

F.No. 394/13/2016-Cus (AS)
 Government of India
 Ministry of Finance
 Department of Revenue
 Central Board of Excise & Customs
 (Anti-Smuggling Unit)

New Delhi, dated 16th August 2017

To

All Principal Chief Commissioners/Chief Commissioners of Customs / Customs (Preventive),
 All Principal Chief Commissioners/Chief Commissioners of Customs & Central Excise/GST,
 All Principal Directors General / Directors General of CBEC,
 All Principal Commissioners/Commissioners of Customs / Customs (Preventive),
 All Principal Commissioners/Commissioners of Customs (Appeals),
 All Principal Commissioners/Commissioners of Customs & Central Excise/GST,
 All Principal Commissioners/Commissioners of Customs & Central Excise/GST (Appeals)

Subject: Guidelines for provisional release of seized imported goods pending adjudication under Section 110A of the Customs Act, 1962 - reg.

Madam / Sir,

The following guidelines are being issued for guidance of the adjudicating authorities in order to ensure uniformity and to streamline the divergent procedures being followed for grant of provisional release of imported goods which are seized under Section 110 of the Customs Act, 1962. Section 110A of the Customs Act, 1962 states that "Any goods, documents or things seized under section 110, may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require".

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 a 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.

2.1. Seized imported goods shall be released provisionally by the competent authority upon request of the owner of the seized goods, subject to executing a Bond for the full value/ estimated value of the seized goods.

2.2. Further, in addition to the Bond mentioned at Para 2.1. above, the competent authority shall take a Bank Guarantee or Security Deposit to cover the following:

- i. the entire amount of duty/differential duty leviable on the seized goods being provisionally released;
- ii. amount of fine that may be levied in lieu of confiscation under Section 125 of the Customs Act, 1962 at the time of adjudication of the case. While securing the same, the competent authority shall take into account the nature of the seized goods, the duty and charges payable on the said goods, their market price and the estimated margin of profit;
- iii. amount of penalties that may be levied under the Customs Act, 1962, as applicable, at the time of adjudication of the case.

2.3. Depending on the specific nature of a case, the competent authority may, for reasons to be recorded in writing, increase or decrease the amount of security deposit as indicated above.

3. In this context, attention is invited to the Judgment dated 28.07.2016 of the Hon'ble Madras High Court in Writ Appeal No. 377 of 2016 in the case of *Malabar Diamond Gallery Pvt. Ltd. vs Additional Director General, DRI, Chennai & Ors.* wherein the Hon'ble Court has given sufficient discretion to the adjudicating authority to deny provisional release of goods in any case where the goods are smuggled or import is treated as illegal and in violation of the statutory provisions. In terms of the said Judgment, by specifying the relevance and reason, the adjudicating authority may deny provisional release of any goods which are liable to confiscation under Section 111 or Section 113 as they would fall under the definition of prohibited goods, in terms of Section 2(33) of the Customs Act, 1962.

4. In the above context, attention is also invited to the common order dated 19.05.2017 of the Hon'ble Delhi High Court in W.P.(C) No. 3965/2017 in the case of *Mala Petrochemical & Polymers v/s The Addl. Director General, DRI & Anr.* and WP(C) No. 4123/2017 in the case of *Mala Petrochemical & Polymers v/s The Commissioner of Customs (Import) ICD, Tughlakabad, New Delhi & Anr.*, wherein the Hon'ble High Court has *inter alia* held that the distinction between provisional assessment and provisional release was perhaps not acknowledged in many of the orders earlier passed by the Court. Distinguishing between cases of misdeclaration vis-à-vis cases of diversion of goods, non-adherence to conditions of notification, undervaluation and misclassification, the Hon'ble Court has observed that ultimately, each case turns on its peculiar facts and there can never be a blanket rule that in all cases of misdeclaration 100% of the duty must be asked to be deposited or that if the importer is asked to do so then he cannot be asked to furnish a bank guarantee. The Hon'ble Court has also referred to the above mentioned case of *Malabar Diamond Gallery P Ltd. v. The Addl Dir General DRI* (supra) in which the Hon'ble Madras High Court has held that although the import of gold was not prohibited, if the import was in violation of the conditions attached to such import, it could amount to smuggling and that a prayer for provisional release could be refused. The Hon'ble Delhi High Court has further observed that the power under Section 110 A of the Act involves exercise of discretion and the scope of judicial review is to examine if the discretion has been rightly exercised; that treatment of all types of wrongful imports on an equal footing might result in miscarriage of justice; and that Section 110 A leaves some margin to the Customs in the exercise of their discretion subject to the recognized legal limits.

4.1. The above mentioned observations of the Hon'ble Madras High Court and Hon'ble Delhi High Court may be kept in mind while allowing provisional release of goods.

5. Where provisional release of seized imported goods is allowed, the bond referred to in Para 2.1 shall contain an undertaking that the importer shall pay the duty, fine and/or penalty as may be adjudged by the Adjudicating Authority, subject to appellate provisions under the Act. Further, where security is furnished by way of Bank Guarantee, the Bank Guarantee should contain a clause binding the issuing bank to keep it renewed and valid till final adjudication of the case, or in the event of non-renewal of Bank Guarantee as above, the guaranteed amount be credited to the Government account by the bank on its own.

6. The issue of provisional release of export goods has been dealt with in detail in Board's Circular Nos. 33/2005 dated 02.08.2005, 01/2011 dated 04.01.2011 and 30/2013 dated 05.08.2013 and the same shall continue to be followed.

7. The Chief Commissioners/Director Generals are requested to circulate the present guidelines to all the formations under their charge. Difficulties, if any, in implementation of the aforesaid guidelines may be brought to the notice of the Board.

M. J.
16/08/17
(Rohit Anand)

Under Secretary to the Government of India

Explanation: For the purpose of this Circular, (i) 'Estimated Value' means an estimate of the value of the seized goods; (ii) 'Estimated Duty' means an estimate of the duty payable on the seized goods; (iii) 'Differential duty' means the difference between the 'estimated duty' and the duty actually paid/deposited.