

(2021) 11 KL CK 0208
In the High Court Of Kerala
Case No : RP NO. 630 Of 2021

State Tax Officer, Investigation Branch-I,	APPELLANT
Vs	
Y.Balakrishnan	RESPONDENT

Date of Decision : 29-11-2021

Acts Referred:

Indian Penal Code, 1860 — Section 302
Central Goods and Services Tax Act, 2017 — Section 2(73), 67(6), 67(8), 129(6), 130, 130(1), 130(2), 130(3), 130(7)
Customs Act, 1962 — Section 110A, 125

Citation : (2021) 11 KL CK 0208

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : Dr.Thushara James, K.Srikumar, K.Manoj Chandran, Ammu Charles

Final Decision : Dismissed

Judgement

Bechu Kurian Thomas, J

1. An interim order is the cause of this review petition. By the interim order, this Court directed release of goods that were the subject matter of proceedings for confiscation under the Central Goods and Services Tax Act, 2017 (for brevity 'the Act'). A review petition against the interim order is preferred by the State Tax Officer, leading to seminal questions on the scope and ambit of the powers of release of goods while the confiscation proceedings are going on.
2. The primary question for consideration is whether section 130(2) of the Act contemplates the release of goods by payment of fine in lieu of confiscation, even before orders of confiscation are issued. In addition, an incidental question that arises is on the quantum payable as fine in lieu of confiscation.
3. The genesis of the dispute emerges from an inspection conducted by the officers of the Kerala State GST Department on 03-08-2021, who seized, as per Rule 139(2) of the Central Goods and Services Tax Rules, 2017, (for brevity 'the

Rules'), beedis, stored by the respondent in this review petition in his different godowns. Orders of prohibition were later issued under Rule 140 of the Rules. For easier comprehension, the review petitioners are hereafter referred to as 'Tax Officer', while the respondent will be referred to as the 'dealer'.

4. It is appropriate to mention that beedi is an indigenous smoking product like a cigar or a cigarette, made by rolling a dried leaf filled with flaked tobacco and is undoubtedly perishable in nature, with a limited shelf life.

5. When attempts to obtain release of the seized beedis were unsuccessful, the dealer initially filed W.P.(C) No.17280 of 2021, wherein, by an interim order dated 26-08-2021, this Court observed that the dealer is free to approach the Tax Officer for release of goods. In the meantime, the Tax Officer issued three separate show-cause notices, all dated 25-08-2021, proposing to confiscate the goods and the conveyances and levied penalty under section 130 of the Act.

6. The dealer immediately filed another writ petition as W.P.(C) No.18169 of 2021, challenging the show-cause notices. The notices specified, apart from tax and penalty, the quantum to be paid as fine in lieu of confiscation of the goods. For reference, the following are extracted from the three notices - Ext.P8, Ext.P8(a) and Ext.P8(b), (the part relating to tax and penalty are not extracted) issued to the dealer relating to the fine in lieu of confiscation:

Ext.P8

Sl.

No.

Description of Goods

HSN

code

Quantity

Total value

Central tax

State tax

Integrated tax

Cess

1

2

3

4

5

6

7

8

9

1

Beedi

2403

827200

packets

8272000

2326500

2326500

0

0

Ext.P8(a)

Sl.

No.

Description of goods

HSN

code

Quantity

Total value

Central tax

State tax/Union Territory Tax

Integrated tax

Cess

1

2

3

4

5

6

7

8

9

1

Beedi

2403

8500

packets

85000

23906

23906

0

0

Ext.P8(b)

Sl. No

Description of goods

HSN

Code

Quantity

Total value

Central tax

State tax/Union Territory Tax

Integrated tax

Cess

1

2

3

4

5

6

7

8

9

1

Onam Diamond Beedi

2403

34 Bags(160 packets @ ☐

200 per

packet

Rs.10,88,000/-

306000

306000

0

0

2

SM Beedi

2403

64 Bags(120 packets @ ☐ 200/- per

packet)+ 80 packets @ ☐ 200/-

TOTAL (Rs.)

Rs.15,52,000/-

436500

742500

436500

742500

0

0

7. The writ petition was filed, alleging that the goods were not liable for confiscation and that perishable goods cannot be detained indefinitely. It was claimed that the goods were liable to be released on a provisional basis, upon execution of a bond or a bank guarantee.

8. After hearing the learned counsel for the dealer as well as the learned Senior Government Pleader, this Court by order dated 07-09-2021 directed the Tax Officer to release the goods in favour of the dealer, on payment of the amounts contemplated under section 130(2) of the Act, after advertent to the plea of the dealer that, the Tax Officer is refusing to abide by the mandate of the Statute, despite the dealer offering to pay the amounts in lieu of confiscation.

9. Soon thereafter, the Tax Officer preferred the present review petition, seeking to review the interim order dated 07-09-2021 in W.P. (C) No.18169 of 2021.

Arguments:

10. The learned Senior Government Pleader Dr.Thushara James, contended that section 130 of the Act does not envisage a provisional release, and the option to pay the fine in lieu of confiscation can arise only after the Tax Officer issues an order of confiscation. The conspicuous absence of the time within which an order to release the goods or conveyance is to be issued, according to the learned Senior Government Pleader, indicated that time was at the discretion of the Tax Officer. According to the learned Senior Government Pleader, the discretion rests upon the Tax Officer to pass an order of confiscation immediately or later, depending upon the circumstances and it is only thereafter that the goods could be released.

10.1. Drawing cue from the concept of provisional release under section 129(6) as well as section 67(6) of the Act, it was also submitted that the absence of a similar provision in section 130 of the Act, indicates the intention of the legislature against a provisional release under the section. After referring to section 125 of the Customs Act, 1962 (for short 'the Customs Act'), it was argued by Dr.Thushara James that, the wordings in the said provision were in pari materia to that of section 130 of the Act, and notwithstanding section 125 of the Customs Act, a separate provision was amended and included as section 110A in the Customs Act. Reliance was made to the decisions in Union of India v. Lexus Exports Pvt. Ltd [(1997) 10 SCC 232], M/s. Meghdoot Logistics v. Commercial Tax Officer (W.P.(C) No.10832 of 2020), as well as the Constitution Bench judgment in Commissioner of Customs (Import) Mumbai v. Dilip Kumar and Company and others [(2018) 9 SCC 1].

11. The learned Senior Counsel Sri. K.Srikumar, duly instructed by Adv. Manoj Chandran, on the other hand, submitted that the non-obstante clause in section 130 of the Act ought not to be interpreted with strict rigour as if all other provisions of the Act, are to be ignored. According to the learned Senior Counsel, the intention of using the term "notwithstanding anything contained in this Act" is only to stipulate that a special provision has been carved out. However, the

same cannot be in ignorance of other provisions of the statute, including the provisions of section 67(6) as well as those relating to perishable goods under section 67(8) of the Act. It was argued that the concept of provisional release will apply even for proceedings initiated under section 130 of the Act. The learned Senior Counsel further submitted that the fine in lieu of confiscation cannot include other amounts specified in section 130(3) of the Act, as those are all leviable on the person, while the confiscation is of the goods.

11.1. The learned Senior Counsel Sri. Srikumar argued that, the language of section 130 of the Act leaves no room for doubt that the fine in lieu of confiscation alone needs to be paid to get release of the goods, while the remaining amounts mentioned in the statute will only become payable. It was further argued that the phrase 'market value' used in section 130(2) has to be understood in the light of the definition of the word as defined in section 2(73) of the Act and therefore, the intention of the legislature is unambiguous that, MRP is not to be used for calculating the fine in lieu of confiscation. Reference was made to the decisions in *Collector of Customs Bombay v. M/s. Elephanta oil and industries Ltd.* [(2003) 4 SCC 325]

12. Two main contentions are raised by the Tax Officer in the review petition. However based upon the contentions raised in the review, the following three issues arise for consideration:

Issues

(i) Whether the provisions of section 130 of the Act contemplate any provisional release of goods, as directed in the interim order of this Court?

(ii) Whether the amount payable for release of the goods under section 130 of the Act is fine alone or is it fine, penalty and tax to be paid together for securing release of the goods? and,

(iii) What is the basis or rate for calculating the fine under section 130 of the Act?

Issue No.(i) Whether the provisions of section 130 of the Act contemplate any provisional release of goods, as directed in the interim order of this Court?

13. For a better understanding of the disputes raised, it is apposite to extract section 130 of the Act.

S.130. Confiscation of goods or conveyances and levy of penalty.

(1) Notwithstanding anything contained in this Act, if any person-

(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(ii) does not account for any goods on which he is liable to pay tax under this Act; or

(iii) supplies any goods liable to tax under this Act without having applied for

registration; or

(iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance, then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as the said officer thinks fit:

PROVIDED that such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon:

PROVIDED FURTHER that the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under sub-section (1) of section 129:

PROVIDED ALSO that where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine equal to the tax payable on the goods being transported thereon.

(3) Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

(4) No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an opportunity of being heard.

(5) Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government.

(6) The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession.

(7) The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government."

14. As the subtitle of the section indicates, the provision deals with two facets of penalising evasion or attempt to evade tax - confiscation and penalty. Section

130(1) of the Act stipulates that, if any of the five conditions specified in the said sub-clauses (i) to (v) are satisfied, then, there can be confiscation of goods and conveyances and a further penalty leviable on the person.

15. Confiscation is not defined in the Act. It is a term that has its origin in Roman law meaning 'seizing' or 'taking into the hands of the Emperor and transferring it to the Emperors Fiscus or Treasury'. The essence of the concept of confiscation is that the confiscated goods are taken by the State as its own property, depriving the true owner of the title to the said goods. (See P. Ramanatha Iyer's Advanced Law Lexicon Vol-I, 4th edition).

16. Confiscation is a drastic power. It is no doubt penal in nature and the owner of the goods will be deprived of the title to the goods. The scheme and objective of the Act are not at all to appropriate goods. Its intent is to ensure that tax is paid for every taxable transaction. The power of confiscation is vested only when the tax officer is satisfied that there was an intent to evade payment of tax or to avoid the rigours of the taxing provisions of the Act. The Gujarat High Court had elaborately dealt with the scope of section 130 of the Act in the decision in Synergy Fertichem Pvt. Ltd. v. State of Gujarat [(2020) 76 GSTR 81 (Guj.)] and had held that confiscation is an aggravated form of action, intended to deter the dealers from evading tax.

17. Section 129 of the Act incorporates the concept of provisional release of goods detained under the said section by reference to section 67(6) of the Act. However, such a tool of referential incorporation or the words 'provisional release' is absent in section 130 of the Act. Though the words 'provisional release' is absent in section 130 of the Act, and there is a conspicuous absence of even a reference to section 67(6), does it indicate the intention of the legislature to avoid release of goods until confiscation orders are issued? The aforesaid is the core question to be answered in this issue.

18. A perusal of sub-clause (2) of section 130 of the Act reveals that, while adjudging, the Tax Officer is bound to give an option to the owner of the goods to pay a fine, which the officer thinks fit, in lieu of confiscation. Section 130(2) is worded in the form of a command to the officer to offer the option to the owner of the goods. In cases where the goods are perishable or where the goods are of extreme significance in terms of time, should the owner of the goods be left to a possible long drawn-out process of adjudication, the period of which is left to the discretion of the officer and wait till the entire adjudication process is completed, to pay that 'fine in lieu of confiscation'?. The hurdle of storing the goods and conveyances until adjudication is completed is one of the reasons for incorporating a provision to redeem the goods on payment of a fine.

19. The issue under consideration, no doubt, requires an interpretation of the provisions of section 130 of the Act. While interpreting a taxing statute, it is elementary that the court has to merely look at what is clearly written. There is no room for any intendment. The Statute is, in fact, a fiat of the Legislature. It

should be read as it is, without deforming or distorting its language. There is no latitude, under any circumstances whatsoever, to interpret taxing statutes based upon any assumption or presumption. The approach of the court, while considering the interpretation to be given to the provisions of a taxing statute is to look at each word of the provision in its literal sense, without any addition, deletion, assumption or presumption. Neither hardship nor equity, has any role while considering the meaning to be ascribed to the provisions of a taxing statute. Further, there is nothing unjust in the taxpayer escaping if the letter of the law fails to catch him because the legislature failed to express itself clearly. Reference to the authoritative pronouncements of the Supreme Court in *State of West Bengal v. Kesoram Industries Ltd. and Others* [(2004) 10 SCC 201], and that in *Commissioner of Customs (Import), Mumbai. v. M/s. Dilip Kumar and Company and Others* [(2018) 9 SCC 1], alone would suffice to fortify the aforementioned legal propositions.

20. In the backdrop of the above principles of interpretation in mind, when the provisions of section 130 of the Act are analysed, it can be discerned that the option to pay a fine in lieu of confiscation is mentioned twice - once in Section 130(2) and again in section 130(7) of the Act.

21. The effect of section 130(7) of the Act is to be appreciated initially. While appreciating the aforesaid sub-clause, it is worth noticing the arrangement of various sub-clauses of section 130 of the Act. Section 130(1) deals with the instances when goods and conveyances are liable for confiscation and the effect of confiscation. (I am skipping sub-clauses (2) and (3) for the time being). When sub-clause (4) speaks about giving an opportunity of being heard, sub-clause (5) refers to the vesting of title of the goods upon the Government after confiscation and sub-clause (6) refers to taking possession of the things confiscated. Sub-clause (7) comes after all the above provisions and refers to confiscated goods, clearly indicating the intent of the legislature that confiscation has already taken place.

22. Under section 130(7) of the Act, the proper officer can after satisfying that the confiscated goods are not required in any other proceeding and, after giving reasonable time of three months, to pay fine in lieu of confiscation, dispose of the goods. The sequential arrangement of the various sub-clauses, especially sub-clause (7) along with the absence of the words "owner of goods" and the use of words "confiscated goods", is crucial in determining the stage at which section 130(7) is attracted. Once confiscation is ordered, ownership of the goods vests with the Government, by operation of law and the goods will change their colour and character to "confiscated goods". An appreciation of the tenor and purport of the words employed in the statute obligates this Court to conclude that section 130(7) of the Act, deals with a post-adjudicatory situation.

23. In contradistinction, when the phraseology of section 130(2) of the Act is examined, it reveals a different set of words employed therein vis-a-vis section 130(7) of the Act. The intention behind the said sub-clause can be gathered from

the words: (a) whenever confiscation of goods or conveyance is authorised by this Act (b) the officer adjudging it, and (c) give to the owner of the goods an option.

24. The words 'authorised by this Act', 'officer adjudging it' and 'owner of the goods', employed in section 130(2) of the Act are decisive in understanding the meaning of the said statutory provision. Of course, the words 'officer adjudging it' is seen in section 130(6) also. However, when the words 'officer adjudging it', is followed by the words 'owner of the goods' as evident from Section 130(2) of the Act, there cannot be any contrary interpretation. The reason is plain and clear. Once the confiscation order is issued, as mentioned earlier, ownership of the goods, by operation of the statute, vests with the Government. The use of the present continuous words "officer adjudging it" and the words 'owner of the goods' is clearly indicative of the intention behind incorporating section 130(2) of the Act. The intent of section 130(2) of the Act is to provide an option to the owner to redeem the goods before he is divested of his ownership and while the process of adjudication is going on.

25. The provision can be looked at from a different angle also. If section 130(2) of the Act was not there in the statute book, would the option to pay a fine in lieu of confiscation be still available? The answer is evident from section 130(7) of the Act, where the option will be available after divesting ownership. Thus, incorporating a provision in the form of section 130(2), over and apart from section 130(7), is an indication of the wisdom of the legislature that even before the owner is divested of his ownership, he must have an option to pay fine in lieu of confiscation. Applicability of section 130(2) of the Act depends, not when confiscation is ordered, but when confiscation is authorised by the Act and when ownership of the goods remains with the owner of the goods and not the Government. In my view, section 130(2) of the Act is a means to obtain a release of the goods or conveyance contemplated at a stage prior to the final order of confiscation. It is not a post adjudicatory release that is contemplated under section 130(2) of the Act and on the contrary, it is a release during the course of adjudication.

26. Absence of the use of the words 'provisional release' or non-reference to section 67(6) of the Act is not determinative of the intent of the section. Since section 130 of the Act is a code by itself, the provisions of section 130 must be viewed independently to understand its scope. None can find fault if the legislature in its wisdom thought it fit to incorporate a provision into section 130 itself for release of the goods in lieu of confiscation at two stages - during adjudication and after adjudication. When the intention of a section is manifest from the words employed, it would be insidious to interpret the section differently, by referring to other sections of the same enactment. Absence of the words provisional release or absence of reference to section 67(6) of the Act is not determinative when section 130(2) of the Act itself is manifest of such a release.

27. The two different stages in which the goods can be released - during adjudication and post-adjudication are obviously created with a purpose. The purpose of the two-stage release is that, if the owner of the goods, even before being deprived of his title to the goods or conveyance, is ready to pay the fine stipulated by the officer, then without further wrangles, if the goods and or conveyance can be released to the said owner, the same avoids unnecessary procedural formalities. If the fine in lieu of confiscation is paid at the initial stage, no prejudice would be caused to the revenue also, since by virtue of section 130(7) even after adjudication, an option to pay fine in lieu of confiscation is to be offered peremptorily. Thus, in view of the above deliberations, I am of the firm view that section 130(2) of the Act applies before the order of confiscation is issued.

28. The decision relied upon by the learned Senior Government Pleader rendered by the Karnataka High Court in M/s.Meghdoot Logistics case, according to me, can be distinguished. Though the said decision observes in paragraph 21 that there is no provision for a provisional release of the seized goods under section 130 of the Act, this Court is of the considered view that the question of release under section 130(2) of the Act never arose for consideration in that case and the observations were only obiter dicta of the Court. The aforesaid decision arose on an issue under section 129 of the Act and in the process of distinction, a passing reference alone was made to section 130. In such a view of the matter, I am not persuaded to follow the said judgment.

29. In the decision in Special Civil Application No.4043 of 2020 by the High Court of Gujarat in Kannan v. State of Gujarat, though it was observed that the competent authority has the power to pass an order of provisional release of goods, subject to certain terms and conditions, this Court is of the view that section 130(2) contemplates a release not provisional or absolute but a release peculiar to the Act during the course of adjudication. Further, the provisions of section 125 of the Customs Act though contains similar wordings as in section 130(2) of the Act, the interpretations adopted therein cannot be adopted in their entirety since specific distinctions are available in the various clauses of section 130 of the Act.

30. Thus, I answer the first question that though section 130(2) is not a case of provisional release, the sub-clause confers power upon the competent officer to release the goods on payment of fine in lieu of confiscation, while the proceedings for confiscation are continuing and before orders of adjudication are passed.

Issue No. (ii). Whether the amount payable for release of the goods under section 130 of the Act is fine alone or is it fine, penalty and tax to be paid together for securing release of the goods?

31. While considering this issue, it is necessary to bear in mind section 130(1) of the Act which provides that when any of the five circumstances mentioned

therein are satisfied, the goods and conveyances shall be liable to confiscation and the person shall be liable to pay penalty under section 122 of the Act. When section 130(2) refers to the option to pay a fine in lieu of confiscation, section 130(3) of the Act refers to what follows, when a fine is imposed under sub-section (2). The owner of such goods or conveyance shall, in addition to the fine imposed, be liable to any tax, penalty and charges payable in respect of such goods or conveyance. The question for consideration is whether the amount of tax, penalty and charges payable by a person is at the time when the fine is imposed or can it be paid at a stage, subsequent thereto.

32. As mentioned earlier, though there is no equity in tax, the statute must be fair to both the assessee as well as to the revenue. As observed by the Supreme Court in *Rajasthan Rajya Sahakari Spinning and Ginning Mills Federation Limited v. Deputy Commissioner of Income Tax, Jaipur* [(2014) 11 SCC 672] hardship or equity is not relevant in interpreting provisions in a taxing statute and the court should not concern itself with the intention of legislature when the language is plain and unambiguous.

33. While understanding the scope of Section 130(3), this Court cannot ignore the interplay between section 130(2) and 130(3) of the Act. To enable release of goods under section 130(2) of the Act, fine in lieu of confiscation has to be imposed. When the owner of the goods opts to pay a fine in lieu of confiscation, while the adjudication is continuing, an obligation to pay the tax, penalty and charges for such goods or conveyance, becomes payable in addition to the fine. Thus, when the fine is paid in lieu of confiscation, the tax, penalty and other charges become payable thereon.

34. The words 'be liable' indicates that the tax, penalty and charges will fall due upon the owner of the goods or the person referred in sub-clause (1), at any point of time thereafter, and not necessarily along with the payment of fine in lieu of confiscation. The words 'in addition' 'be liable' and 'payable' in section 130(3) are indicative of the burden of obligation that will befall, over and apart from fine. These words cannot be stretched to mean that the liability will have to be paid immediately. There is a necessity to conduct an adjudication before ascertaining the quantum of tax, penalty and other charges payable. Before such adjudication, the dealer cannot be compelled to pay the tax or penalty.

35. At the stage when the fine in lieu of confiscation is paid to obtain release, the adjudication as to whether the goods or conveyance are to be actually confiscated or not, or whether any tax or penalty or other charges are due for the goods or conveyance, have not been ascertained. Similarly the quantum of tax and penalty have also not been ascertained by any form of adjudication. As mentioned earlier, it requires an adjudication. Adjudication requires a hearing. The period within which the adjudication has to be completed, is left to the discretion of the Proper Officer.

36. The observation in *Synergy Fertilizer Pvt. Ltd. v. State of Gujarat* [(2020)

76 GSTR 81 (Guj.)], is relevant. It was observed therein that "the fine provided in the first proviso to sub-section(2) of section 130 is the maximum fine leviable. Consequently, the Proper Officer adjudging the case is required to examine the seriousness of the contravention and impose fine accordingly. It is not as if in every case the Proper Officer should levy the maximum fine. The order of confiscation should therefore reflect due application of mind on the part of the Proper Officer to the quantum of fine imposed by him."

37. In this context, this Court will have to bear in mind the pristine principle that in our Constitutional framework, rule of law is attained only when there is fairness, not only in the substantive law and the procedural law, but even in its application. (See the decision in Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited [(2015) 1 SCC 1] and Radha Krishan Industries v. State of Himachal Pradesh and Others, [(2021) 6 SCC 771]. Thus the constitutional principle of fairness must be inherent in every statutory provision and be even infused into the statutory provisions by courts when called upon to do so.

38. The words in a statute often take their meaning from the context of the statute as a whole, as is clear from the legal maxim 'exposition ex visceribus actus'. The words cannot be construed in isolation. The words 'be liable' in the context in which it occurs in section 130(3) of the Act only imports a possibility of attracting liability. Merely because the owner of goods or conveyance opts to pay fine in lieu of confiscation does not mean that the facts essential for incurring the liability to order confiscation automatically stands proved. That proof has to come out through the process of adjudication, as otherwise, there would be conferment of unbridled powers upon the Proper Officer to coerce every dealer to pay fine, tax, penalty and other charges without even any adjudication. Such a procedure is against fairness and contrary to the principle of rule of law.

39. In the decision in Superintendent and Remembrancer of Legal Affairs to Government of West Bengal v. Abani Maity [(1979) 4 SCC 85], though the words 'be liable' in that decision was held to have a compulsive force, it was observed as follows;

"Accordingly, the word "liable" occurring in many statutes, has been held as not conveying the sense of an absolute obligation or penalty but merely importing a possibility of attracting such obligation, or penalty, even where this word is used along with the words 'shall be'. Thus, where an American Revenue Statute declared that for the commission of a certain act, a vessel "shall be liable to forfeiture", it was held that these words do not effect a present absolute forfeiture but only give a right to have the vessel forfeited under due process of law. Similarly, it has been held that in Section 302, Indian Penal Code, the phrase "shall also be liable to fine" does not convey a mandate but leaves it to the discretion of the Court convicting an accused of the offence of murder, to impose or not to impose fine in addition to the sentence of death or imprisonment for life."

40. Thus the words "be liable" in section 130(3) of the Act only conveys a possibility of attracting the obligation and not an imperative obligation, shorn of fair procedure. In view of the above deliberations, this Court is of the view that, when fine in lieu of confiscation is paid by a dealer under section 130(2) of the Act, the liability for payment of tax, penalty and charges will fall upon the dealer, in addition to the fine and they need be paid only after adjudication. To obtain the release of the goods or conveyances, while the adjudication proceedings are continuing, the taxpayer needs to pay only the fine and not the tax, penalty and charges thereon. The tax, penalty and charges can be paid after adjudication.

Issue No.(iii) What is the basis or rate for calculating the fine under section 130 of the Act?

41. Though the questions that arose for consideration were confined to the two issues earlier mentioned, the rate for calculating the fine is an incidental question that was argued at length by both sides and hence the said issue is also considered.

42. The first proviso to section 130(2) states that the fine leviable shall not exceed the market value of the goods confiscated. The term 'market value' is defined in section 2(73) to mean "the full amount which a recipient of a supply is required to pay in order to obtain the goods or services or both of like kind and quality at about the same time and at the same commercial level where the recipient and the supplier are not related".

43. The definition of the term market value clearly indicates that the term is not referable to the maximum retail price and on the contrary, it is a sale price that is agreed to between a bonafide supplier and a bonafide purchaser, who are not related to each other.

44. If the goods that are subject to confiscation proceedings carries an invoice and the Proper Officer has no dispute on the value mentioned in the invoice based upon a preliminary appreciation of the amount payable for goods or services of a like kind or quality, at or about the same time and at the same commercial level, then that shall be the market value. If on the other hand, the tentative amount or the amount assumed to be the market value preliminarily is disputed by the taxpayer, it calls for a determination during adjudication, where an opportunity for showing the true market value of the property will be available to the taxpayer. A reading of the definition, no doubt, reveals that the statute does not reckon MRP as the criteria for determining the fine leviable. The intention and the explicit words used in the statute clearly indicates that the proper officer cannot base the fine on the MRP imprinted on the goods, if there are other materials available to fix the market value.

45. In the instant case, if the taxpayer has a dispute on the value fixed tentatively by the Proper Officer, he can dispute the same and during the course of adjudication, get a determination of the market value also. The amount payable is in the realm of a disputed question of fact and this Court cannot

determine, in this proceeding, the quantum payable by the dealer.

Conclusions:

46. The above discussion thus leads to the following conclusions:

(1) The provisions of section 130 of the Act contemplate release of goods on payment of fine in lieu of confiscation at two stages (i) during the process of adjudication, under section 130(2) and, (ii) post-adjudication under section 130(3) of the Act.

(2) At the time of release of goods under section 130(2) of the Act, the owner of the goods is required to pay the fine in lieu of confiscation alone, while penalty tax and other charges can be paid after adjudication.

(3) The basis for calculating the fine in lieu of confiscation under section 130 of the Act is only the market value as defined under section 2(73) of the Act and not the maximum retail price.

Having come to the above conclusions, this Court is of the view that the review petition has no merit and the same is dismissed.