submits that the present writ petition may be treated as representation to the respondents. In case, any further amount is due and payable as interest, the respondents may inform and the petitioner upon verification shall comply.

Statement made by counsel for the petitioner is accepted subject to all just exceptions.

The writ petition will be treated as representation to the respondents and the respondents will pass an appropriate order, if required and necessary, after hearing the petitioner. Parties are, however, given liberty to revive the petition in case there is any dispute.

Keeping in view the nature and controversy and as the Statute had fixed a time limit, we feel that the respondents should dispose of the entire issue within a period of two weeks from the date copy of this order is received by them.

Writ petition is disposed of."

12. The said representation was decided by an order dated 24.03.2014. The order notices that since the appellant had deposited only Rs.27,50,669/- as against the demand of Rs.52,19,582/-, the said deposit cannot be treated as compliance of section 28(5) of the Customs Act. It was also stated that the show cause notice shall, therefore, be adjudicated upon in due course.

13. This order led to the filing of another Writ Petition No. 2650 of 2014 by the appellant contending that in case of shortfall of any duty and interest, the correct course would be to issue a show cause notice. The Department also stated that a fresh show cause notice would be issued. The Writ Petition was, accordingly, disposed of on 21.05.2014 with a direction to the respondent to proceed in accordance with law.

14. At this stage, it would also be necessary to notice that Purushottam Jajodia,

to whom the notice dated 28.10.2013 had also been issued, filed Writ Petition No.416 of 2014 before the Delhi High Court contending that since the show cause notice was not issued to him within the time specified in section 110(2) of the Customs Act, the goods and the currency seized should be released. This submission was accepted and the Writ Petition was allowed on 24.07.2014 with a direction to the respondent to release the goods, including the currency seized forthwith unconditionally.

15. The aforesaid judgment of the Delhi High Court was assailed by the Department before the Supreme Court and the Supreme Court by an order dated 11.09.2014, stayed the operation of the order dated 24.07.2014. The Supreme Court further ordered that adjudication proceedings may continue but the same shall not be finalised without leave of the Court.

16. The order dated 11.09.2014 was subsequently modified by the Supreme Court on 17.03.2015 and the said order is reproduced below:

"The respondents in both the appeals shall be entitled to refund of 50% of the seized amount and the watches seized by the appellant within four weeks hence subject to an undertaking filed before the Registry of this Court within ten days that if the appellant succeed in appeal, they shall make good the dues along with interest.

List the matter after six weeks."

17. A show cause notice dated 24.09.2014 was thereafter issued to the appellant under section 28(6)(ii) of the Customs Act, seeking demand of the balance amount of customs duty of Rs. 24,68,918/-.

18. Another noticee Pankaj Lakhani also filed a Writ Petition before the Delhi High Court for release of the goods on the basis of the judgment of the Delhi High Court in Writ Petition No. 416 of 2014 filed by Purushottam Jajodia. Relief was not granted to Pankaj Lakhani and the order of the Delhi High Court is reproduced below:

"The learned counsel for the petitioner places reliance on a Division Bench's decision of this Court in Purushottam Jajodia vs. Directorate of Revenue Intelligence, New Delhi Directorate of Revenue Intelligence, New Delhi, 2014 (307) ELT 837 (Del). However, the learned counsel for respondents points out that the operation of the said judgment has been stayed by the Supreme Court by virtue of an order dated 11.09.2014 in SLP (C) No.24478/2014 and the stay order is continuing. Although, subsequently, the Supreme Court by an order dated 11.05.2015 directed that the goods shall be released within a week. The learned counsel for the petitioner submitted that although the Supreme Court stayed the operation of the said judgment, yet it granted release of the goods and, therefore, the same order should be passed by this Court. We are afraid that we cannot accept this argument inasmuch as the Supreme Court has stayed the operation of the said judgment on which the petitioner places reliance. The

powers of the High Court are not equivalent to those of the Supreme Court and it is also not clear as to under which circumstances the goods were directed to be released in that case.

Renotify on 22.02.2016.”

19. Pankaj Lakhani, thereafter, moved the Supreme Court and by order dated 22.07.2016 the Supreme Court directed that the appellant shall be entitled to refund of 50% of seized amount and the watches seized by the respondent within four weeks, subject to an undertaking filed before the Registry. The order is reproduced below:

“Leave granted.

The appellant shall be shall be entitled to refund of 50% of the seized amount and the watches seized by the respondent within four weeks hence, subject to an undertaking filed before the Registry of this Court within ten days that if the appeal fails, the appellant shall make good the dues along with interest.

Tag with Civil Appeal No. 3122 of 2015”

20. The appellant also filed Writ Petition No. 10841 of 2015 before the Delhi High Court contending that the goods should be released as the mandatory requirement of section 110 of the Customs Act that the notice should be issued within six months of the seizure had not been complied with. This petition was dismissed by order dated 21.05.2019 and the relevant portion of the order is reproduced below:

“9. Learned counsel for the Petitioner urged that this Court should pass an order on the same terms as the interim order passed by the Supreme Court on 17th March, 2015 permitting release of 50% of the seized watches and currency subject to undertaking being filed.

10. It is already noticed that a similar request was turned down by Division Bench of this Court by its order dated 11th August, 2015 in WP(C) No. 6605/2015. Consequently, the above prayer is declined.

11. As far as the central issue in the writ petition is concerned, with the Petitioner not having been able to persuade this Court about the Respondents’ failure to serve him the SCN on or before 28th October 2013, the Court is not inclined to entertain the writ petition.

12. This order however will not preclude the Petitioner from urging all the contentions available to him in accordance with law in the proceedings pursuant to the impugned SCN, except of course that it has not been served on him. 13. The writ petition is dismissed. The interim order is vacated.”

21. Thereafter, the appellant filed another application for provisional release of the goods on 31.10.2019.

22. In the meantime, the show cause notice dated 27.10.2017 earlier issued to

M/s Johnson Watch Co. Pvt. Ltd., was adjudicated upon by order dated 27.05.2020. In paragraph 39 of the order a finding has been recorded that M/s. Johnson Watch Co. Pvt. Ltd. did not co-operate in the investigation and despite repeated requests for providing details, the Directors did not turn up for investigation. The said paragraph also gives a summary of verification of the watches contained in Annexure-A to the show cause notice dated 27.10.2017, as follows:

Annexure-A - Summary of verification and duty calculation (Amount in Rs.)

S.No.

Reference of Annexure (A1 to A11 for various showrooms/stores/ residence of JWCPL)

Total Watches detained/seized

No. of watches for which documents available

No. of watches for which no documents available

(1)

(2)

(3)

(4)

(5)

1

Annexure A1 Showroom/Store of JWCPL at A-12 South Ex. Pt-I, New Delhi

1622

982

640

2

Annexure A2- residence of Director of JWCPL at K-6A Ground Floor Green Park Ex., New Delhi

1460

1306

154

3

Annexure A3- residence of Director of JWCPL at K-6A Ground Floor Green Park Ex., New Delhi

117

46

71

4

Annexure A4- Showroom/Store of JWCPL at G-6 Ambience Mall NH- 8, Gurgaon

584

0

584

5

Annexure A5- Showroom/Store of JWCPL at K-1 Cannaught Place, New Delhi

250

0

250

6

Annexure A6- Showroom/Store of JWCPL at K-1 Cannaught Place, New Delhi

280

193

87

7

Annexure A7- Showroom/Store of at M/s. Bhagwan Singh & Sons P. Ltd., C-20 Cannaught Place, New Delhi authorized retailer of M/s. Johnson Watch Company Pvt. Ltd.

234

0

234

8

Annexure A8- Showroom/Store of at M/s. Sondhi Brother, C-21 Cannaught Place, New Delhi authorized retailer of M/s. Johnson Watch Company Pvt. Ltd.

250

138

112

9

Annexure A9- Showroom/Store of at M/s. Johnson Watch Company Pvt. Ltd., at Shop No. UG-19 Ambience Mall, Nelson Mandela Marg, Vasant Kunj, New Delhi

692

93

599

10

Annexure A10- Showroom/Store of at M/s. Johnson Watch Company Pvt. Ltd., at 243, DLF Emporio, Vasant Kunj, New Delhi

253

0

253

11

Annexure A11- Showroom/Store of at M/s. Johnson Watch Company Pvt. Ltd., at C-19 Cannaught Place New Delhi

491

111

380

Total

6233

2869

3364

23. The appellant, thereafter, filed Writ Petition No. 4566 of 2020 before the Delhi High Court for a direction upon the respondent to release the goods after accepting the balance deposit of Rs. 24,68,913/- in terms of the letter dated 24.03.2014 and the show cause notice dated 24.09.2014. It was pointed out by the learned senior counsel appearing for the appellant that 3356 high-end wrist watches had been released by the Commissioner of Customs (Preventive) and number of other high-end wrist watches had also been released pursuant to the orders passed by the Supreme Court.

24. This petition was disposed of by an order dated 25.08.2020 with a direction to the respondent to consider the provisional release application preferred by the petitioner as the petitioner had expressed readiness to make the payment of the remaining amount of the duty and after examining the orders whereby goods of

other parties had been released. The said order has been reproduced in paragraph 2 of this order and the operative part is again reproduced:

“11. Looking to the above submission and the readiness shown by the petitioner to make the payment of remaining duty as stated hereinabove, and also looking to the orders which are at Annexure P-3, P-16 and P-18, and also keeping in mind the judgment and order dated 01.06.2020 passed by the Division Bench of this Court in CUSAA 229/2019, we hereby direct the respondent No.1 to decide the application for the provisional release of the goods, in accordance with law. The petitioner shall prefer application for provisional release of goods within a period of one week from today. The respondent No.1' shall decide the provisional release application preferred by the petitioner under Section 110-A of the Customs Act, 1962 within a period of two weeks from the date of the receipt of the provisional release application from the petitioner.”

(emphasis supplied)

25. Thereafter, the appellant filed an application dated 31.08.2020 before the Principal Commissioner of Customs (Preventive) with a prayer to consider the release of goods on payment of the entire duty amount. This application was rejected by order dated 11.09.2020. The relevant portion of the order has been reproduced in paragraph 3 of this order.

26. This appeal has, accordingly, been filed to assail the aforesaid order dated 11.09.2020.

27. Shri Tarun Gulati, learned senior counsel assisted by Shri Sumit Kumar Batra appearing for the appellant made the following the submissions:

i. The order dated 11.09.2020 passed by the Principal Commissioner rejecting the request of the appellant for provisional release of the goods deserves to be set aside for the reason that it has been passed in a predetermined and mechanical manner, without appreciating the facts of the case;

ii. The Principal Commissioner completely ignored the fact that in all other cases, the goods had been released either because of an undertaking given by the Directors of M/s Johnson Watch Co. Pvt. Ltd. or on the basis of the orders passed by the Supreme Court, but the application made by the appellant has been rejected even though the appellant had deposited substantial amount of duty demanded and had undertaken to deposit the balance amount of duty without prejudice to rights and contention;

iii. The stay order granted by the Supreme Court on 11.09.2014 could not have been made a ground for rejection of the application filed by the appellant;

iv. The Principal Commissioner committed an error in observing that the goods seized were “prohibited goods” liable for confiscation under section 111(d) of the Customs Act;

v. The Principal Commissioner completely failed to appreciate that the decision of

the Delhi High Court in Additional Director General (Adjudication) vs. M/s. Its My Name Pvt. Ltd., CUSAA 229/2019 and CM No. 53877/2019 decided on 01.06.2020 was not applicable to the case of the appellant; and

vi. The Principal Commissioner committed an error in holding that proceedings against the appellant can be initiated under sections 132 and 135 of the Customs Act, even though all the other noticees had been excluded from the ambit of such proceedings, as can be seen from the order dated 27.05.2020 passed by the Principal Commissioner on the show cause notice dated 27.10.2017 issued to M/s Johnson Watch Co. Pvt. Ltd.

28. Shri Rakesh Kumar, learned authorized representative of the department, however, supported the impugned order passed by the Principal Commissioner and made the following submissions:

i. Section 110A of the Customs Act provides for a discretionary mandate to the adjudicating authority and each case has to be seen on its own merits;

ii. The admission made by the appellant regarding the engagement in illegal smuggling activities in the statement recorded under section 108 of the Customs Act has till date not been retracted;

iii. The adjudicating authority, in the order dated 27.05.2020 adjudicating the show cause notice dated 27.10.2017, referred to the earlier show cause notice dated 28.10.2013 and as observed that both the show cause notices are inter-linked and have to be seen and treated collectively;

iv. The seized goods are important piece of evidence in proceedings that may be initiated under sections 132 and 135 of the Customs Act and so provisional release shall adversely affect the prosecution ; and

v. Seized goods i.e. foreign watches are deemed to be "prohibited goods" and, therefore, the Principal Commissioner was justified in rejecting the application filed for provisional release.

29. The submissions advanced by the learned senior counsel for the appellant and the learned authorized representative appearing for the department have been considered.

30. Section 110A of the Customs Act deals with provisional release of goods, documents and things seized pending adjudication and is reproduced below:

"110A. Provisional release of goods, documents and things seized or bank account provisionally attached pending adjudication.

Any goods, documents or things seized or bank account provisionally attached under section 110, may, pending the order of the adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

31. Discretion is, therefore, cast upon the adjudicating authority under section 110A of the Customs Act while deciding an application filed for provisional release of the goods and in *P. Pandithurai vs. Joint Commissioner of Customs (Adjudication)*, Trichy, 2020 (373) E.L.T. 451 (Mad.), the Madras High Court observed that such discretion must be exercised in a manner known to law and that an opportunity of being heard is also required to be given. The observations are as follows:

“The adjudicating authority should be permitted to exercise their discretion in manner known to law. While exercising their discretion, they may also examine the statements made by the petitioner. Naturally, they would have to provide an opportunity to the petitioner of being heard.”

32. The Madras High Court in *Malabar Diamond Gallery Pvt. Ltd. vs. Additional Director General, DRI Chennai & Ors.*, Writ Appeal No. 377 of 2016 decided on 28.07. 2016, also observed that sufficient discretion has to be given to the adjudicating authority in passing an order for provisional release of the goods. The Delhi High Court in *Mala Petrochemical & Polymers vs. The Additional Director General, DRI & Anr.*, W.P. (C) 3965/2017 decided on 19.05.2017 drew a distinction between provisional assessment and provisional release of goods and also observed that each case has to turn on its own peculiar facts.

33. In the present case, a search had been carried out at the residential premises of the employees of M/s. Johnson Watch Co. Pvt. Ltd. on 29.10.2012 and also at its various showrooms and the residence of its Directors on 29.10.2012 and 30.10.2012. Details of the high-end wrist watches recovered from the residence of Pushpak Lakhani, Shikha Pahwa, Pankaj Lakhani, Purushottam Jajodia and the Directors and showrooms of M/s. Johnson Watch Co. Pvt. Ltd., have been mentioned in paragraphs 5 and 6 of this order. It is seen that while 95 high-end wrist watches were recovered from the appellant, about 6233 high-end wrist watches were recovered from M/s. Johnson Watch Co. Pvt. Ltd., 5 high-end wrist watches were recovered from Purushottam Jajodia and 16 high-end wrist watches were recovered from Pankaj Lakhani. What is important to notice is that all the 6233 high-end wrist watches recovered from M/s. Johnson Watch Co. Pvt. Ltd., were released merely on the basis of an undertaking given by the Directors in 2012 even without any application having been moved by M/s. Johnson Watch Co. Pvt. Ltd. for provisional release of the seized goods. This apart, the 5 high-end wrist watches recovered from Purushottam Jajodia and 16 high-end wrist watches recovered from Pankaj Lakhani were also released pursuant to the orders passed by the Supreme Court. All the cash amount of Rs. 3050000+5413700+750000+\$4700 recovered from M/s. Johnson Watch Co. Pvt. Ltd. and 50% of the cash recovered from Purushottam Jajodia and Pankaj Lakhani were also released, pursuant to the orders passed by the Supreme Court.

34. Thus, it is only in the matter of the appellant that relates to 95 high-end wrist watches and Rs. 61 Lakhs in cash that an order has that not been passed

by the department for release of the watches and infact the application filed by the appellant for provisional release of the goods has also been rejected.

35. The details of the high-end wrist watches/cash seized and released are as follows:

S. No.

Name

No. of Watches seized

Cash Seized

Watches released

Cash released

Details

1.

Johnson Watch Co. Pvt. Ltd.

6233 for 2869- documents available and for 3364, no documents available)

- 3050000

- 5413700

- 750000

- \$4700

6233

All

On an undertaking given by the Directors in 2012 itslef. No application for provisional release was made by JWCPL or its Directors.

2.

Purushottam Jajodia

5

1000000/-

5

500000/-

Supreme Court order dated 17.03.2015

3.

Pankaj Lakhani

16

-

16

-

Supreme Court order dated 17.03.2015

4.

Appellant Pushpak Lakhani

42

4700000

None

None

5.

Ms. Shikha Pahwa

44 new 9 old

1400000

None

None

36. In Writ Petition No. 4566 of 2020 filed by the appellant before the Delhi High Court emphasis had been placed by the learned senior counsel appearing for the appellant on this aspect of discrimination relating to release of watches seized from M/s. Johnson Watch Co. Pvt. Ltd. as can be seen from paragraph 8 of the order, and this fact was also noticed by the Delhi High Court in paragraph 11 of the judgment. The Principal Commissioner was, therefore, required to consider this aspect while deciding the application filed by the appellant for provisional release of the goods but this fact has not been examined at all by the Principal Commissioner in the impugned order.

37. All that has been stated by the learned authorized representative appearing for the Department is that the appellant had not been able to show documents in respect of the 95 high-end wrist watches that had been seized. A perusal of the chart shows that even M/s. Johnson Watch Co. Pvt. Ltd. had not been able to show documents for 3364 high-end wrist watches, but these watches were released by the Department itself merely on the basis of an undertaking given by the Directors of the Company even though a formal application for provisional release of the goods had not even been filed. There is no distinction between the high-end wrist watches seized from the appellant and the 3364 high-end wrist

watches seized from M/s. Johnson Watch Co. Pvt. Ltd. and indeed none could be pointed out by the learned authorized representative appearing for the Department. It is certainly not open to the Department to adopt a different approach for release of high-end wrist watches as while in the case of M/s. Johnson Watch Co. Pvt. Ltd., 3364 high-end wrist watches for which documents had not been produced by the said Company were released in 2012 itself merely on the basis of an undertaking given by the Directors, but in the case of the appellant, even though a formal application was moved and an amount of the Rs. 27,50,669/- towards duty demanded under the show cause notice had also deposited with an undertaking that the balance amount of duty would be deposited, yet the application filed by the appellant for provisional release of the seized goods has been rejected. For this reason alone, the application filed by the appellant for provisional release of the goods deserves to be allowed.

38. In *Gauri Enterprises vs. Commissioner of Customs*, 2002 (81) ECC 501, the Tribunal examined whether the Commissioner of Customs, Pune was correct in absolutely confiscating the impugned goods when admittedly 37 such consignments of used Diesel Engines imported by various other importers through C.F.S., Pune were released on payment of Redemption Fine. In regard to this issue, the Tribunal held that the adjudicator cannot be selective in its approach to the import of similar goods as in the case of M/s. Preet International the same goods had not been treated as "prohibited goods". The relevant paragraph of the decision is reproduced below:

"(c) In the case of M/s. Preet International relied upon by the appellants, the same adjudicator, as in this case, as Commissioner (Appeals), in March 2001, around the time the imports impugned herein were contemplated/effectuated, has in case of imports of Diesel engines, while approving the higher values, fixed by the assessing officer, upheld the value mis-declarations and the redemption fine but reduced the redemption fine to about Rs. 3 lakhs on a value of Rs. 8.52 lakhs. This order was relied upon by the appellants before the adjudicator. It has not been considered and has been disposed of by the learned adjudicator, in the present case as Commissioner, in Para 4(b) of the impugned order before us, with the recorded remarks as "During the course of hearing, I informed the Advocate that the Department has not accepted the order of the Commissioner (Appeals) and appeal has been filed against that order". ***** In the case of M/s Preet International, the very same goods, had not been treated as prohibited goods nor the decision of Sheikh Md. Omer (SC) or Shehla Enterprises was applied, by the very same adjudicator, even though, there was a finding of mis-declaration of value arrived by him. We find, the same adjudicator, had the knowledge of these cases i.e., in the case of Sheikh Md. Omar & Shehla Enterprises (where undervalued diesel engines were absolutely confiscated) he could have applied those case law, in his knowledge, to the case M/s. Preet International before him. Since, as Commissioner (Appeals), he could have exercised the statutory power given to him under first proviso to Section 128A(1), by putting the appellants in M/s. Preet International case to a notice.

This was not done. The learned DRs defence, therefore does not and cannot shield, the present order from the consequences, of what the Advocate here in this case submitted before us as regards the conduct of the Commissioner, "A mala fide bias against us". Be that as it may, the mere fact that an order has been challenged in Appeal, as it is not accepted by the Department, cannot be a cause to have obliterated the effect of that order, especially when it is not stayed. We therefore do find that the adjudicator is being selective in his approach to the import of similar goods."

(emphasis supplied)

39. Even otherwise, none of the reasons mentioned in the impugned order by the Principal Commissioner can be said to be good and valid reasons for rejecting the application filed for provisional release of the goods.

40. The reasons given by the Principal Commissioner for rejecting the application filed by the appellant for provisional release of the goods are as follows:

i. The adjudicating authority has a discretion to decide the application for provisional release but the offer made by the appellant to deposit the balance amount of duty under protest is not legally sustainable since proceedings pursuant to the subsequent show cause notice dated 27.10.2017 have been completed and the appellant has been held liable to penalty;

ii. The facts of the case covered under the show cause notice dated 28.10.2013 are identical to Its My Name case decided by the Delhi High Court as provisional release of seized goods was not allowed where the goods were found to be without valid documents;

iii. The seized goods covered under the show cause notice dated 28.10.2013 would be piece of evidence in proceedings under sections 132 and 135 of the Customs Act;

iv. Seized goods are "prohibited goods" liable for confiscation under section 111(d) of the Customs Act; and

v. The judgment of the Delhi High Court in Writ Petition No. 416 of 2014 filed by Purushottam Jajodia was stayed by the Supreme Court on 11.09.2014.

41. Much emphasis has been placed by the learned authorized representative appearing for the Department on the decision of the Delhi High Court in Its My Name. Learned senior counsel for the appellant also placed reliance on this judgment. The relevant paragraphs on which reliance has been placed by them are reproduced below:

"42. Significantly, these were cases emanating out of a final adjudication of the liability of the concerned assessee/importer, after due appreciation of evidence. No such final determination of the liability of the respondent, before us, qua any part of the seized goods, has taken place in the present case. While deciding whether to release, or not release, the seized goods provisionally, the learned

Tribunal was not called upon to adjudicate, either finally or tentatively, on the alleged infractions committed by the respondent, or the consequent liability, if any, of the seized goods to confiscation under the Act. In the absence of any such adjudicatory exercise having taken place at the hands of the authority below, the question of whether any “substantial question of law”, relatable to the infractions alleged to have been committed by the respondent, at all arises before us at this stage, becomes seriously questionable.

45. Having thus generally delineated the scope of appellate jurisdiction under Section 130 of the Act, we deem it appropriate to emphasize, at the cost of repetition, that this Court is not sitting in appeal, consequent to an adjudicatory exercise, determining the correctness of the allegations in the Show Cause Notice dated 26th September, 2019, having been completed, and carried in appeal before the learned Tribunal. The present appeal is directed against an order of provisional release. No final determination, of the liability of the imported gold, gold jewellery, or silver, to confiscation, has taken place; nor has the learned Tribunal accorded its imprimatur to any such decision. The learned Tribunal has directed provisional release of the seized gold, gold jewellery and silver. An order of provisional release is, at all times, an interlocutory exercise, and does not finally adjudicate on any liability.

The following passages, from U.O.I. v. Manju Goel: 2015 (321) ELT 19 (SC), merit reproduction, in this context:

“3. The High Court, after hearing the matter, disposed of the writ petition vide impugned judgment dated 2-3-2005 directing the appellants to release the goods on provisional basis on the condition that the respondent herein would deposit the amount of customs duty and would also furnish a bank guarantee of 20 per cent of the value of the goods in question and for the balance value of the goods, she would furnish a personal bond to the satisfaction of the concerned authority in the Customs Department. Operative portion of the judgment reads as under:

“However to protect the interest of revenue, we direct that the goods in question be released on provisional basis within two weeks from the date of receipt of this order, provided that the petitioner deposits the amount of CD and furnishes bank guarantee of 20% of the value of the goods in question and for the balance value of goods, furnish a personal bond to the satisfaction of concerned authority in the Customs Department.

The petition stands disposed of with the above directions.”

4. It is this judgment which is the subject matter of the present appeal. It is clear from the aforesaid direction that the respondent was allowed to get the goods released on provisional basis with certain conditions. We are informed that after the passing of this aforesaid direction by the High Court, the Respondent had even got the goods released after complying with the directions of the High

Court. In these circumstances, nothing survives in the present appeal. Otherwise also, there is no reason to interfere with the order in question, when the arrangement made by the High Court in the said order was only provisional one by way of interim arrangement.”

47. The exercise of power, to release imported goods on a provisional basis, under Section 110A of the Act is, essentially and fundamentally, discretionary in nature. At this point, we deem it appropriate to reproduce Section 110A of the Act, for ready reference, thus:

“110A. Provisional release of goods, documents and things seized or bank account provisionally attached] pending adjudication. - Any goods, documents or things seized or bank account provisionally attached under section 110, may, pending the order of the adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.”

It merits mention, here, that, while, earlier, this Court had expressed the view that there was no substantial difference between “provisional release” and “provisional attachment”, a clear departure, from this view, was voiced in *Mala Petrochemicals & Polymers v. A.D.G., D.R.I.*: 2017 (353) ELT 346 (Del), in which, additionally, the fundamentally discretionary nature of the power exercised by the Commissioner/ADG, under Section 110A of the Act was underscored, thus (in para 23 of the report):

“The power under Section 110A of the Act involves exercise of discretion. The scope of judicial review is to examine if the discretion has been rightly exercised; that it is not based on irrelevant materials and is fair and reasonable in the circumstances. It is not an appellate power. The drawing of a distinction between seizure of imported goods as a result of undervaluation and seizure of imported goods upon mis-declaration cannot per se be said to be irrational. On the contrary, the failure to draw such a distinction and treat all types of wrongful imports on an equal footing might result in miscarriage of justice. That is perhaps why Section 110A has been worded in the way it has, leaving some margin to the Customs in the exercise of their discretion subject, of course, to the recognised legal limits.”

Mala Petrochemicals & Polymers was followed, subsequently, in *Maggie Marketing (P) Ltd v. Commissioner of Customs (Exports)* (2019) 366 ELT 70 (Del).

48. Clearly, provisional release may be allowed, under Section 110A of the Act, of “any goods, documents or things seized”. The Court, as the interpreter of the legislation, cannot profess to greater wisdom than the legislator. Where the legislature has not thought it appropriate to limit, in any manner, the nature of goods, documents or things which may be provisionally released, under Section 110A, in our view, it is no part of the function of a court to read, into the said

statutory provision, any artificial limitation, not to be found therein. It is only in exceptional situations, where there is an apparent legislative lacuna, which, if left unfilled, would result in manifest injustice, or frustrate the object of the legislation, that a Court can step in and fill the lacuna and, to that limited extent, perform a quasi-legislative function. Else, the Court must rest content with being an interpreter of existing legislation, and has to accept the legislation for what it is.

49. We may, to make matters clearer, contradistinguish Section 110A of the Act, as extracted hereinabove, with Section 125(1) thereof, which reads thus:

“125. Option to pay fine in lieu of confiscation. –

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :”

Section 125(1) of the Act permits release, on payment of duty and redemption fine, of goods prohibited, as well as not prohibited. In the case of prohibited goods, Section 125(1), by using the word “may”, confers discretion, on the adjudicating authority, to grant, or not grant, the person, from whose custody or possession the goods had been seized, the option to release the goods on payment of redemption fine. In the case of goods which are not prohibited, however, Section 125(1) mandates grant of permission, to the person, from whose custody or possession the goods were seized, the option to redeem the goods on payment of redemption fine. We are not concerned, in the present case, with Section 125, directly, as the issue of liability to confiscation is still at large before the adjudicatory authority; reference to the said provision has been made only to indicate that, even in the case of prohibited goods, the Act permits release thereof, on payment of redemption fine.

50. We are, therefore, unable to subscribe to the submission, of the learned ASG, relying on *Om Prakash Bhatia*: 2003 (155) ELT 423 (SC), that, by virtue of their having been imported in contravention of the Act, the gold, gold jewellery and silver, which were seized, had acquired the character of “prohibited goods” and had, consequently, become ineligible for provisional release. We do not deem it necessary to enter into the niceties of the issue of whether, applying *Om Prakash Bhatia*, the goods in issue could be regarded as “prohibited” or not. It is not the case of the Revenue that the gold, gold jewellery or silver, forming subject matter of controversy, was prohibited for import per se, in that there was any provision, in the Foreign Trade Policy, or any other statutory instrument, absolutely prohibiting import thereof. The learned ASG seeks to treat the import of the seized gold, gold currency and silver as “prohibited”, by drawing an

analogy from Om Prakash Bhatia. Even if, for the sake of argument, the gold, gold jewellery and silver were to be treated as "prohibited", that, by itself, would not render the ineligible for provisional release, under Section 110A of the Act, for the simple reason that Section 110A does not except its application in the case of "prohibited" goods. Rather, it indicates, unequivocally, to the contrary, by using the omnibus expression "any goods, documents or things".

51. The learned ASG also placed pointed reliance on Circular 35/2020-Cus supra, issued by the CBEC, para 2 of which absolutely proscribes provisional release of "goods prohibited under the Customs Act, 1962 or any other Act for the time being in force", "goods that do not fulfil the statutory compliance requirements/obligations in terms of any Act, Rule, Regulation or any other law for the time being in force; and "goods specified in or notified under Section 123 of the Customs Act, 1962". Mr. Ganesh relied on Agya Import Ltd: 2018 (362) DLT 1037 (Del), which holds that para 2 of the said Circular was merely in the nature of a "general guideline", and did not incorporate any mandate. We, having perused para 2 of Circular 35/2017-Cus supra, vis-à-vis Section 110A of the Act, are not inclined to be so magnanimous. According to us, para 2 of Circular 35/2017-Cus is clearly contrary to Section 110A and is, consequently, void and unenforceable at law. It is not permissible for the CBEC, by executive fiat, to incorporate limitations, on provisional release of seized goods, which find no place in the parent statutory provision, i.e. Section 110A of the Act. Executive instructions may, it is trite, supplement the statute, where such supplementation is needed, but can never supplant the statutory provision. By excluding, altogether, certain categories of goods, from the facility of provisional release, para 2 of Circular 35/2017-Cus supra clearly violates Section 110A, whereunder all goods, documents and things, are eligible for provisional release. Goods, which are eligible for provisional release under Section 110A of the Act, cannot be rendered ineligible for provisional release by virtue of the Circular. (Be it noted, here, that we refer to the "eligibility" of the goods for provisional release, as distinct from the "entitlement" thereof, which has to be determined by the adjudicating authority in exercise of the discretion conferred on her, or him, by Section 110A.) Para 2 of Circular 35/2017-Cus, therefore, effectively seeks to supplant Section 110A, to that extent, and has, therefore, to be regarded as void and unenforceable at law.

54. Before proceeding to deal with the actual aspect of provisional release of the seized gold, gold jewellery and silver, we deem it appropriate to deal with the residual submission, of the learned ASG, to the effect that the learned Tribunal ought not, in any case, to have itself exercised the jurisdiction, vested in the adjudicating authority – in the present case, in the ADG, DRI – and fixed the terms of provisional release. According to her, the only course of action open to the learned Tribunal, consequent to quashing the Order, dated 4th October, 2019, of the ADG, was to remand the matter to the ADG, to exercise the jurisdiction

vested in him by Section 110A of the Act, and fix the terms of provisional release. The learned Tribunal, according to her, could not have undertaken this exercise, and, by doing so, it effectively usurped the jurisdiction of the learned ADG, conferred by Section 110A.

55. We are unable to agree, for various reasons.

56. Firstly, Section 129B(1) of the Act empowers the learned Tribunal, seized with an appeal, challenging the order of the adjudicating authority, to “pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary”. We are convinced that the jurisdiction, of the learned Tribunal, to “confirm, modify or annul” the order dated 4th October, 2019, was wide enough to encompass the power to direct provisional release, and fix the terms thereof. Remand, to the authority to pass the order under appeal before the learned Tribunal, is, statutorily, only an alternative course of action, the learned Tribunal. We may take judicial notice, at this point, of the fact repeated demands, to the authorities below, merely clog the litigative process and lead to multiplicity of proceedings, and benefits neither the assessee nor the Revenue. Where, therefore, the learned Tribunal is in a position to decide the appeal, it would be well advised to do so, rather than merely remand the matter to the authority below. Indeed, in a case in which the learned Tribunal is in a position to decide the appeal on merits, and pass effective unenforceable directions, remand, by it, of the proceedings, the authority below, may amount, practically, to abdication of its jurisdiction. It is obviously with a view to ensure that the demand is not resorted to, as an “easy way out”, that the legislature has, advisedly, conferred wide powers, on the learned Tribunal, to confirm, modify or annul the order before it. On principle, therefore, we are unable to discern any apparent illegality, or want of propriety, on the part of the learned Tribunal, in directing provisional release and fixing the terms thereof, rather than remand in the matter to the ADG, to undertake the said exercise.

57. Secondly, in the present case, any such demand, by the learned Tribunal, to the ADG, as Mr. Ganesh has correctly submitted, would have been an exercise in futility. We are entirely in agreement with the finding, of the learned Tribunal, regarding the unsustainability, ex facie, of the order, dated 4th October, 2019, of the learned ADG. In fact, the order borders on perversity, and may also amount, perilously, to disobedience, of the directions issued by us in our order dated 9th October, 2019 in WP (C) 8707/2019. Para 7.3 of the order, dated 4th October, 2019, of the learned ADG, reads thus:

“In view of above mentioned citations on restricted and prohibited goods, it appears that it would be premature to arrive at any conclusion, about provisional

release of seized goods, before completion of adjudication proceedings.”

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

58. Thirdly, it is trite that an appeal is a continuation of the original proceedings, and that the appellate authority enjoys the powers vested in the original authority. The power to direct provisional release, therefore, did vest in the learned Tribunal, and continues to vest in this Court, seized with successive appeals, emanating from the order of the ADG. It is for this reason that, in the orders to which Mr. Ganesh has alluded – and to which we do not deem it necessary to make reference – the terms of provisional release have been fixed by this Court and, on occasion, this Court has directed the learned Tribunal to fix the terms of provisional release.

59. We, therefore, reject the submission, of the learned ASG, that the learned Tribunal exceeded its jurisdiction in directing provisional release of the seized gold, gold jewellery and silver, and fixing the terms thereof.

60. Proceeding to the merits, we reiterate that our jurisdiction, conferred by Section 130 of the Act, is limited to deciding substantial questions of law, arising from the impugned order of the learned Tribunal. We are not an appellate authority on facts; we exercise appellate jurisdiction only on “substantial questions of law”. It is obvious that an order of provisional release, is essentially a discretionary order, as is apparent from the very tenor of Section 110A of the Act. The scope of interference, by an appellate court, with a discretionary order of the court below, especially where the appellate jurisdiction is statutorily limited to substantial questions of law, is heavily circumscribed. In passing an order of provisional release, there is no adjudication, by the authority concerned, of the competing rights and liabilities of the parties before it. The authority does

not pronounce on the issue of whether there has, or has not, been an actual evasion of duty, or other contravention of Customs law, by the importer seeking provisional release. That is an exercise which has to suffer the rigour of the adjudicatory process, which, in the case of the present respondent, stands set in motion with the issuance of Show Cause Notice dated 26th September, 2019.

61. At the same time, provisional release is not a rule, or a vested right. Section 110A has, advisedly, left the matter to the discretion of the adjudicating authority, to be exercised in his best judgement, keeping in mind the overall facts and circumstances. The use of the word "may" is amply sufficient to clothe the adjudicating authority with the jurisdiction to decide one way or the other, on the request for provisional release, keeping, at all times, the interests of justice paramount. The sequitur would, however, be that, where the authority – in the present case, the learned Tribunal – has decided to provisionally release the goods in issue, and has fixed the terms of provisional release, this Court would, in appellate jurisdiction under Section 130 of the Act, interfere only where the exercise of discretion, by the learned Tribunal, is found to be perverse, in that it is contrary to the facts before the learned Tribunal, amounts to a perverse appreciation thereof, or is such as no reasonable person would have arrived at. Absent these infirmities, we are convinced, in our mind, that no case for interference, with the decision of the learned Tribunal could be said to have been made out, even if we, on the facts, may be of the opinion that the learned Tribunal could have decided otherwise. These, in our view, are principles which are too well settled to merit repetition.

68. These two "categories", of the gold jewellery seized at the Airport have, we feel, to be dealt with, differently.

73. We may hasten to add, here, that our view, in this regard, does not discountenance, in any manner, the allegation, of the DRI, that the entire quantity of 51172.4 grams of gold jewellery was, in fact, being smuggled into India, or that it was, consequently, liable to confiscation. That is a matter to be decided in adjudication. Provisional release of the gold jewellery does not, in any manner, inhibit the adjudicating authority from holding that the jewellery was, in fact, liable to confiscation, or passing appropriate orders in that regard. It is precisely for this reason that, at the time of provisional release, the importer is required to furnish a bond, covering the full value of the imported goods, along with security, in accordance with law. Allowing provisional release of the seized gold jewellery does not, therefore, interfere, in any manner, with due adjudication of the Show Cause Notice, or with the jurisdiction, of the adjudicating authority, to hold the gold jewellery liable to confiscation. The mere fact that imported goods, consequent on adjudication may, possibly, be held to be liable to confiscation at a later stage, cannot be a ground to refuse provisional

release. Else, Section 110A of the Act would, in our view, be largely rendered nugatory and otiose.

74. The order, dated 4th October, 2019 *supra*, of the ADG, DRI, as also the submissions advanced by the Revenue before the learned Tribunal and, thereafter, before us (through the learned ASG) rely, essentially, on the allegations in the Show Cause Notice, dated 26th September, 2019, as a ground to oppose the request for provisional release of the seized gold jewellery. This, in our view, is an erroneous approach. Seizure of goods is, in nearly every case, bound to invite, in its inevitable wake, a Show Cause Notice, proposing confiscation thereof. If the mere fact of issuance of such a Show Cause Notice, and the allegations therein, are to be treated as sufficient to justify rejection of the prayer for provisional release, Section 110A would be reduced to a dead letter.

76. We are not persuaded to change our view, on the basis of the various statements, recorded under Section 108 of the Act, on which the learned ASG sought to rely. Statements, under Section 108 of the Act, we may note, though admissible in evidence, acquire relevance only when they are, in fact, admitted in evidence, by the adjudicating authority and, if the affected assessee so chooses, tested by cross examination. We may, in this context, reproduce, for ready reference, Section 138B of the Act, thus:

“138B. Relevancy of statements under certain circumstances. —

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.”

A Division Bench of this Court has, speaking through A. K. Sikri, J. (as he then was) held, in *J & K Cigarettes Ltd v. Collector of Central Excise*: 2009 (242) ELT 109 (Del) that, by virtue of sub- section (2), Section 138B(1) of the Act would

apply, with as much force, to adjudication proceedings, as to criminal proceedings. Following this, it has been held, by the High Court of Punjab and Haryana, in *Jindal Drugs Pvt Ltd v. U.O.I.* : 2016 (340) ELT 67 (P&H) that, unless and until one of the circumstances contemplated by clause (a) of Section 138B(1) (a) applies, the adjudicating authority is bound to follow, strictly, the procedure outlined in clause (b), before treating a statement, recorded under Section 108 of the Act, as relevant. (We may note, here, that *Jindal Drugs* was rendered in the context of Section 9D of the Central Excise Act, 1944 which is, however, in *pari materia*, and in *haec verba*, with Section 138B(1)(b) of the Act.) Paras 19 to 21 of the judgement in *Jindal Drugs* may, for ready reference, be reproduced thus:

"19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

20. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence in-chief has to precede cross-examination, and cross examination has to precede re-examination.

21. It is only, therefore, –

(i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence, that the question of offering the witness to the assessee, for cross-examination, can arise."

We express our respectful concurrence with the above elucidation of the law which, in our view, directly flows from Section 138B(1) of the Act – or, for that matter, Section 9D of the Central Excise Act, 1944.

77. The framers of the law having, thus, subjected statements, recorded under Section 108 of the Act, to such a searching and detailed procedure, before they are treated as relevant in adjudication proceedings, we are of the firm view that such statements, which are yet to suffer such processual filtering, cannot be used, straightaway, to oppose a request for provisional release of seized goods. The reliance, in the appeal before us, on various statements recorded during the course of investigation in the present case cannot, therefore, in our view, invalidate the decision, of the learned Tribunal, to allow provisional release of the seized 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019.

79. We are, however, of the view that the learned Tribunal erred in clubbing the aforesaid quantity of 25400.06 grams of gold jewellery which 25299.68 grams of gold jewellery, the Bill of Entry in respect of which was undated, unregistered and unsigned, by the importer as well as by the Customs Import Clerk. Submission of a registered Bill of Entry, in accordance with Section 46 of the Act, is the sine qua non for licit importation of goods. In the absence of a registered Bill of Entry, importation of goods is impermissible. The quantity of 25299.68 grams of gold jewellery, being not covered by any registered, signed or appraised Bill of Entry, bearing the signature either of the importer or of the Customs Import Clerk, could not, in our view, have been provisionally released, as the import was invalid and irregular ab initio. The exercise of discretion, by the learned Tribunal, in allowing provisional release of the said quantity, by clubbing it with the 25400 grams of gold jewellery, in respect of which there was a registered, signed and appraised Bill of Entry, with a specific Job Number, in our view, was completely untenable in law. It cannot, therefore, be said that the learned Tribunal, in allowing provisional release of the quantity of 25299.68 grams of gold jewellery, for which no registered or signed Bill of Entry, having an assigned Job No, was available, exercised its discretion in accordance with law. The exercise of discretion by the learned Tribunal, in respect of this quantity of gold, therefore, in our view, suffers from perversity in law, and cannot sustain."

(emphasis supplied)

42. The following position emerges from the aforesaid decision of the Delhi High Court in Its My Name:

- i. The Tribunal is not required to adjudicate either finally or tentatively at the time of provisional release as to whether the alleged infractions committed or the consequent liability, if any, of the seized goods to confiscation under the Customs Act;
- ii. The order of provisional release is an interlocutory exercise and does not finally adjudicate on any liability;
- iii. The exercise of power under section 110A of the Customs Act to release

imported goods on a provisional basis is essentially and fundamentally discretionary in nature;

iv. Section 110A of the Customs Act contemplates release of any goods. Thus, both prohibited goods and non-prohibited goods can be released;

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

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

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

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

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

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

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

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

43. It would also be seen from the aforesaid decision of the Delhi High Court in *Its My Name*, that the decision of the Tribunal has only been faulted for the reason that there were two category of gold but the Tribunal clubbed the two categories without separately exercising of discretion for each category. Thus, the decision of the Delhi High Court in *Its My Name* does not support the Department and the Principal Commissioner committed an error in placing reliance upon this decision for rejecting the application filed by the appellant for provisional release of the goods.

44. The Principal Commissioner also committed an error in rejecting the application filed by the appellant for provisional release of the goods by holding that the seized goods were "prohibited goods" liable for confiscation under section 110(d) of the Customs Act. As noticed above, the watches of all other co-noticee were released by the Department and this issue has been raised by the

Department only in the case of the appellant. Even while adjudicating the show cause notice issued to M/s. Johnson Watch Co. Pvt. Ltd., by order dated 27.05.2020, only a fine has been imposed under section 125(1) of the Customs Act and the goods have not been confiscated. The Delhi High Court had also in Its My Name held that both prohibited and non-prohibited goods can be released under section 110A of the Customs Act.

45. The view taken by the Principal Commissioner for rejecting the application filed by the appellant for provisional release of the goods for the reason that a discretion is vested in the authority and since the subsequent show cause notice dated 27.10.2017, was adjudicated upon and the appellant was held liable to penalty, also suffers from an error.

46. As noticed above, the watches of M/s. Johnson Watch Co. Pvt. Ltd. had been released even though no application had been filed for provisional release of the goods and even otherwise only a fine has been imposed while adjudicating the show cause notice and the goods have not been seized. In the present case, the appellant had deposited Rs.27,50,669/- and had also made an offer to deposit the balance amount of duty under protest. The mere fact that the judgment of the Delhi Court in the Writ Petition filed by Purushottam Jajodia was stayed by the Supreme Court on 11.09.2014, could not also have been made a ground for rejecting the application filed by the appellant for provisional release of the goods. It needs to be noted that the stay order was subsequently modified by the Supreme Court and the goods were directed to be released. In the present case, the appellant had not only deposited a substantial amount of duty proposed in the show cause notice but had also made an offer to deposit the remaining amount under protest so that the goods could be released provisionally. It has also been found as the fact that the 6233 high-end wrist watches recovered from M/s. Johnson Watch Co. Pvt. Ltd. were released merely on the basis of an undertaking given by the Directors in 2012 without even moving any application for provisional release of the goods. Not only that, 5 high-end wrist watches recovered from Purushottam Jajodia and 16 high-end wrist watches recovered from Pankaj Lakhani were also released pursuant to the orders passed by the Supreme Court and it is only in the matter of the appellant that relates to 95 high-end wrist watches and Rs. 61 Lakhs in cash that the application for provisional release of the goods has been rejected.

47. Thus, for all the reasons stated above, it is not possible to sustain the order dated 11.09.2020 passed by the Principal Commissioner and it would be appropriate to direct that, subject to the appellant depositing the remaining balance amount of duty proposed in the show cause notice within a period of 30 days from the date of this order, the goods and the cash seized from the appellant should be released within the next 30 days. The impugned order dated 11.09.2020 is, accordingly, set aside and the appeal is allowed to the extent indicated above.

(Order Pronounced on 03.01.2022)