

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

**COURT No. III**

**Customs Appeal No. 55422 of 2023**

(Arising out of Order-in-Original No. CUS-APR-ASS-2702-2023-GR-3/4/6-O/o Pr COMMR-CUS-ACC(I) DELHI/10817 dated 03.08.2023)

**TASHA GOLD PVT LTD**

Plot No. N-19, Site-V  
Kasna Industrial Area,  
Greater Noida,  
Gautam Buddha Nagar  
Uttar Pradesh-201310

**Appellant**

Vs.

**PRINCIPAL COMMISSIONER OF CUSTOMS, NEW  
DELHI, ACC (IMPORT)**

Air Cargo Complex  
Import, New Customs  
House, Near Igi Airport,  
New Delhi-110037

**Respondent**

**APPEARANCE:**

Shri Arjun Raghuvendra, Shri Jayant Kumar & Shri Soham Bandopadhyay,  
Advocates, for the Appellant

Shri. Nagendra Yadav Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR.SOMESH ARORA, MEMBER (JUDICIAL)  
HON'BLE MS.HEMAMBIKA R.PRIYA, MEMBER (TECHNICAL)**

**FINAL ORDER NO. A/51595/2023**

DATE OF HEARING: 26.10.2023  
DATE OF DECISION: **05.12.2023**

**PER:SOMESH ARORA**

The Appellant has filed the present appeal against the letter/order dated the 03.08.2023 addressed by the Respondent, wherein the Principal Commissioner of Customs rejected the request for provisional release of the impugned goods imported under B/E No. 3625730 dated 06.12.2022 under Section 110A of the Customs Act, 1962 ("the Act")

2. In the impugned letter/order, the Respondent has mentioned that the provisional release of the impugned goods has been rejected, because-

a. The imported goods fall under category of 'prohibited goods' of the Act, since the gold content of the imported goods is "found to be above 95% and the license issued by DGFT to the Appellant was for import of Gold Dore Bars (having gold content not exceeding 95%).

b. CBIC Circular no. 35/2017 Customs dated 16.08.2017 in the guidelines for provisional release of seized goods pending adjudication under Section 110 A of the Act has prescribed that provisional release of the goods prohibited under the Customs Act, 1962 or any other Act for the time being in force shall not be allowed.

Aggrieved by the above rejection of provisional release the Appellant however is challenging the impugned letter/order before us on the following grounds-

**A. Impugned goods are not prohibited goods-**

3. "Prohibited Goods" are defined in Section 2(33) of the Customs Act, 1962 as meaning "any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with." The Gold Dore bars which are imported by the appellant are therefore not 'prohibited goods' in accordance with the said definition.

4. Foreign Trade Policy (FTP) states that imports are free except when regulated by way restriction as laid down in ITC (HS). Gold Dore bars have conditions imposed and therefore fall under the category of restricted goods'. The appellant-company being a refinery was issued import license (with actual user condition) by the DGFT for import of Gold Dore Bars. Gold dore bars are imported under ITC (HS) for 7108 12 00, for which the only

condition imposed is that Gold Dore is subject to actual user conditions by refineries. The said condition has been complied with by the Appellant.

5. The dispute in the present case is regarding the alleged non-compliance with Notification No. 12/2012-Cus., dated 17.03.2012. This notification was superseded in the year 2017 by Notification 50/2017-Customs dated 30.06.2017. Further, the notification whose benefit has been claimed by the Appellant is Notification No 96/2008-Cus dated 13.08.2008 and all required conditions under that notification are fulfilled by the Appellant. The Appellant has not claimed the benefit of Notification no. 50/2017- Cus dated 30.06.2017.

6. However, for the sake of abundant clarity, the compliance of conditions under Notification no. 50/2017-Cus dated 30.06.2017 are also discussed. Sl. No. 354 of Notification 50/2017-Cus. dated 30.06.2017, on GDB having gold content not exceeding 95% requires conditions No. 9 and 40 to be fulfilled, the compliance regarding the same are as follows:

Condition No.	Condition	Compliance
9.	The importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty Rules, 2017)	The procedure is followed by the importer. Also therefore is no allegation in the impugned order that any procedure as prescribed in any of these Rules have not been followed by the Appellant.
40. (a)	The goods are directly shipped from the country in which they were produced and each bar has a weight of 5 KG. or above;	Thos condition is satisfied in respect of 26 out of 27 gold dore bars imported by the Appellant. One bar weighing 4.240 kg has been shipped by

		the exporter erroneously and the foreign exporter has accepted that such import was their mistake. A copy of the email from the foreign exporter M/s. equinox in this regard is placed on record.
40. (b)	The goods are imported in accordance with the packing list issued by the mining company by whom they were produced;	Condition is satisfied as the import was as per the packing list and the same was also provided to the customs authorities who have not pointed out any discrepancy. Further the condition does not state that the packing list issued by the mining company has to be submitted at time of import.  A copy of the packing list is placed on record.
40 ( c)	The importer produces before the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, an assay certificate issued by the mining company or the laboratory attached to it, giving detailed precious metal content in the Dore bar	Condition is satisfied as assay certificate furnished by mining company makes it apparent that the goods conform to the conditions of import license being of up to 95% purity.  Copy of the Assay Certificate provided by the miner is placed on record.
40 (d)	The gold Dore bars are imported by the actual user for the purpose of refining and manufacture of standard gold bars of purity 99.5% and above;	The Appellant has imported the said gold dore bars for the purpose of refining and manufacture of standard gold bars of purity 99.5%. Hence, the said condition stands

		fulfilled.
40 (e)	The silver Dore bars are imported by the actual user for the purpose of refining and manufacture of silver bars of purity 99.9% and above.	Not Applicable

7. Out of the 27 gold dore bars, there is one gold dore bar of less than 5 kg weight. The import of this gold bore is a genuine error by the foreign exporter as evidenced by their email attached. The said gold bar was declared to the proper officer at the time of import as weighing 4.240 kg and there is no misdeclaration at any point in time.

7.1 In this context, it was submitted that in the course of business, such errors may happen and the Customs Act, 1962 is conscious of the possibility of such errors occurring. Section 26A of the Act provides for refund of import duty on such goods and the legislative intent is very clear in this regard. The relevant extract of the said section is as follows-

*"Section 264. Refund of import duty in certain cases. -*

*(1) Where on the importation of any goods capable of being easily identified as such imported goods, any duty has been paid on clearance of such goods for home consumption, such duty shall be refunded to the person by whom or on whose behalf it was paid, if- (a) the goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods:*

***Provided*** *that the goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;*

***Provided*** *that the period of thirty days may, on sufficient cause being shown, be extended by the Principal Commissioner of Customs or Commissioner of Customs for a period not exceeding three months: Provided further that nothing contained in this section shall apply to the goods*

*regarding which an offence appears to have been committed under this Act or any other law for the time being in force.”  
(emphasis supplied)*

7.2 As can be seen, the legislature in its wisdom has foreseen a scenario where there can be imported goods which are "not in conformity with the specifications agreed upon between the importer and the supplier of goods" and allows for refund of duty paid on such goods.

7.3 Therefore, in accordance with section 26A, the Appellant is also entitled to the refund of import duty paid on the import of this 4.240 kg gold bore which is not accordance to the agreed specifications between the Appellant and the foreign supplier.

7.4 It was submitted that such goods can, be exported in accordance with Rule 10 of Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022 (hereafter SEU Rules) notified by Notification No. 74/2022 Customs ( N .T.) dated 09.09.2022. This rule provides for re-export or clearance of defective goods. The relevant extract of the said rule is as follows-

*10. Re-export or clearance of unutilised or defective goods. -  
(1) The importer who has availed the benefit of a notification shall use the goods imported in accordance with the conditions mentioned in the concerned notification within the period and with respect to unutilised or defective goods, so imported, the importer shall have an option to either re-export or clear the same for home consumption, within the said period, namely (i) within the period specified in the notification; (ii) within six months from the date of import, where the time period is not specified in the notification: Provided that, the said period of six months can be further extended by the jurisdictional Commissioner for a period not exceeding three months, if sufficient reason is shown that the causes for not conforming to the time period were beyond the importer's control.*

*(2) Any re-export of the unutilised or defective goods referred to in sub rule (1) shall be recorded by the importer in the monthly statement by providing the details of necessary export documents: Provided that the value of such goods for*

*re-export shall not be less than the value of the said goods at the time of import.*

*(3) The importer who intends to clear unutilised or defective goods for home consumption shall have an option of voluntary payment of applicable duty along with interest on the common portal and the particulars of such clearance and the duty payment shall be recorded by the importer in the monthly statement.*

*Therefore, the defective gold dore bar which has not met the may be a specifications will be returned to the exporter. One bar weighing 4.240 kg is a case of genuine mistake and is not at case of misuse of the import license or any mala fide object nor disregard for the statute.*

8. Further, the impugned order in holding the goods as "prohibited goods" has referred to and relied upon a test report dated 27.01.2023. However, the Appellant has never been provided with a copy of such test report dated 27.01.2023 with regard to the goods imported vide Bill of Entry No. 3625730 dated 06.12.2022. This amounts to a violation of the principles of natural justice.

8.1 The impugned order has been passed without providing the relied upon document - the test report dated 27.01.2023-and an opportunity of fair hearing to the Appellant. It is a settled principle that an order passed without following natural justice is bad in law and must be set aside on that ground alone.

8.2 Appellant places reliance on the judgment of Hon'ble High Court of Delhi in Ganesh Sawant v. Commissioner of Customs (Appeals), (2023) 8 Centax 218 (Del.) in which it is held that even where the statute does not explicitly provide for issuance of notice or provision of opportunity of hearing, the revenue authorities are required to grant the same to ensure that natural justice is done. The failure to adhere to these well-established legal

prerequisites renders the impugned order bad in law and should therefore be set aside on this count alone.

9. On the question of the impugned goods failing to adhere to the prescribed gold content, the Appellant submitted that there are three test reports which show that the impugned goods comply with the gold content requirement.

9.1 The test/assay report dated 01.12.2022 provided by the mining company indicates the gold content for all the 27 bars part of the impugned consignment. It shows that gold content in the bars range from 92.8% to 94.8%, thereby adhering to the requirement prescribed in the law.

9.2 Further, at the port of import, the proper officer drew samples and sent it to the CRCL laboratory for testing. The CRCL lab report dated 24.02.2023 indicates that the gold content is 94.70%. This again confirms that the gold bars in the consignment are adhering to the requirement prescribed in the law.

9.3 Lastly, DRI drew three samples and sent them to the CRCL laboratory for testing. The CRCL lab reports for these samples dated 18.01.2023 indicate that the gold content is marginally above 95% i.e., 95.10%, 95.26% and 95.17%.

9.4 With regard to the last test report, the Appellant had addressed an RTI application dated the 17.08.2023 to the seeking the information with respect to Method of testing of gold percentage in gold dore bars employed by CRCL, CRCL/SOP-13 method of testing percentage of gold in gold dore bars, Margin of error in CRCL/SOP-13 method of testing. CRCL has responded to the inquiries of the Appellant vide response dated 18.09.2023 as follows-



a. Method of testing of gold percentage in gold dore bars employed by CRCL- Indian Standard 1418:2009 and CRCL/SOP-13.

b. CRCL/SOP-13 method of testing percentage of gold in gold dore bars- Gravimetric Method, c. Margin of error in CRCL/SOP-13 method of testing- Permissible Error= +/-0.25%.

9.5 It must be noted that the method employed for testing in this case the Gravimetric method which is not the prescribed standard method for test as prescribed. Notwithstanding the same, the gold content according to this report is marginally above 95% i.e., 95.10%, 95.26% and 95.17% and these are within the permissible limits and thus cannot be held as prohibited goods.

10. This was not the first time that the Appellant had been importing gold Dore bars from LDCs. There have been 103 consignments imported previously from 20.11.2018 to 09.12.2022 before the impugned consignments. Each of these consignments were cleared by the proper officer for home consumption without holding any of them as prohibited.

10.1 It was submitted that Gold Dore Bars are not under self-assessment or the Risk management system (RMS). Each consignment of gold bar is provisionally assessed by the proper officer and samples were drawn and tested by CRC for gold content. Without such testing and assessment, there was no clearance for home consumption.

10.2 On all the previous 103 consignments, the same procedure was carried out and each of them was found to be compliant with law. 33 out of the said 103 consignments were also subjected to first check. None of the 103 consignments were at any point held as prohibited. Therefore, the impugned

order contradicts the assessment of previous consignments by the department and such reversal in stand by the revenue without any material change in facts is bad in law.

B. Notwithstanding the above, the reliance on CBIC Circular No 35/2017 to deny provisional release is violative of Section 110 A and therefore cannot be relied upon as held in multiple judicial precedents.

11. Para 3.2 of the impugned order records that as per CBIC Circular No. 35/2017-Cus dated 16.08.2017, it has been prescribed that provisional release of goods prohibited under Customs Act, 1962 or any other law for the time being in force shall not be allowed.

12. Relevant para of Circular No. 35/2017 reproduced below for reference:

**Circular 35/2017 - Guidelines for provisional release of seized imported goods pending adjudication under Section 110A of the Customs Act, 1962- Reg.**

para. 2. While provisional release of seized imported goods under Section 110A of the Customs Act, 1962 may normally be considered by the competent adjudicating authority upon request made by the owner of the seized goods, provisional release shall not be allowed in the following cases-

- i. Goods prohibited under the Customs Act, 1962 or any other act for the time being in force;
- ii. Goods that do not fulfill the statutory compliance requirements/ obligations in terms of any Act, Rule, Regulation or any other law for the time being in force;
- iii. Goods specified in or notified under Section 123 of the Customs Act, 1962;
- iv. Where the competent authority, for reasons to be recorded in writing believes that the provisional release may not be in the public interest.

13. The Appellant relied on the judgment of the Hon'ble High Court of Delhi in Additional Director General (Adjudication) v. Its My Name Pvt. Ltd., 2021 (375) E.L.T. 545 (Del.) wherein it was held that Para 2 of Circular No

35/2017 is contrary to the parent statute - Section 110A of the Customs Act and is void.

14. The Appellant placed reliance on the judgement of the Hon'ble High Court of Bombay in Sidharth Vijay Shah v. Union of India, 2021 (375) E.L.T. 53 (Bom.) in which it was held that no limitation was imposed in Section 110A that goods categorized as prohibited goods under Section 2(33) cannot be subjected to provisional release under Section 110A. It was also held that even filing of appeal before Hon'ble CESTAT cannot be a bar on order of provisional release.

15. It was submitted that adherence to the said Circular No. 35/2017 cannot be made to refuse provisional release of goods. Section 110A of the Customs Act provides that seized goods can be released and does not make any difference between prohibited and non-prohibited goods. The interpretation of Section 110A the Hon'ble Delhi High Court in Its My Name (supra) is reproduced below:

*"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."*

(Emphasis supplied)

16. The Hon'ble High Court also opined that Section 110A the Customs Act does not distinguish between prohibited and non-prohibited goods and such distinction is found in Section 125 of Customs Act but even therein prohibited goods may be released on payment of redemption fine. The Appellant humbly states that it is entitled to provisional release of goods and more so when it has paid duty although it was not statutorily due. The

impugned order denying provisional release is without legal basis/ and is liable to be set aside.

**C. Goods can be categorised as "prohibited" only after adjudication-**

17. Categorization of goods is a subject to adjudication and in regard to the fact of the present case, the customs authorities entertain such a view at the time of seizure does not make the goods prohibited goods. For seizure, the officer must have reason to believe that goods are liable for confiscation and in the instant case, it has been stated that goods are prohibited. However, it is submitted that such belief or act of seizure does not establish that the goods are prohibited goods.

18. The High Court of Madras in Al Qahir International v. Commissioner of Customs, Tuticorin, 2021 (378) EL.T. 784 (Mad.) has held that the question of goods being prohibited is a matter of adjudication and since both importer and customs authorities prior to adjudication have their own grounds for opposite views, the balance of convenience was in favour of the assessee-importer and goods could not be termed as prohibited goods till such time adjudication was completed.

19. The appellant thus submitted that the impugned gold is not prohibited goods in as much as all documents to examine description, purity etc., have been submitted and purity is below 95% as per report dated 27.02.2023 even as per testing conducted by the department.

**D. Appellant has satisfied the conditions of applicable Notification No. 96/2008-Cus.-**

20. The appellant had claimed the benefit of preferential tariff scheme under Notification No. 96/2008-Cus., dated 13.08.2008 and the subject

goods fall under tariff item 7108 1200 which are 'restricted goods' as per ITC (HS) Import Policy.

21. It is submitted by the appellant that the only condition as per ITC (HS) Import Policy is that Gold Dore bars can be imported against import license with Actual User (AU) condition. The Appellant-company being a refinery has been issued license by DGFT and is permitted to import the Gold Dore Bars with Actual User Condition.

22. Notification No. 96/2008-Cus. Provides for preferential tariff scheme for imports from 'Lesser Developed Countries' (LDC). The subject goods are imported from Republic of Rwanda which falls under the category of LDC. One of the conditions of Notification 96/2008 is that the importer should satisfy that the subject goods in respect of which exemption is claimed are from a country listed in the Schedule of the said Notification.

23. The said condition mentioned in the first proviso to Notification No. 96/2008 is reproduced below for reference:

*When imported into India from a country listed in the Schedule to this Notification:*

*"Provided that the importer proves to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, that the goods in respect of which the exemption under this notification is claimed are of the origin of the country listed in the schedule to this notification, in accordance with provisions of the rules of origin, published in the notification of the government of India in the Ministry of Finance (Department of Revenue), No. 100/2008-Cus (N.T.), dated 13th August 2008."*

24. The Appellant has submitted the 'Certificate of Origin' (COO) which was issued and certified by Rwanda Chamber of Commerce, Industry and Agriculture for claiming exemption under Notification 96/2008 and therefore, eligible for benefit under the said Notification. It is pertinent to note that

there is no specific condition in ITC (HS) that for import of Gold Dore Bars, conditions under Notification No. 50/2017 have to be fulfilled. The appellant has not claimed exemption benefit under Notification No. 50/2017-Cus and therefore, they are not required to fulfil conditions prescribed in Notification No. 50/2017-Cus.

25. On the question of choosing a beneficial notification, it is submitted that an importer is free to choose the notification which is more beneficial to him. In case of *Share Medical Care V. Union of India*, 2007 (209) ELT 321 (S.C), Hon'ble Supreme Court held that if applicant is entitled to benefit under two different notifications or under two different heads, he can claim the one which is more beneficial and it is duty of authorities to grant such benefits if applicant is entitled to such benefit.

(Emphasis supplied)

**E. Seizure of the entire consignment is not valid-**

26. Section 110 of Customs Act stipulates that "any goods are liable to confiscation under this Act". That is only such goods which are confiscable which are improperly imported on account of infractions listed in Section 111 of the Customs Act. Goods which are not tainted by the same and those which have been properly imported cannot be seized. It is submitted that the continued seizure and detention of the entire consignment is without sanction of law.

27. The Appellant drew attention to *Innovation, Secunderabad and Another v. Central Board of Excise and Customs and Another*, 1984 (15) E.L.T. 91 (A.P.) wherein in the context of confiscation of various goods, the goods were segregated into three categories with specific violation - smuggling (restricted goods), non- maintenance of records and a third category for which no specific violation was mentioned. The department

contended that the third category of goods are also liable for confiscation since in respect of other goods, the facts and conduct of the importer rendered them liable for confiscation. However, the Hon'ble High Court held that confiscation of the third category of goods was bad since it was on the basis of a presumption drawn from the facts relating to other category of goods. It is submitted that the entire consignment of 27 gold dore bars cannot be detained because one article was found to be not of prescribed weight.

**F. Collection of customs duty on prohibited goods is without authority of law-Amount paid liable to be refunded- Submitted**

28. The Appellant submitted that customs duty is payable on goods imported into India and as per Section 2(23) import, with its grammatical variations and cognate expressions, means bringing into India from a place outside India.

29. Section 12 of the Customs Act defines dutiable goods and states that duties of customs shall be levied at such rates as may be specified under Customs Tariff Act, 1975 on goods imported into India.

30. It was submitted that for collection of customs duty, activity of import should be completed. The Hon'ble Supreme Court in Garden Silk Mills Ltd v. Union of India, 1999 (113) E.L.T. 358 (S.C.) has held that import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed.

31. The Appellant also wishes to place reliance on the interpretation of the word "import" as pronounced by the Hon'ble Supreme Court in Mangalore Refinery & Petrochemicals Ltd. v. C.C., Mangalore, 2015 (323) E.L.T. 433 (S.C.) wherein it was held that act of import which triggers levy of customs duty is complete only after the goods are cleared for home consumption or warehoused as the case may be.

32. The goods have been seized by the DRI and they having declared the goods to be prohibited in nature (and hence cannot be imported), customs duty cannot be on the same.

33. The amount of Rs. 15,20,96,571/- (Rupees Fifteen Crores Twenty Lakhs Ninety-Six Thousand Five Hundred and Seventy-One only) is already paid vide TR Challan 4336 dated 20.12.2023 under major head "customs duty" cannot be appropriated by the revenue authorities since the collection of such duty is without authority of law and the same is liable to refunded with applicable interest.

**G. Denial of provisional release of goods even though duty has been paid, is not sustainable-**

34. Since the subject goods were needed immediately due to business urgency, as per the instructions of DRI, duties were paid without claiming exemption under Notification No. 96/2008 under protest vide TR-6 Challan No. 4336 dated 21.12.2022 seeking release of goods. It is reiterated that the Appellant is eligible for claiming exemption under Notification No. 96/2008-Cus., having imported gold dore bars from the Republic of Rwanda which is listed as an LDC and the documents for claiming the exemption such as Certificate of Origin are in order. The appellant had earlier imported gold from other LDCs and had availed the exemption. The payment of duty



was made under instructions from DRI and not voluntarily by accepting liability.

35. However, even though the duty (as directed by the department) has been paid, the goods were detained under a panchnama and a detention memo was issued on the same day. The panchnama and the detention memo, has no material evidence mentioned based on which it is alleged that the Appellant has misused exemption notification.

36. It is submitted that the gold dore bars imported by the Appellant are not prohibited goods rather they are 'restricted' under ITC (HS) which can be imported by refineries like the appellant in this case. Therefore, the subject goods can be provisionally released as they are not prohibited under the Customs Act.

37. It is further submitted by the Appellant that he has the right to get the goods released under the provisions of Section 110A of the Customs Act, 1962. Section 110(1A) provides the certain goods being perishable or hazardous nature of any goods, on account of depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, may be directed to be disposed of by the Central Government.

38. It is submitted by the Appellant that as per the above provisions it is evident that the goods may be released by taking a bond with such security as may be required. Further, In the present case, the appellant has deposited the duty as required and hence, provisional release of the goods may be granted.

**H. The entire proceeding is arbitrary on multiple counts and is therefore bad in law.**

39. The test report on which the impugned order is relied on is dated 27.01.2023. However, the Appellant has neither been provided with a copy of such test report dated 27.01.2023 nor has the Appellant been heard in the matter. This approach is grossly arbitrary and amounts to a violation of the principles of natural justice.

40. The 103 consignments previously imported were never held as prohibited. The impugned order contradicts the assessment of all these previous 103 consignments of the department and such reversal in stand by the revenue without any material change is entirely arbitrary.

41. The Appellant was forced to pay the entire customs duty on the impugned shipment for clearance of import but then the import was never cleared but seized. This whole process of demanding duty on an import which was not liable to duty and then seizing the consignment after the deposit was made reeks of arbitrariness.

42. The reliance on a test report dated 27.01.2023 when there are three other test reports including the source Assay certificate provided by the mining company and the CRCL test reports which clearly show the gold content is within limit is arbitrary.

Appellants also inter alia, took various grounds on the point of natural justice

**Case of the Department**

43. The Appellant had filed BE No. 3625730 dated 06.12.2022 for clearance of goods i.e. Gold Dore Bars (having gold content not exceeding

95%)." They classified the goods under CTH 71081200 and claimed the benefit of notification No. 96/2008 and notification No. 50/2017 . The Department has seized the goods on reasonable belief that the Appellant has misused the benefit of S.No. 354 of notification No. 50/2017-Cus dated 30.06.2017 and Country of Origin benefit notification No. 96/2008-Cus dated 13.08.2008. Thereafter, the inventory of the goods was prepared on 23.01.2023 before the Commissioner (Appeals). The Appellant requested for provisional release of the goods and filed W.P. (C) No. 1137/2023 before the Hon'ble Delhi High Court. The DRI produced 3 Test Reports dated 18.01.2023 before the High Court wherein the gold content was shown above 95%. The Hon'ble High Court has disposed of the W.P. (C) No. 1137/2023 vide order dated 06.07.2023 with a direction to the Commissionerate to expeditiously dispose of the application, if any of the Appellant for provisional release. The Pr. Commissioner, through the Assistant Commissioner vide letter dated 03.08.2023 conveyed for rejection of the provisional release request. Aggrieved, the Appellant filed appeal No. C / 50422 / 2023 before this Hon'ble Tribunal.

44. Department on the other hand submitted that the appellant has violated the following conditions of Notification No. 50/2017-Cust dated 30.06.2017.

(a) With the import of Gold Dore Bar weighing less than 5 Kg. Condition No-40 (a) of the Notification No-50/2017-Cus stands violated.

(b) Condition 40 (b) of the Notification specifies that the goods are imported in accordance with packing list issued by the company. But while filing the Bill of Entry appellant has not submitted the packing list of the Miner. It is the statutory requirement while importing Gold

Dore Bars that it should be in accordance with the packing list issued by Mining and it was not left to the discretion of the supplier. The packing list nowhere mentioned the Sr.No. of Box in which this 4.240 KG of Gold Dore Bar was placed.

(c) Assay Certificate seems to be not genuine.

45. Since the genuineness of the Assay Certificate appears to be doubtful and fake the representative samples were drawn and sent to CRCL for verification of the content mentioned in Assay Report. Thus, on the basis of reasonable belief for mis-use of Notification No- 50/2017-Cus dated 30.06.2017 and Notification No-96/2008-Cus dated 13.08.2008, the goods were detained under Detention Memo dated 23.12.2022.

46. Further, as has been submitted supra, the appellant also needs to refer to the condition sheet of the License DGFT License No-0111003380 dated 23.03.2022 issued by the DGFT for the import of Gold Dore Bars otherwise which import of Gold Dore Bar is a prohibited item. Import of Gold Dore Bars can only be permitted when an importer has valid DGFT Import License with actual user conditions and follows Notification No- 12/2012 Cus dated 17.03.2012 as a mandatory condition (Later Notification No - 50/2017 dated 30.06.2017 has been issued in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2012 -Customs, dated the 17th March, 2012).

47. Representative samples were drawn by the officers of Respondent on 23.12.2022 in presence of authorised representative of the appellant and the Customs Officer. Further CRCL vide report dated 27.01.2023[with regard to purity content of Gold Dore Bar] has reported the content of Gold beyond 95% (above 95% ). The appellant imported all the 27 Gold Dore Bars vide single Bill of Entry as one consignment. And since separate Bills of Entry

were not filed independently in respect of each bar. Therefore the whole consignment was found liable for confiscation in the event of fake Assay Report.

48. The Appellant has presented only the small part of the Hon'ble High Court Order in the matter of Its My Name Private Limited (cited supra). Hon'ble High Court of Delhi has made the following observations which requires attention:-

*"12. Undisputedly, the Import Policy alludes to Gold Dore bars being permitted for import against an "import license with Actual User [AU] condition". As was noticed hereinabove, the import permission which was granted to the petitioner specifically alluded to the notification of 2012. The permission which was granted to the petitioner mandatorily required it to comply with the conditions imposed in that notification. We are also of the firm opinion that once that notification came to be superseded by the 2017 notification [and which was the notification which held the field at the time when the import was effected] the petitioner was bound to comply with the conditions relating to weight and purity as stipulated therein.*

*13. It is also not the case of the petitioner that it had, at any time, approached the respondents to seek amendment of the conditions which stood added to the import permission. In view of the aforesaid, it would be impermissible for the petitioner to now contend that the notifications of 2012 and 2017 would not be applicable. In view of the aforesaid, we find ourselves unable to sustain the submission of the petitioner being entitled to import Gold Dore bars solely on the basis of the notification of 2008."*

49. Thus Hon'ble High Court of Delhi has clearly stated that the appellant has to comply with the conditions as mentioned under Notification No-50/2017-Customs dated 30.06.2017 as amended, since the appellant has violated the condition 40 of the notification, the goods are liable for confiscation.

50. It is submitted that as per DGFT Policy issued vide Notification No-49/2015-20 dated 05.01.2022, import of Gold Dore Bars is restricted and the same can be understood as under:

<b>ITC(HS) Code</b>	<b>Item Description</b>	<b>Policy</b>	<b>Existing Policy Condition</b>	<b>Revised Policy</b>
71081200	Other Unwrought forms	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).  Gold Dore can be imported by refineries against a license with AU condition	Import allowed through nominated agencies notified RBI (in case of Banks), DGFT (for other agencies) and IFSCA (for qualified jewelers International Bullion Exchange)  Gold Dore can be imported by refineries against an import license with AU condition.

51. From the above policy condition it is clear that except Gold Dore import of other items falling under CTH 71081200 is allowed only through nominated agencies as notified by RBI & DGFT (for other agencies) and IFSCA. In so far as import of Gold Dore Bar is concerned the same is not allowed even through RBI and DGFT (for other agencies) and IFSCA. The same is only permitted for refineries only against an import License with Actual User Condition.

50.1 However, firstly it has been seen from the application filed by the appellant before DGFT that appellant has itself applied for import of Gold Dore Bars under CTH 71082000, whereas Appellant is importing Gold Dore Bars under CTH 71081200. It is to further bring to notice that the Appellant has been importing Gold Dore Bars since 2019 and that the CTH earlier applied was under CTH 71081200.

50.2 Secondly the Gold Dore Bars which the appellant has imported vide Bill of Entry No-3625730 dated 06.12.2022 is having Gold Content above 95% which does not come under the scope of Import Policy and the License so issued to the appellant.

51. That, the contents of paragraph under reference are false, frivolous and mis leading and in response to the same it is submitted that the appellant has been issued import License with import condition to follow Notification No-12/2012-Cus dated 17.03.2012 as a mandatory condition (Later Notification No-50/2017 dated 30.06.2017 has been issued in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2012 -Customs, dated the 17th March, 2012. In view of the above it is submitted that once the mandatory conditions of the import license are not met..

52. The goods in question are restricted in nature subject to conditions of the Import license, without which the goods are not allowed to be imported. Whereas Section Z(33) of the Customs Act, 1962 defines the Prohibited goods, the same is reproduced below:-

*"...Prohibited goods means any goods the import or export of which is subject to any prohibition under this act or any other law for the time being in force but does not includes such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with..".*

52.1 Therefore, all goods where in which non-observance of any of the conditions subject to import has not complied with falls under the category of prohibited goods as per Customs Act 1962. The case laws mentioned at S.. 1 to 4 of the Revenue's Case Compilation also supports Revenue's view

that if there is any violation of the condition of the gold imported, the gold becomes prohibited and should not be released.

53. The subject goods are beyond the prescribed boundaries of import license issued to the petitioner. And are thus do not subject for provisional release under Section 110A of the Customs Act, 1962.

54. That, the contents of paragraph under reference are false, frivolous and mis leading and in response to the same it is submitted that the Hon'ble High Court of Delhi in their Order dated 06.07.2023 at Para 13 clearly specify that

*"the Import Policy alludes to Gold Dore bars being permitted for import against an "import license with Actual User [AU] condition". As was noticed hereinabove, the import permission which was granted to the petitioner specifically alluded to the notification of 2012. The permission which was granted to the petitioner mandatorily required it to comply with the conditions imposed in that notification. We are also of the firm opinion that once that notification came to be superseded by the 2017 notification..."*

*Further at para 14 Hon'ble High Court observed that "...we find ourselves unable to sustain the submission of the petitioner being entitled to import Gold Dore bars solely on the basis of the notification of 2008.."*

55. Therefore, all goods where in which non-observance of any of the conditions subject to import has not complied with falls under the category of prohibited goods as per Customs Act 1962.

55.1 The subject goods are beyond the prescribed boundaries of import license issued to the Appellant and are thus do not subject for provisional release under Section 110A of the Customs Act, 1962 in view of guidelines prescribed under the judgments of Hon'ble Madras High Court and Hon'ble




Delhi High Court prescribed in the CBIC Circular-35/2017-Cus dated 16.08.2017.

Further, the department vide further submission dated 06.11.2023 indicated that date of report as got clarified by them was actually 18.01.2023 only and not 27.01.2023 as has inadvertently gone on record in impugned order. So department sets at rest the controversy that report dated 27.01.2023 was not supplied to the appellants

56. A part from above, during course of hearing, appellants additionally submitted and relied on the decision of M/s. TATA CHEMICAL LTD. VS. C.C. (P), JAMNAGAR as reported in 2015-TIOL-S.C.-CUS. to emphasize that once a Chemical analysis report is submitted by the party, department if it desires to have another report, then the Proper Officer has to give recorded reasons to subject imported goods to another chemical test. They placed reliance on para 14 of the decision of the Apex Court to buttress their argument and to state that there is nothing to show that the Proper Officer had exercised option of recording its reasoning. And to contrary, the Proper Officer when it did second testing had found the goods in order as per description given by them and only then had allowed the clearance. Appellants further stated that in the same decision lays down in para 17 that even the testing of sampling is required to be done in accordance with the procedure laid down by ISI or BIS and any deviation will make such testing liable to be rejected. Further advocate relied on the decision of Saurashtra Chemicals Division of Nirma Ltd Vs. C.C.-Jamnagar (prev), in which following the decision of Apex Court in the matter of TATA CHEMICAL Ltd., cited (supra), Ahmedabad Bench had rejected the BSI/ISI report, as the sample were not drawn as per prescribed procedure of BIS. It was their contention that in this case also there is a requirement of BIS in relation to IS No. IS 1418 : 2009 that determination of Gold, in Gold Bullion, Gold Alloy and Gold Jewelry has to be done according to cupellation (Fire Assay Method) and the same not having been

done by the DRI according to that method, the report in any case is liable to be rejected or cannot be preferred over the first report in the matter submitted by them in relation to all the 27 samples which was based on Fire Assay Method as distinguished from the report of DRI which was based on random checking of three samples which was on the basis of SOP-13. They also stated that the random test report of three bars being relied upon by DRI, out of 27 Gold Bars only indicated purity of 95.10, 95.26, 95.17 which was exceeding requirement of 95% only by miniscule percentage and that too albeit when done by wrong methodology. They also seek to rely on the following RTI report obtained by them from office of CRCL as reproduced below:-

भारतसरकार वित्तमन्त्रालय, राजस्वविभाग केन्द्रीयअप्रत्यक्ष कर एवंसीमाशुल्कबोर्ड केन्द्रीयराजस्वनियन्त्रणप्रयोगशाला हिलसाइडरोड, पुसा, नईदिल्ली- 110012		Government of India Ministry of Finance, Department of Revenue Central Board of Indirect Taxes & Customs Central Revenues Control Laboratory Hillside Road, Pusa, New Delhi - 110012 Tel.:011-21520123/25843494 Fax: 011-25843495 Email: dir.crcl-cbec@nic.in Website:http://crcl.gov.in
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C.No. 1-CE-II/SB/RTI/2022-23 Dated: 15<sup>th</sup> September 2023

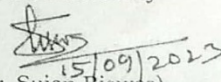
To  
 Shri R.P. Meena  
 Chemical Examiner Grade-I (CPIO)  
 Central Revenues Control Laboratory  
 Hill Side Road, Pusa, New Delhi-110012  
**Subject: Information Under RTI act,2005 regarding.**

Sir,

Please refer to your letter C.No.99-Estt./RTI/57/2021-22/3997 dated 14<sup>th</sup> September, 2023 on the subjected cited above, enclosing therewith a copy of RTI application dated 17.08.2023 received from shri Sohan Bandhyopadhyay, 152, Metro view Apartment, 4<sup>th</sup> Floor, Dwarka Sector -13, Pocket-B, Kakrola, New Delhi-110078, which is transferred from CPIO & US- Cus-III/IV, Central Board Of Indirect Taxes & Customs, North Block, New Delhi, received in this office on 14<sup>th</sup> September, for seeking information under RTI Act,2005.

In this regard, the point wise reply is given below-

Sr. No.	Queries	Reply
1.	What is the method of testing of gold percentage in Gold Dore Bars being done by Central revenues Control Laboratory (CRCL)?	Indian standard 1418:2009 and CRCL/SOP-13
2.	What is the test method CRCL/SOP-13 for testing of percentage of gold in gold dore bars?	Gravimetric Method
3.	What is the Margin of error in testing of Gold Dore bars through test method CRCL/SOP-13 ?	Permissible Error = $\pm 0.25\%$


Yours faithfully  
  
 (Dr. Sujan Biswas)  
 15/09/2023  
 Chemical Examiner Gr-II  
 CRCL, New Delhi-12

56.1 It was therefore, their submission that even seizure needs to be vacated and all benefits as was being permitted to them for their earlier imports at least 103 consignments from year 2018 to 2020, which were cleared by the Customs earlier should be allowed to them without any hinder by Customs department/DRI and the whole seizure is vacatable as even the percentage is in accordance with tolerance limit permitted as above of  $\pm .25$  as indicated by the CRCL as per above RTI response and also it is clear from the response of RTI that CRCL while following SOP-13 for testing percentage of gold in Gold Dore Bars has Followed Gravimetric Method and not a "Fire Assay Method" as is prescribed under Indian Standard 1418-2009. Therefore, report based on which seizure has been made is rejectable.

57. We have considered the rival submissions and various materials including case law as put forth by both sides. At this stage, we have to only decide about previsional release under Section 110A of the Customs Act, 1962 and various conditions for the same on merits of the matter, as well as sustainability of the seizure made in the light of materials which have come on record, the matter can be appropriately decided by adjudicating authority when it is eventually decides the matter when results of whole investigations by way of final show cause notice is placed before it. At this stage, we are mainly concerned that till the time investigation gets over and matter gets adjudicated, interests of both parties do not suffer and balance is maintained. We find that in instant case, three samples were subjected to test at various stages. Firstly, as per the requirement of the impugned notification before importing the goods from source country from the Lab of mining company which is placed at page 49 of the paper book. Secondly, we find that at the running page 56 of the paper book, Customs had drawn a sample and obtained report while granting discharge of the cargo on 24.02.2023 which found the purity to be 94.70 which was conformity with

the report of mining which company is available at running page 49 and which is reproduced below:- (To be termed as 1<sup>st</sup> report)

49



**NGALIMINING**  
ESTABLISHED IN 2004


*In conformity with: Rwanda Mines, Petroleum and Gas Board  
Ref: Memo to Gold Exporters dated: 17.02.21*

**Sampling Methods:**

Cutting     Scrapping  
 Drilling     Client's Sample     Deep Sampling

**Assay Method:** Fire Assay

ASSAY REPORT						
Report No.	:	EQUI/2022/04				
Report Date:	:	01/12/2022				
Invoice No.	:	EQUI-IND0004				
Name & Address	:	EQUINOX MINING LIMITED 20093 KIGALI-RWANDA TEL: +250788547122				
Sample Receipt Date	:	01/12/2022				
Date of test performed	:	01/12/2022				
Description of Sample	:	Gold Dore Bars				
Sampling Date	:	01/12/2022				
Sample Type	:	GOLD DORE BARS				
Assay Method	:	FIRE ASSAY - IS 1418-2009				
Description	:	Bar Weight	Sample ID	Sample gms	Gold Finesse in PPT	Silver Finesse in PPT
Bar 1	:	7,792.20	EQUI002-1	3.1	947.0	53.0
Bar 2	:	9,010.60	EQUI002-2	4.1	948.0	52.0
Bar 3	:	7,368.00	EQUI002-3	3.2	948.0	52.0
Bar 4	:	8,858.90	EQUI002-4	4	947.0	53.0
Bar 5	:	4,234.70	EQUI002-5	3.6	947.0	53.0
Bar 6	:	8,257.90	EQUI002-6	3.3	947.0	53.0
Bar 7	:	6,612.70	EQUI002-7	3	938.0	62.0
Bar 8	:	6,092.90	EQUI002-8	3.1	938.0	62.0
Bar 9	:	5,590.50	EQUI002-9	3	945.0	55.0
Bar 10	:	6,446.90	EQUI002-10	3.8	945.0	55.0
Bar 11	:	8,357.30	EQUI002-11	4	946.0	54.0
Bar 12	:	6,657.20	EQUI002-12	3.4	945.0	55.0
Bar 13	:	5,858.70	EQUI002-13	3.9	945.0	55.0
Bar 14	:	8,871.00	EQUI002-14	4.2	928.0	72.0
Bar 15	:	7,402.00	EQUI002-15	3.5	928.0	72.0
Bar 16	:	8,671.40	EQUI002-16	3.7	943.0	57.0
Bar 17	:	10,762.40	EQUI002-17	4	943.0	57.0
Bar 18	:	7,965.30	EQUI002-18	3.3	943.0	57.0
Bar 19	:	5,749.60	EQUI002-19	3	943.0	57.0
Bar 20	:	8,815.20	EQUI002-20	4	943.0	57.0
Bar 21	:	9,014.80	EQUI002-21	3.1	941.0	59.0
Bar 22	:	9,838.50	EQUI002-22	3.2	941.0	59.0
Bar 23	:	8,061.20	EQUI002-23	3.3	947.0	53.0
Bar 24	:	7,409.30	EQUI002-24	3	947.0	53.0
Bar 25	:	6,558.20	EQUI002-25	4	947.0	53.0
Bar 26	:	8,686.50	EQUI002-26	3.2	944.0	56.0
Bar 27	:	8,408.30	EQUI002-27	3.1	944.0	56.0
Other Impurities (if any)	:	N/A				
Any deviations from method specified	:	N/A				
Any unusual features observed	:	Nil				
Additional Information	:	Nil				



Address : P.O Box 7189 | Kigali,Rwanda | Website: www.ngali.com





Report drawn by port Customs was as follows (To be termed as 2<sup>nd</sup> report)



**TEST REPORT**

ULR No.: TC855422300000087F

Lab No: CL/NCH/5086/Imp/27-12-2022

Date: 24-02-2023

**Part-A : Packing details**

Name and Contact Information of Customer: Asst. Commissioner of Customs, ACC Import Commissionerate, Import Shed, Near IGI Airport, New Delhi.

B/E No. & Date: 3625730 Dated 06-12-2022

Specification/Declared value: 94.50 %

Description of Sample : GOLD DORE BAR

Date of Receipt : 27-12-2022

Date of Testing :- 23-02-2023 to 24-02-2023

Sampling Plan : Sample not drawn by us

**Part-B**

Test Report:- The sample is in the form of yellowish metallic turnings. It is composed of an alloy of gold and silver having Gold Content 94.70 % by Wt.

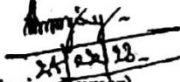
S. No.	% Purity of	Test Method	obtained Value	Specified Value/Declared Value
1	Gold Content % by mass	CRCL/SOP-13	94.70	94.50

**Weight details of analysed sample, recovered gold & remnant**

1	Net weight of sample received (gm)	3.0134
2	Net weight of sample taken for qualitative test (consumed) (gm)	0.0526
3	Net weight of sample taken for quantitative test (gm)	0.6015
4	Net weight of untested sample (gm) 1-(2+3)	2.3593
5	Net weight of recovered gold (gm)	0.5696
6	Net weight of impurities (gm) (3 - 5)	0.0319
7	Total loss in weight (gm) (2+6)	0.0845
8	Total weight of remnant sample & recovered gold (gm) (1-7)	2.9289

Scaled remnant sample and recovered gold returned herewith

Facsimile of seal<sup>m</sup>  affixed on sealed remnant sample is as under.

  
 (Sanjay Kumar)  
 Chemical Examiner  
 (Authorized Signatory) Examiner Gr-II  
 भारत सरकार/ Govt. of India  
 वित्त मंत्रालय/ Ministry of Finance  
 नयीन सीमा शुल्क प्रयोगशाला, नई दिल्ली  
 New Custom House, New Delhi-110037

57.1 We also find that last report of the CRCL obtained by DRI which is a running page 21 ( to be termed as 3<sup>rd</sup> report) indicates slightly higher

percentages in three samples than the prescribed 95% but largely within the tolerance limits of  $\pm .25$  indicated by the CRCL itself and its reply of RTI. Further, the report based on which seizure has been made has subjected sample to a test other than Fire Assay Method as is prescribed by BIS. While noting above material, we will not like to comment about maintainability or otherwise of the seizure. at this stage, as there is always a possibility that investigating agency during the process of investigation may chance upon and collect any further evidence strengthening their case on legal and for factual basis. However, we find that out of 27 Gold Bars admittedly 1 bar below was 5kg i.e. of 4.240 kg which is claimed to be erroneously imported due to error on the part of exporter by the appellants and the same in any case shall not be allowed to be imported under the conditions of Notification No. 50/2015-Cus dated 30.06.2017 or Notification No. 96/2008-Cus. Further, we also find that the appellants had initially claimed benefit of Notification No. 96/2008-Cus dated 13.08.2008 based on the country of origin being of Republic of Rwanda. However, on the behest of Investigating Agency and under protest to get release of consignment, they paid duty under protest on TR-6 challan No. 446 dated 21.12.2022. However, the goods were not released to them detention was converted into seizure. We find that the differential duty which was paid on the goods which were to be released but eventually not released was to the extent of 15.20 Crores (approx) which is with the department available for any appropriation, if so needed. We, further find that the another Gold Bar 4.240 which cannot be subjected to claim of exemption at present. The fate of the same whether being eligible for re-export are not has to be decided by the adjudicating authority, at the time of adjudication, the same will have a value exceeding Rs. 2.5 crores. We find that availability of this amount of security exceeding Rs. 17.5 crores along with execution of bond of full value of the goods should suffice to safeguard the interest of revenue. While attempting to

balance both the rival interests, we have been guided by the following facts and propositions-

1. Appellant is an established importer and a person in this business having validly imported 103 consignments from the Year 2018 till the date of impugned consignment. This being 104th consignment and cannot be termed as a "fly by night" operator and that at the moment consignment test report regarding the purity which has been chosen to be relied upon by the department has deviation within tolerance limits and also the difference is so miniscule that by preponderance of probability propensity to do smuggling cannot be inferred, prima facie, on the part of appellants. We also find that huge working capital of the appellant is standing blocked because of the present litigation in terms of duty discharged and gold held by the department. Further, we find that M/s. NEYVELILIGNITE CORPORATION LIMITED VS. UNION OF INDIA in the matter reported in 2009 (242) ELT 487 (Mad.), it was held in para 31-32 that goods which are exempted from duty subject to conditions cannot become prohibited if one or more of the conditions of exemption notification are violated, they only become dutiable. Again we prima facie find that Section 110A which deals with provisional release of seized goods does not place any fetter by distinguishing between prohibited, restricted or dutiable goods. Even if under Section 125 in relation to gold under Section 123 for violation, the gold becomes absolute confiscatable, it is clear it cannot be in relation to dutiable gold which becomes eligible to higher duty on claim of exemption being refused as upheld in cited decision (supra) of M/s. NEYVELILIGNITE CORPORATION LIMITED. Further, we find that para 2 of CBEC Circular No. 35/2017-Cus issued by CBEC relating to guidelines for provisional release of seized imported goods pending adjudication has been struck down as being against the statute vide para 51 of the decision in the matter of ADDITIONAL DIRECT GENERAL

ADJUDICATION vs. ITS MY NAME PVT. LTD. as reported in 2021 (375) ELT 545 (Delhi). Paras 72-73 & 51 the decision of the jurisdiction High court are relevant in this regard and the same are reproduced below:-

**"51.***The Learned ASG also placed pointed reliance on Circular No. 35/2020-Cus. supra, issued by the C.B.E. & C., 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. (supra), 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 No. 35/2017-Cus. supra, vis-a-vis Section 110A of the Act, are not inclined to be so magnanimous. According to us, para 2 of Circular No. 35/2017-Cus. is clearly contrary to Section 110A and is, consequently, void and unenforceable at law. It is not permissible for the C.B.E. & C., 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. [Lok Prahari v. State of U.P., (2016) 8 SCC 389, which digests several earlier decisions]. By excluding, altogether, certain categories of goods, from the facility of provisional release, para 2 of Circular No. 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 No. 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."*

.....

.....

**"72.***Insofar as the quantity of 25400.06 grams of gold jewellery, covered by the registered, appraised, dated and signed Bill of Entry, dated 20th April, 2019, is concerned, therefore, the decision, of the Learned Tribunal, to allow provisional clearance, cannot be said to be perverse, so as to give rise to any substantial question of law, as would warrant interference, in appeal, by us. We may repeat, in this context, that the decision, as to whether the gold jewellery ought, or ought not, to have been provisionally released, was entirely discretionary. The facts before the Learned Tribunal, which are also before us, cannot be said to be such as would render the exercise of discretion, by the Learned Tribunal, in favour of provisional release of the 25400.06 grams of gold jewellery, perverse. Absent such perversity, no case, in our view, can be said to exist, as would justify our interference, with the exercise of discretion by the Learned Tribunal, in exercise of our jurisdiction under Section 130 of the Act.*



*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."*

Ruling being of jurisdictional High Court on validity of Circular as well as on scope of powers under Section 110A is binding on us and is worthy of following in substance.

58. Therefore, We are of the view that goods even if there is any remote possibility of being found prohibited or restricted at the time of adjudication is there, cannot be subjected to non release in terms of Section 110A. In view of foregoing, we allow the provisional release of 26 Gold Dore weighing 5 kg plus more, subject to the following conditions:-

1. That the duty paid at the time of seeking release of goods of Rs. 15.20 crores approximately, even if voluntarily paid or paid under protest shall not be sought for refund by the appellants and shall remain available to the department till culmination of adjudication.
2. One Gold Dore Bar weighing 4.24 kg will remain available with the department as security and shall not be released including release for re-export if sought by the party till adjudication is over. Apart from above security the party shall furnish a bond binding itself to pay equivalent of full value of consignment plus 20% in lieu of penalty thereon, to the department.

3. That the provisional release by the department, shall be done within two weeks of compliance and documentation of formalities as per para (1) and (2) above, by the appellant.
59. Accordingly, appeal is disposed of.

(Order pronounced in the open court on **05.12.2023**)

**(SOMESH ARORA)**  
**MEMBER (JUDICIAL)**

**(HEMAMBIKA R.PRIYA)**  
**MEMBER (TECHNICAL)**

Prachi