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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10630 OF 2022

Pernod Ricard India Private Limited
A Company incorporated under the
Companies Act, 1956, having its
registered office at Building No. 8C,
15th Floor, DLF Cyber City,
DLF Phase -II, Gurgaon-122 002 … Petitioner

Versus

1. The Union of India through
Joint Secretary, Ministry of Finance,
Department of Revenue, Room No. 46,
North Block, New Delhi – 110 001.

2. Central Board of Indirect Taxes and
Customs through its Secretary,
Ministry of Finance, Department of
Revenue, Room No. 46, North Block,
New Delhi – 110 001

3. The Principal Commissioner of
Customs (NS-1), Jawaharlal Nehru
Customs House Raigad,
Mumbai- 400 707

4. Joint Commissioner of Customs
The office of Principal Commissioner
of Customs (NS-1), Jawaharlal Nehru
Customs House Raigad,
Mumbai- 400 707

5. Deputy Commissioner of Customs
The office of Principal Commissioner
of Customs (NS-1)
Jawaharlal Nehru Customs House
Raigad, Mumbai – 400 707

6. The Principal Commissioner
of Customs, Noida Customs
Commissionerate, Concor Complex
P.O. Container Depot, Greater Noida
Gautam Budh Nagar,
Uttar Pradesh – 201 311 … Respondents

Mr.Dil Jit Singh Ahluwalia with Mr. Sandeep A., Mr.Raghav Taneja and Mr. Angad Singh Ahluwalia i/b. Vidhi Partners for the Petitioner.

Mr. Anil C. Singh, Additional Solicitor General with Ms.Shehnaz V. Bharucha and Mr. Satyaprakash Sharma for the Respondents.

CORAM : NITIN JAMDAR AND GAURI GODSE, JJ.

RESERVED ON : 25 November 2022.

PRONOUNCED ON: 20 December 2022.

JUDGMENT : (Per Nitin Jamdar, J.)

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for disposal.

2. The Petitioner has challenged the direction issued by Respondent No.3 to the Petitioner on the ICEGATE Portal demanding bank guarantee for differential duty on of bills of entry for imports of the Petitioner of concentrates of alcoholic beverages from 1 April 2022 onwards.

3. The Petitioner is a private limited company. The Petitioner manufactures, blends and sells indian made foreign liquor. Respondent No.1 is the Union of India. Respondent No.2 is the Central Board of Indirect Taxes and Customs. Respondent No.3 is the Principal Commissioner of Customs (Nhava Sheva). Respondent No.4 is Joint Commissioner of Customs. Respondent No.5 is the Deputy Commissioner of Customs, and Respondent No.6 is the Principal Commissioner of Customs, Noida, UP.

4. In case of import of goods by an Indian buyer from a foreign supplier, who is related, there is a possibility that the goods are imported at a lower value than the market price, thus causing a loss in customs duty levied on the value of the imported goods as per the provisions of the Customs Act. For that purpose, a specialized branch is set by the Customs known as Special Valuation Branch (SVB). Its function is to investigate the valuation of such imported goods from related parties. SVB investigates the impact of the such relationship on the invoice value of the imported goods.

5. The Petitioner has been importing concentrates of alcoholic beverages from M/s.Chivas Brothers Limited, United Kingdom since 1994. There has been litigation regarding these import activities in the past, which is not directly relevant for the present discussion to describe it in detail. On 28 February 2012, the Petitioner filed an annexure along with documents for the proposed import of concentrates of alcoholic beverages in view of the Supply Agreement dated 11 January 2012. On 17 October 2014, the Directorate of Revenue Intelligence (DRI), New Delhi, initiated an investigation that the Petitioner has been importing concentrates from Chivas Brothers, a related party and DRI suspected undervaluation of goods. During the investigation by DRI, the Petitioner deposited Rs. 40 crores as an ad-hoc deposit on 16 February 2015. A further deposit of Rs. 20 crores was made with the DRI, New Delhi, on 6 May 2015. The DRI submitted a detailed report dated 6 July 2021 regarding the short payment of customs duty and the undervaluation of concentrated alcoholic beverages provisionally imported by the Petitioner. The DRI's investigation report stated that the differential duty amounting to Rs.20,08,68,69,079/- appears to be payable by the Petitioner and, therefore, it was requested to initiate proceeding for the finalization of the assessment of goods imported by the Petitioner.

6. The case of the Petitioner was also referred by the Assistant Commissioner of Customs to Special Valuation Branch (SVB) to take the relationship and valuation of goods imported by

the Petitioner from the foreign supplier- M/s.Chivas Brothers into account. SVB submitted investigation report on 30 December 2021. The SVB concluded that the Petitioner- importer and M/s.Chivas Brothers Limited, UK are related parties in terms of Rule 2(2)(iv) and 2(2)(vi) of the Customs Valuation Rules, 2007. It was observed that the Petitioner and M/s.Chivas Brothers are fully owned subsidiaries of Pernard Ricard, S.A. It was observed that the declared prices are liable for rejection under Rule 12 of the Rules of 2007 and are to be re-determined and required to be loaded from 2011 to 2020 quarterly, half-yearly & yearly. Further, for the imports made after the year 2020 with effect from 1 January 2021 and onwards, the value of imported goods is to be re-determined and is required to be loaded at the rate of 67.49% of the invoice value.

7. On 17 February 2022, the Petitioner presented the bill of entry No.7481421 dated 14 February 2022 at Nhava Sheva port for clearance of the goods. A query was raised to the Petitioner on 1 April 2022, uploaded on the ICEGATE portal that as per recommendations of the SVB for the imports made after the year 2020 with effect from 1 January 2021, the value of the imported concentrates of alcoholic beverages of different malts is re-determined and is required to be loaded at the rate of Rs. 67.49% of the invoice value as per the SVB report. A similar query was uploaded on the ICEGATE Portal on 9 May 2022 at Inland Container Deport, Dadri, regarding bills of entry Nos. 8596233 and 8596820. The Petitioner was asked to give consent and to submit for

either assessing the bills of entry with recommended loading or for assessing the bills of entry provisionally on submission of bond and bank guarantee for the differential duty. The Petitioner submitted bank guarantees on 27 May 2022 at Nhava Sheva Port and on 31 May 202 at Inland Container Deport, Dadri for the provisional assessment of import consignments The Petitioner submitted bank guarantees to the tune of Rs.2,08,18,000/- on 27 May 2022 and for Rs.1,30,16,000/- on 31 May 2022. Thereafter, for several bills of entry, the Petitioner submitted bank guarantees for a total amount of Rs.213,79,76,000/-. According to the Petitioner, since the Petitioner was facing commercial exigencies, it had no option but to furnish bank guarantees and did so under protest.

8. Pursuant to the SVB and DRI reports, show-cause notice was issued to the Petitioner on 27 June 2022. After referring to the report of DRI and SVB, the show-cause-notice called upon the Petitioner to show cause as to why the declared invoice values should not be rejected under Rule 12 of the Rules of 2007 in respect of Bills of Entry provisionally assessed at Nhava Sheva Port pending SVB Investigation. Why the said provisionally assessed Bills of Entry should not be finalized under Section 18 of the Customs Act, 1962 by re-determining the value of provisions of Rules 5 and 9 of Rules of 2007 by loading the declared value of goods imported from M/s.Chivas Brothers Limited, for the period specified therein. Also, why 67.49% of the invoice value, as mentioned in the show cause notice should not be loaded with effect from 1 January 2021 and

onwards. Further, why differential duty consequential to loading of value as in the assessed Bills of Entry should not be recovered. Lastly, the Petitioner was put to notice why the *ad hoc* deposits of Rs.60 crore made during the investigation should not be appropriated against the total duty liability.

9. The Petitioner was furnished with a copy of the reports of the DRI and SVB. Respondent No.5, pursuant to the reports, issued a show cause notice to the Petitioner proposing to enhance the value of concentrates of alcoholic beverages imports made from 1 October 2021 by loading 67.49% of the declared value.

10. Thereafter, the Petitioner filed this writ petition on 2 September 2022. The Petitioner has prayed for a direction that the Respondent Nos.3 and 6 should refrain from insisting on furnishing bank guarantees for differential duty on future import of concentrates of alcoholic beverages by the Petitioner by loading of 67.49% of the invoice value based on the SVB investigation report. The Petitioner has sought a direction to Respondent Nos. 3 and 6 to provisionally assess all future imports on the declared value pending finality of the adjudication upon submission of provisional duty bond without insisting on the bank guarantees. The Petitioner further seeks a direction that the provisional assessment should be done in respect of all future imports strictly in terms of Circular No.5/2016-Customs dated 9 February 2016. The Petitioner also prayed that the Respondents be directed to release the bank guarantees amounting to Rs.129,97,25,000/- furnished for the

imports effected after 1 April 2022. On 27 September 2022, ad-interim order directing the Respondents not to take coercive steps against the Petitioner was granted.

11. We have heard Mr. Dil Jit Ahluwalia, learned Advocate for the Petitioner and Mr. Anil Singh, Additional Solicitor General for the Respondents.

12. The core issue before us is the direction to furnish the bank guarantees for differential duty on imports of the Petitioner's products by loading a specified percentage of the invoice value. There is no dispute that the power to direct furnishing security exists under Section 18 of the Customs Act. According to the Petitioner, this power is structured by Circulars No.5/2016 dated 9 February 2016 and Circular No. 38/2016 issued by the Central Board of Excise and Customs. According to the Petitioner, in the facts of the Petitioner's case, these Circulars, which are binding on the Respondents, prohibit the Respondents from demanding bank guarantees for the differential value and the imports pending further proceedings will have to be cleared only on a personal bond. According to the Respondents, Circular No.5/2016 does not apply to the facts of the case, and Circular No. 38/2016 supports the Respondents' case. According to the Respondents, there is no absence of power for demanding security as sought to be argued by the Petitioner. The arguments of the learned Counsel have centered around these two Circulars and Section 18(1) of the Customs Act.

13. Chapter V of the Customs Act deals with levy and exemption from the customs duty. Section 12 of the Act states that customs duty shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 and other applicable laws. Section 14 deals with the valuation of goods. Section 15 deals with the date of determination of the rate of duty and tariff valuation of imported goods. Section 16 deals with the date of termination of the rate of duty and tariff valuation of exported goods. Section 17 stipulates that an importer entering any imported goods under Section 46 of the Act, otherwise than provided in Section 85 of the Act, will self-assess the duty. The Proper Officer may verify the entries so made and self-assessment of goods and examine and test the goods. The Proper Officer may require the importer to produce any document or information whereby duties leviable on imported goods can be ascertained. When the Proper Officer, upon verification of self-assessment, finds that self-assessment is not correctly done, he would re-assess the duty leviable. The relevant provision for the present discussion is Section 18(1) of the Act. Section 18(1) reads thus:

> *"18. Provisional assessment of duty*
>
> *(1) Notwithstanding anything contained in this Act but without prejudice to the provisions of section 46 and section 50,-*
>
> *(a) where the importer or exporter is unable to make self-assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or*
>
> *(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or*
>
> *(c) where the importer or exporter has produced all the*

necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry,

the proper officer may direct that the duty leviable on such goods, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed as the case may be, and the duty provisionally assessed."

Section 18(1)(c) states that where the importer has produced all the documents and furnished complete information, however, if the Proper Officer deems it necessary to make further enquiry, the Proper Officer may direct that the duty leviable on such goods be assessed provisionally, if the importer furnishes such security as the Proper Officer may deem fit for payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed as the case may be and the duty provisionally assessed.

14. The subject matter of this petition relates to the reference to the Special Valuation Branch. As stated earlier, SVB was created as a specialized agency to, *inter alia,* investigate transactions involving special relationships between buyer-seller which have a bearing on the assessable value. The Circulars Nos.1/98-Customs, dated 1 January 1998 and 11/2001-Customs, dated 23 February 2001, prescribed the procedure to be observed by the Customs Houses for referring cases to SVB and timelines to be followed for

finalizing such cases. Trade and industry made representations regarding delays in the finalization of SVB investigations, continued uncertainty due to provisional assessments, and increased transaction costs due to extra duty deposits pending the investigation. The Central Board of Excise and Customs (Board) took cognizance of the World Customs Organizations Guide to Customs Valuation and Transfer Pricing (June 2015). It was also noted that the earlier Circulars were based upon the Rules of 1988, which were superseded by the Rules of 2007. In light of these facts and that a large number of SVB investigations were pending in various Customs Houses, a need was felt to streamline the procedure relating to investigations by SVBs. In this backdrop, Circular No.5/2016 came to be issued by the Board.

15. The Circular 5/2016 is titled "Investigation by Special Valuation Branch (SVB) – Streamlining of Procedure". Clause-3.1 of Circular No.5/2016 reads as under:

> *"3.1 The SVBs are presently functioning at the Customs Houses at Bengaluru, Chennai, Kolkata, Delhi and Mumbai. Para 1 (b) of circular No.11/2001, dated 23rd Feb., 2001 laid down the jurisdiction of the SVBs based upon the principle of location of the corporate office of the importer. After reviewing this arrangement from the point of view of convenience of the trade, it has been decided to continue with the same administrative arrangements. Accordingly, as & when imports requiring investigation by SVBs are noticed at any customs formation, the concerned Commissionerate shall after following the procedure laid down in this circular, transfer all relevant records to the jurisdictional SVB for investigations. However, in cases where the import takes place through CHs of Mumbai/ Delhi/ Chennai/ Kolkata/*

> *Bangalore, the importer will be free to select the SVB of the Customs House of import or the Customs House most proximate to the corporate office, as convenient to him."*
>
> (emphasis supplied)

The underlined portion above refers to investigation. Clauses-3.2 and 3.3 are of importance. They read as under:

> *"3.2. The Board has reviewed the practice relating to levy of 'Extra Duty Deposits' (EDD) in cases where SVB investigations are undertaken. It has been taken into consideration that 'Extra Duty Deposit' @ 1% of declared assessable value is being obtained from the importer for a period of 4 months during which time he is required to submit required documents and information to the SVB. In the event of his failing to do so, the EDD can be increased to 5% till such time the importer complies. Upon the importer, complying with the requisition for documents and information, Circular 11/2001 - Cus dated 23.2.2001 provides that EDD shall be discontinued, while imports will continue to be assessed provisionally till the completion of investigations. In other words, the imports were continued to be assessed provisionally on the basis of a PD Bond but without any EDD. It has also been noted that many importers have represented on delays in dispensing of EDD, even though they have provided the required information and a period of 4 months has passed without the case having been decided. Therefore, the Board has decided that while reference to SVB requires the assessments to be provisional, for the sake of reducing transaction cost and bringing uniformity across Customs Houses, no security in the form of EDD shall be obtained from the importers. However, if the importer fails to provide documents and information required for SVB inquiries, within 60 days of such requisition, security deposit at a rate of 5% of the declared assessable value shall be imposed by the Commissioner for a period not exceeding the next three months. Simultaneously, the importer shall be granted a further period of 60 days to comply with the requisition for information & documents. If the importer fails to submit documents within this extended period, the*

Commissioner in charge of SVB may consider the use of other provisions of the Customs Act for obtaining documents/ information from an importer for conducting investigations. In no case shall the imposition of Security Deposit exceed the period of three months specified above. Furthermore, the Board has also decided that the importer would be free to choose whether the Security Deposit to be provided for the purposes of provisional assessment shall be by way of cash deposit or a Bank Guarantee. The form of Bond to be initially furnished by the importer is attached as Annexure D. The form of Bond to be used in a case where taking a Security Deposit becomes necessary is attached as Annexure E.

3.3 It has also been decided that the existing system of adjudication, wherein the proper officer of the SVB passed an appealable order followed by the assessing officer passing another corresponding order finalizing provisional assessments should be replaced\it has now been decided that the SVB shall not issue an appealable order. Instead, the SVB shall convey its investigative findings by way of an Investigation Report to the referring customs formation for finalizing the provisional assessments. This would obviate multiple streams of appeals for the trade."

(emphasis supplied)

The extra duty deposit at the rate of percentage of declared assessable value was obtained from the importers for four months. They were required to submit the documents and information to SVB. If they failed to do so, the extra duty deposit was to be increased to 5% until the importer complied. The imports continued to be assessed provisionally based on a bond without any EDD. For the sake of reduction of transaction cost and for bringing uniformity across the customs house , by this Circular No.5/2016 the Board decided that while referring to SVB requires assessment to be provisionally no security in terms of EDD shall be obtained from the importers;

however, the importers fail to provide documents within sixty days of requisition, security deposit of 5% of the declared assessable value shall be imposed by the Commissioner for a period of not exceeding three months. Simultaneously, the importers were granted a further time of sixty days to comply with the documents. If the importers fail to submit documents within the prescribed period, the SVB would consider for obtaining information. The security deposit was to be within three months. Clause-3.2 of Circular No.5/2016 refers to Circular No.11/2001, which had provided and makes a specific reference to imports to continue to assess provisionally till the completion of the investigation. Clause 3.3 of Circular No.5/2016 states that it has been decided that SVB will not issue an appealable order, instead, the SVB shall convey its investigative findings by way of an investigation report to the referring customs formation for finalizing the provisional assessment.

16. The procedure for making reference to SVB is laid down in Clause 5 of Circular No.5/2016. The Circular recognizes that scrutiny of transactions between related persons can pose complex issues and may delay clearance. The importers are advised that if their transaction falls in such a category, they should, so far as possible, file a prior bill of entry, preferably 15 days before the import. The importers are also advised to provide information as prescribed in Annexure-A to the Circular and information enjoined under the Rules of 2007 when filing the Bill of Entry. This is to give sufficient time to decide whether the transaction needed to be

referred to SVB. Then, upon filing the Bill of Entry and receipt of information in Annexure A, the proper officer will determine whether, prima facie, there is a need for investigation by the SVB. The proper officer will complete this examination within three days of filing the Bill of Entry and submit the matter before the Commissioner.

17. The Clause-5.3 of Circular No.5/2016 then states that the Commissioner, after due consideration of the preliminary findings, would take a view whether the matter be referred to the SVB for further investigations and whether the goods be provisionally assessed to duty in terms of Section 18(1) of the Customs Act, or whether the transaction does not merit investigation by SVB. That assessment should be finalized based on inquiries to be conducted by the proper officer. The procedure for reference to SVB is referred to in Clause-6 of Circular No.5/2016, and it will be fruitful to reproduce Clause-6, which reads thus:

> *"6. In the event of the Commissioner directing investigations by SVB, the proper officer shall promptly carry out provisional assessment in terms of section 18 of the Customs Act, 1962 and ensure that no delays occur in the release of the goods.*
>
> *6.1 In order to facilitate expeditious inquiries by the SVB, the proper officer shall alongside of provisionally assessing the bill of entry, requisition further information from the importer as per Annexure B to this circular. The importer should be advised to furnish the documents and a duly indexed reply to the questionnaire to the jurisdictional SVB (as per Para 3.1) within 60 days.*

6.2 The documents received from the importer with respect to the checklist shall be duly acknowledged by the SVB. An intimation shall be forwarded to RMD and the referring appraising group regarding submission of the documents within time so that provisional assessments, without security deposit or bank guarantee, continue till the finalization of the investigation.

6.3 The documents received from the importer with respect to the checklist shall be duly acknowledged by the SVB. An intimation shall be forwarded to RMD and the referring appraising group regarding submission of the documents within time so that provisional assessments, without security deposit or bank guarantee, continue till the finalization of the investigation.

(emphasis supplied)

Further procedure in the SVB is laid down in Clause-8, which reads thus:

"8. Upon receipt of all related records from the referring customs formation, the SVB shall forthwith assign a case number and update the Central Registry Database (CRD) maintained by DGoV, The SVB shall also inform the RMD of the details of the importer, his IEC code, and details of seller for inserting suitable instructions for assessing officers at all Customs Houses so as to ensure provisional assessments during the currency of SVB inquiries.

8.1 Upon receipt of information from the importer as per Annexure B, SVB shall commence inquiries, during the course of which the Deputy Commissioner / Asst. Commissioner (SVB) may call for further documents or information as required. The importer shall also be given suitable opportunity to submit evidence in support of the declared value.

8.2. The SVBs shall, as far as possible, complete the investigations and issue its findings within two months from

the date of receipt of information in Annexure B. In cases where investigations are not completed within 2 months, the SVB shall seek the approval of the jurisdictional Commissioner for such extended time period as is deemed necessary to complete investigations. However, where investigations are not completed within 4 months from the date of receipt of information in Annexure B, the matter shall be submitted before the Chief Commissioner for extension of period as is deemed fit.

8.3 Upon completing investigations, the SVB shall submit the findings before the Principal Commissioner/ Commissioner, quantifying the extent of influence on the transaction value due to the relationship or payments towards royalty or licence fee or other payments actually made or to be made as a condition of sale of the imported goods. Upon approval by the Principal Commissioner/ Commissioner, an Investigation Report (IR, for short) shall be prepared incorporating all relevant facts, submissions made by the importer, investigative findings, grounds for acceptance or rejection of transaction value, and the extent of influence on declared transaction value, if any. The IR shall include all relied upon documents and shall be communicated to the referring customs station/ appraising group and such other stations where imports have been provisionally assessed. A copy of the IR shall also be sent to the DgoV."

(emphasis supplied)

Finalization of Assessments is enunciated in Clause-9 which is as follows:

"9. Upon receipt of the IR from the SVB, where investigate findings are that the declared value is found conforming to Rule 3 of the CVR, 2007, the customs stations where provisional assessments have been undertaken shall immediately proceed to finalize the same. There would be no need to issue a speaking order for finalizing the provisional assessments in such cases.

9.1 However, when investigate findings are that the

declared value has been influenced by the circumstances surrounding the sale, the proper officer shall issue a show cause notice to the importer within 15 days of the receipt of the IR, under intimation to the concerned SVB.

9.2 In cases where imports have been cleared through multiple customs locations, the jurisdictional commissioner of the SVB shall, after issue of notices by the proper officers in the said locations, make a proposal addressed to the Commissioner (Customs), CBEC recommending appointment of a common adjudicating authority by the Board for the purpose of passing order for finalization of the provisional assessments."

This, in short, is the scheme of Circular No.5/2016.Thus by issuing Circular No.5/2016, the Board reviewed the practice of levying Extra Duty Deposit (EDD) and security in cases where the SVB has undertaken investigations. It is necessary to note at this stage that the underlined and emphasized portion from the clauses reproduced above refers to Investigation. This aspect will be elaborated later.

18. The learned Counsel for the parties have advanced detailed arguments on the implications of Circular 5 of 2016 on the respondents' power to demand the impugned bank guarantees.

19. Mr. Dil Jit Ahluwalia, learned counsel for the Petitioner, submitted as follows. Section 18(1) of the Customs Act, 1962 deals with the provisional assessment of duties and in case of the contingency where the case has been referred to SVB, and the subsequent assessment pursuant thereto is covered under Circular No.5/2016 dated 9 February 2016. This Circular covers the

contingencies up to the finalization of the assessment and therefore the power under section 18(1) of the Customs Act conferred upon the Proper Officer to insist on security in terms of bank guarantee is now structured by Circular No.5/2016. Circular No.5/2016 stipulates a personal bond and security deposit of 5% on declared value only for three months. Therefore, Circular No.5/2016 being a complete code, from reference to SVB till finalization of assessment for further imports, the Respondents can, at the most, take personal bond and security deposit of 5% only for three months. The Petitioner has given all the documents; thus, even this clause does not apply. Even after the investigation report has been submitted by the DRI or SVB and the show-cause-notice is issued, and the assessment still needs to be completed, Circular No.5/2016 would apply. Circular No.5/2016 does not distinguish between the period during which the investigation is carried out by SVB and the period post submission of the investigation findings till the finalization of the assessment. No specific provision or Circular has been shown by the Respondents that after the investigation report by SVB is supplied, the Respondents would have the power to demand security to the tune of 100% in the form of a bank guarantee. The investigation findings of the SVB are only findings, and the assessment does not conclude on furnishing these findings. Earlier, the appeal was maintainable against the findings of SVB, however, the same has been removed to streamline the process. Demanding a bank guarantee of 100% differential value for future imports is illegal and without jurisdiction.

20. Mr.Anil Singh, learned Additional Solicitor General, on the other hand, submitted: There cannot not be any dispute that the power is vested upon the Proper Officer under Section 18(1) of the Customs Act to demand such security as may be necessary to secure the interest of revenue. Even assuming the power is structured by Circular 5/2016, in the cases where reference is made to SVB, the conditions therein regarding personal bond and limited security is only till the investigation finding/ report by SVB is submitted. Circular No.5/2016 will have to be read in totality, and it is issued only to govern the procedure of investigation to be carried out by SVB and not the entire assessment. There is a clear distinction between the Investigation and Assessment. The subject matter of Circular No.5/2016 is the procedure of investigation by SVB. Therefore, in respect of conditions regarding furnishing security, Circular No.5/2016 will have to be restricted till the submission of the report by SVB. This aspect has been made very clear in Clause 6.3 of Circular No.5/2016; wherein there is a reference to the continuation of provisional assessment without a security deposit or bank guarantee only till the finalization of the investigation. Even Clauses 8.2 and 8.3 of the said Circular make the position very clear. After the investigation report has been received, which is referred to in Clauses 9, 9.1 and 9.2, a show-cause notice is to be issued within fifteen days. This show-cause-notice has been issued and; therefore, as far as security deposit and bank guarantee is concerned, Circular No.5/2016 does not govern the position after the report is received

from SVB as in the present case. Therefore, after the investigation findings from SVB are received, the power of the Proper Officer flows from Section 18(1) of the Act, where discretion is conferred upon the Proper Officer and it is rightly exercised.

21. We have considered the rival contentions. It is not disputed and cannot be disputed that under Section 18(1) of the Act, the authorities have the power to insist upon security in the form of a bank guarantee while clearing the goods on provisional assessment. This power under Customs Act is the main source of power. Section 18(1) lays down the power to seek security during the provisional assessment. It is also not disputed that if the Circulars structure the power under Section 18(1), it has to be exercised within the parameters of the Circulars issued under the Act.

22. Circular No.5/2016 is not to be read piecemeal as sought by the Petitioner but in its entirety. The heading of the Circular is vital for the present discussion, which reads thus:

> *"Investigation by Special Valuation Branch (SVB) – Streamlining of Procedure"*

The purpose and intent of the Circular is clear from its heading and it will determine its ambit. The purpose of issuing the Circular No.5/2016 is clear from its heading. It is issued to streamline the procedure of investigation by SVB. The procedure is for the investigation of related party import cases and other cases by SVB.

There is no ambiguity in the title and the subject heading. The emphasis is clearly on 'investigation'. In Circular No.5/2016 after narrating the background in Clauses 1, 2, and 3, referred to above, with more than sufficient clarity it is stated that what is stated the position regarding security is applicable only till the submission of investigative findings by SVB. Clause-2 refers to representations of trade and industry regarding procedure and delays in SVB investigations pending in various Customs Houses; and the need to streamline the procedure to reduce delays in 'investigations'. When the imports requiring investigation are noticed, the concerned Commissionerate is supposed to transfer all relevant records to the jurisdictional SVB. Since SVBs are located at few places, the most proximate to the corporate office of the importer can be chosen. In Clause-3.2, the Board reviewed the practice of levying EDD in the cases where 'investigations' are undertaken. Thereafter in the context of the investigation, it is stated that EDD would be discontinued upon the importer complying with documents and information. The imports were supposed to be continued to be assessed provisionally on the basis of the bond but without EDD, and it was noted that there were delays in dispensing with EDD even when information necessary for investigation was supplied. To reduce the delay in the investigation before SVB and to bring uniformity and reduce transaction costs, the Board decided, no security in the form of EDD would be obtained from the importers. It is not necessary that Circular No.5/2016 should have prefixed each sentence with "pending investigation". The clauses of the Circular will have to be

read meaningfully. Clause-3.3 states that earlier, the findings of SVB were appealable; now, the investigative findings have to be submitted with an investigation report to finalize the provisional assessment. This has to be read along with the mandate of issuing the show-cause notice within fifteen days after receiving the investigation report.

23. The first part of Circular No.5/2016 regarding only personal bond, no EDD and, at the most, security deposit at the rate of 5% till three months, is clearly applicable till the investigation by SVB is complete. There is no indication that the same position would continue even after SVB submits its findings. Though in Clause-9 there is a reference to the finalization of assessment and in Clause-10 to change in the circumstances, the thrust of Circular No.5/2016 is to regulate the procedure of investigation by SVB.

24. Therefore, proceeding on the basis that Circular No.5/2016 would structure the provisions of Section 18(1) of the Act, the restriction would be only till the investigation by SVB is complete and provisional assessment awaiting investigative findings by SVB. Clause-6.3 makes it even more evident. Clause-6.3 deals with the procedure for reference to SVB, that documents received from the importer are to be duly acknowledged by SVB, and the position regarding security and bank guarantee to continue till the finalization of 'Investigation'. Under Clause 8.3, the SVB shall submit the findings. Clause-9, which is heavily relied on by the Petitioner though refers to the finalization of assessment, it is in the

context of the further procedure after the investigation is complete. However, as far as the aspect of the security is concerned, the same is still for a limited period until the investigative findings are submitted. This is so because there is distinction between the Investigation and Assessment.

25. There is a difference between the position pending the investigation by SVB and the position after the investigative findings are reached and supplied to the assessing officer. Once the investigative findings are received, the assessing officer will have to proceed to issue a show-cause notice and take necessary steps as per Section 18(1) of the Act. Therefore, we find no merit in the contention of the Petitioner that the position envisaged in Circular No.5/2016 regarding furnishing of an only bond, without any EDD and security, will continue even after the investigative findings are received and show-cause notice is issued.

26. The Petitioner has also relied on Circular No.38/2016 and advanced arguments based on the same. Circular No.38/2016 lays down guidelines regarding provisional assessment under Section 18(1) of the Act. These are general guidelines. Circular No.38/2016 refers to the Customs (Provisional Duty Assessment) Regulations, 2011 and Notification No.81/2011-Customs(NT) dated 25 November 2011. It refers firstly to the deposit of 20% of the differential duty between provisional duty and duty to be finally assessed or re-assessed, secondly execution of a bond and, thirdly, the

surety or security of the bond. As regards the deposit of 20% of duty provisionally assessed, the Circular mentions that the Board decided it to be dispensed with in favour of the importers to reduce transaction costs. Clause 2.7 refers to Section 18 of the Act of 1962 and that uniform guidelines are to be followed by all Customs Stations in respect of security. It would be necessary to reproduce Clauses 2.8, 2.9 and 3 of Circular No.38/2016. They read thus:

> *"2.8 Wherever, duty is to be assessed provisionally, the importer shall: (a) for the purposes of undertaking to pay on demand the deficiency, if any, between the duty as maybe finally assessed and the duty provisionally assessed, execute a bond in the prescribed form (enclosed); and (b) furnish such security for the payment of the duty deficiency, as indicated in para 3 below.*
>
> *x x x x*
>
> *2.9 The security to be obtained shall be in the form of a bank guarantee or a cash deposit, as convenient to the importer.*
>
> *x x x x*
>
> *3. The following guidelines shall be followed while obtaining security where provisional assessment under Section 18 of the Customs Act is being undertaken:*

Sl. No.	*Class of Importer*	*Amount of Bank Guarantee or Cash deposit to be obtained as as "security" of the differential duty*	*Remarks*
1	----	----	----
2	----	----	----
3	----	----	----
4	*Cases referred to SVB*	*As per Circular*	

		No.5/2016-Customs dated 9.2.2016 issued from F.No.465/12/2010-Cus V	
5(a)	----	----	----
5(b)	----	----	----
5(c)	----	----	----
6(a)	----	----	----
6(b)	*Cases, where the proper officer deems it necessary to order a provisional assessment, whether for the purposes of chemical test or requirement of information or causing inquiries:*		*Provided that the Principal Commissioner of Customs or the Commissioner of Customs may reduce the amount of security where there are good & justifiable reasons to do so.*
	(1) Where differential duty has been estimated.	*100%*	
	(2) Where, despite best efforts by the proper officer, differential duty cannot be computed	*0%*	*N.A.*

(emphasis supplied)

It is stated in Clause-2.8 that for the purposes of undertaking to pay on demand the deficiency, if any, between the duty as may be finally assessed and the duty provisionally assessed, execute a bond in the prescribed form and furnish such security for the payment of the duty deficiency as indicated in Clause-3. Clause-3 states about the guidelines to be followed while obtaining security where provisional

assessment in terms of class of importer, amount of bank guarantee or a cash deposit of the differential duty. Sub-clause-4 of Clause-3 deals with cases referred to SVB to be dealt with as per Circular No.5/2016. Sub-clause-6(b) deals with cases where the Proper Officer had ordered provisional assessment to cause inquiries where differential duty has been estimated that security can be 100% of the differential duty.

27. On the implication of Circular No.38/2016, Mr. Ahluwalia, learned counsel for the Petitioner, submitted as follows: Under the Customs (Provisional Duty Assessment) Regulation 2022, in addition to the personal bond, security/bank guarantee up to 20% of differential duty could be leviable by the Proper Officer under Section 18(1) of the Act; however, this is reviewed and dispensed with as noted in Circular No.38/2016. Thus, the Respondents' action in demanding security in terms of a bank guarantee of up to 100% of differential duty even when the stipulation of 20% stands removed, is entirely illegal. The removal of 20% of the security of differential duty was to reduce the delay in the clearance of transactions for ease of doing business. Paragraph 2.8 of the Circular dated 38/2016 is clear and widely worded that whenever duty is to be assessed provisionally, a bond is to be executed, and the importer shall furnish security for payment of differential duty. The Respondents' case that even under Clause-3 of Circular No.38/2016, security can be obtained is misplaced as this clause is not applicable. The Respondents never had the power to insist on the security of

100% of the differential duty, and they had power only for the 20% of the differential duty and that too is now taken away.

28. Countering the arguments of the Petitioner on Circular 38/2016, Mr.Anil Singh, the learned ASG, first made a grievance that the entire foundation of the Petitioner's case is only on Circular No.5/2016 and that there are no pleadings regarding the historical background of the dispensation of 20% security based on Circular No.38/2016. He submits, even otherwise, Circular No.38/2016 specifically refers to the cases referred to SVB to be governed by Circular No.5/2016. Clauses 2.8 and 2.9 of Circular No.38/2016 refer to the execution of a bond and furnishing of security in the form of a bank guarantee or cash deposit. It states that security, where provisional assessment under Section 18(1) is undertaken, would be followed as per Clause 3. In sub-clause 6(b) of Clause-3, the cases where the Proper Officer deems it necessary to order provisional assessment, whether for the purposes of a chemical test or for causing inquiries, bank guarantees of the differential duty of 100% can be directed to be furnished. Therefore, under Circular No.38/2016, till the SVB submits the investigative findings, Circular No.5/2016 would apply and thereafter sub- clause-6(b) of Clause-3 of Circular No.38/2016 and Section 18(1) of the Act would apply. The differential duty, as per sub-clause-6(b)(1), has now been estimated. The demand for bank guarantee of 100% of differential duty is just and proper.

29. The learned ASG is correct in making a grievance regarding the manner in which the Petitioner has advanced arguments based on the Circular 38/2016. The Petitioner has only referred to Circular No.38/2016 cursorily in the pleadings, and it is not even annexed to the petition, and the same was handed over during the oral arguments. The argument of the Petitioner was liable to be rejected on this count alone, yet we have looked into the same and have found that it has no substance.

30. Circular No.38/2016 lays down guidelines for provisional assessment under Section 18 of the Customs Act. Though there is a reference in Clause-2.5 regarding dispensing of a 20% deposit of the duty provisionally assessed, Clause-2.8 states that where the duty is to be assessed provisionally, the importer shall furnish such security for payment of duty deficiency. As per Clause-3 of the said Circular, such security can be in the form of a bank guarantee. Clause 3 lays down, in a tabular form, the guidelines for obtaining security for provisional assessment. In sub-clause-4 of Clause-3, it is stated that the cases referred to SVB will be governed by Circular No.5/2016.

31. Proceeding on the basis that Circular No.38/2016 structures the power under Section 18 of the Act, even that will not assist the Petitioner. Sub-clause- 6(b) of Clause-3 of Circular No.38/2016 refers to the procedure after differential duty has been estimated. Therefore, after SVB has estimated the same till the

finalization of the assessment, sub-clause 6(b)(1) of Clause-3 of Circular No.38/2016 would apply. Circular No.38/2016 in sub-clause(6)(b) of Clause-3 refers to the cases where it is necessary to order provisional assessment for causing inquiry.

32. Thus, the position after submission of the investigation report by SVB is not covered by Circular No.5/2016, and the contingency is covered under Section 18(1) of the Act and also by sub-clause-6(b)(1) of Clause-3 of Circular No.38/2016. Sub-clause-6(b)(1) of Clause-3 of Circular No.38/2016 speaks of a 100% of bank guarantee. No position is shown to us that after the SVB submits an investigation report, estimates the differential duty, and records a finding that there has been undervaluation, the power under Section 18(1) of the Act to demand security for differential duty is taken away.

33. The Petitioner then contended that the impugned action of the Respondents is contrary to their conduct as in the past also there were two DRI investigations and two show-cause-notices were issued for the period between June 1995 and June 2000 and for the period between July 2000 and May 2001, and even though these show-cause notices were issued to the Petitioners on prima facie finding of undervaluation, no security was sought for from the Petitioner even though at that time security up to 20% of differential duty could be levied. There is no merit in this submission. No legal bar is shown, nor the principle of estoppel can be applied. Show-

cause-notice is already issued, and the proceedings are underway. Having received the investigative finding that 67.49% will have to be loaded as differential duty on the import from the related party and the Petitioner is importing the same goods from the same related party; the Respondents have exercised discretion by insisting upon bank guarantee to secure the interest of the exchequer. Further, the question in this petition is whether the present impugned action is illegal, which we have found that it is not. Therefore, there is no error in Respondents' subjecting the import of Petitioner's goods to the furnishing of bank guarantee under Section 18(1) of the Act.

34. The Petitioner sought to contend, based on the format of the personal bond appended to Circular No. 5/2016, that since the bond is till the completion of the assessment, the aspect of security under Circular No.5/2016 would also apply till the assessment was over. Secondly, it was contended that the personal bond could be executed and deficit duty could be recovered, and the bond would adequately protect the Revenue, and it is not necessary to insist on a bank guarantee. There is no substance in this contention. The language of the personal bond will not determine as to what will be the legal position regarding the furnishing of the security. Because the bond continues till the assessment, the same analogy cannot be automatically extended concerning furnishing security.

35. One of the contention of the Petitioner is that only two ports have issued show-cause notices, and it cannot be that the

proceedings go on for every future import. There is no merit in this contention also. Time limit of fifteen days is stipulated under Circular No.5/2016 for issuance of show-cause-notice. If there is a delay in the issuance of a show-cause notice after the receipt of investigative findings, necessary directions can always be issued to protect and balance the interest of the parties if such a case is made out. Therefore, this position is not determinative to ascertain the respondents' power to insist upon bank guarantees of differential duty after the investigation report is received from the SVB.

36. Thus, having received the findings from the SVB that the Petitioner is undervaluing its import from the related party and differential duty has been estimated at 67.49%, as per the provision of Section 18(1) of the Act read with Circular No.38/2016, bank guarantees to the tune of 100% were correctly insisted upon. There is no error, illegality or lack of power in the Respondents' action in insisting upon the bank guarantee with the loading of 67.49% of the invoice value relying on the investigative findings of SVB. No mandamus can be issued to the Respondents to provisionally assess all future imports of the Petitioner till the adjudication is complete upon only furnishing a bond without insisting on furnishing of the bank guarantee. No direction can be issued to the Respondents to provisionally assess the future imports of the Petitioner in terms of Circular No.5/2016 dated 9 February 2016 after the investigative findings have been received from SVB and show-cause-notice has been issued. Since we find no error nor lack of jurisdiction for

insisting on bank guarantees towards the differential duty, no direction can be issued to the Respondents to return the bank guarantee, which the Petitioner has submitted.

37. There is, therefore, no merit in this petition.

38. Writ petition is accordingly dismissed. Rule is discharged. No order as to costs.

(GAURI GODSE, J.) (NITIN JAMDAR, J.)