* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 25 January 2024**
Judgment pronounced on: 06 May 2024

\+ W.P.(C) 10537/2022 & CM APPL. 31692/2022 (Amendment), CM APPL. 63917/2023(Direction)

ACME HEERGARH POWERTECH PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha Chandramouli, Mr. Rahul Vijaya Kumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G.,Advs.

\+ W.P.(C) 10835/2022 & CM APPL. 63484/2023 (Direction)

ACME PHALODI SOLAR ENERGY PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G., Advs.

\+ W.P.(C) 10836/2022 & CM APPL. 64309/2023

ACME DEOGHAR SOLAR POWER PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

Versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G.,Advs.

\+ W.P.(C) 10838/2022

AVAADA MH SUSTAINABLE PVT LTD ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ORS. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G., Advs.

\+ W.P.(C) 10840/2022

AVAADA SUNRAYS ENERGY PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G.,Advs.

\+ W.P.(C) 10844/2022 & CM APPL. 63485/2023 (Direction)

ACME DHAULPUR POWERTECH PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG

along with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G.,Advs.

\+ W.P.(C) 10853/2022 & CM APPL. 63486/2023 (Direction)

ACME AKLERA POWER TECHNOLOGY PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G.,Advs.

\+ W.P.(C) 1507/2023 & CM APPL. 5656/2023 (Interim Stay)

JAKSON POWER PRIVATE LIMITED ..... Petitioner

Through: Mr. Arvind Datar, Senior Adv. with Mr. Manish Mishra and Ms. Meghna Mittal, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha

Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G., Advs.

\+ W.P.(C) 10837/2022 & CM APPL. 63489/2023 (Direction)

ACME RAISAR SOLAR ENERGY PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG along with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G., Advs.

\+ W.P.(C) 12386/2022 & CM APPL. 36603/2023 (Direction), CM APPL. 53174/2023 (Direction)

ACME HEERGARH POWERTECH PRIVATE LIMITED ..... Petitioner

Through: Mr. Sujit Ghosh, Senior Advocate with Ms. Mannat Waraich, Mr. Shubh Dixit and Ms. Ananya Goswami, Advs.

versus

ASSISTANT COMMISSIONER OF CUSTOMS, ICD CONCOR, JODHPUR & ANR. ..... Respondents

Through: Mr. N. Venkataraman, ASG with Ms. Amritha Chandramouli, Mr. Rahul Vijayakumar, Mr. Chandrashekara Bharathi, Ms. Kushi S., and Mr. Shivshankar G., Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

S. No.	Particulars	Paragraph Nos.
A.	PREFACE	1 - 6
B.	THE FACTUAL BACKDROP	7 – 22
C.	SUBMISSIONS OF ACME AND AVAADA	23 - 42
D.	SUBMISSIONS OF THE RESPONDENTS	43 - 75
E.	SUBMISSIONS OF JAKSON POWER PRIVATE LIMITED	76 - 79
F.	SUPPLEMENTAL SUBMISSIONS OF THE PETITIONERS	80 - 84
G.	THE STATUTORY SCHEME	85 - 99
H.	RELATED DEVELOPMENTS	100 - 105

I.	THE VALIDITY OF THE IMPUGNED INSTRUCTION	106 - 121
J.	THE INTERPLAY BETWEEN SECTIONS 61 AND 65	122 - 142
K.	THE "IN RELATION TO" QUESTION	143-149
L.	MOOWR REGULATIONS AND THE CONTEMPORANEOUS MATERIAL	150-161
M.	DISTORTION OF THE LEVEL PLAYING FIELD	162-165
N.	APPLICABILITY OF PURPOSIVE INTERPRETATION PRINCIPLES	166-177
O.	ANCILLARY ISSUES	178-179
P.	FINAL DETERMINATION	180

A. PREFACE

1. These batch of writ petitions assail the validity of a **Central Board of Indirect Taxes and Customs**[1] Instruction dated 09 July 2022 [which hereinafter and for the sake of brevity shall be referred to as the **"impugned Instruction"**] issued in exercise of powers conferred by Section 151A of the **Customs Act, 1962**[2] pertaining to the warehousing of imported capital goods used in the generation of solar power and the asserted inapplicability of the **Manufacture and other Operations in Warehouse (No.2) Regulations, 2019**[3] framed in the backdrop of

[1] Board
[2] Act
[3] MOOWR Regulations

Section 65 of the Act.

2. The petitioners also impugn various **Show Cause Notices**[4] which came to be issued in purported implementation of the impugned Instruction and which calls upon them to explain why the license of warehousing as granted in terms of the MOOWR Regulations be not cancelled. In W.P.(C) 10838/2022, besides assailing the impugned Instruction, the petitioner therein has also impugned the validity of the letter dated 19 July 2022 cancelling the warehouse license of the petitioner. In W.P.(C) 12386/2022, the petitioner has impugned the letter dated 23 August 2022 which sought a provisional duty bond as a condition precedent to the provisional release of the imported goods.

3. The impugned Instruction is questioned, with it being contended that the same is contrary to Section 151A of the Act, and more particularly the Proviso appended thereto. The petitioners would contend that the impugned Instruction compels and commands the Customs authorities to cancel all licenses pertaining to solar generation units and thus impeding the statutory discretion which otherwise stands conferred upon them. The petitioners have also assailed the Instruction on the anvil of the Proviso to Section 151A, with it being urged that the Board stands statutorily injuncted from framing an order, instruction or direction which would compel an officer of Customs to make a particular assessment or one which may interfere with the discretion, which otherwise stands entrusted in it. The submission essentially was that the Customs authorities stand deprived of the right to examine or adjudge the validity of the licenses held by the petitioners and the impugned Instruction urging them to take emergent steps to cancel all

[4] SCN

existing licenses. According to the petitioners, the Instruction is in essence a direction to the Customs officials to not only refrain from granting any fresh licenses but to also review existing licenses and thus depriving the petitioners of the opportunity to explain why their licenses granted under the MOOWR Regulations were valid.

4. On a more fundamental plane, it was asserted that the impugned Instruction proceeds on a wholly incorrect and erroneous understanding of the scheme underlying Sections 61 and 65 of the Act and the MOOWR Regulations themselves, and which enables an importer to bring into India any capital goods which may then be validly housed in licensed warehouses and a manufacturing process or other operations in relation to those goods being undertaken. The petitioners contend that neither the Act nor the MOOWR Regulations can possibly be construed as excluding solar power generation from its ambit and the stand to the contrary as taken by the respondents being wholly untenable.

5. Although the writ petitions were essentially concerned with the validity of the impugned Instruction, Mr. Venkatraman, the learned ASG had submitted that bearing in mind the larger ramifications concerning solar generation by units like those of the petitioners and their resultant impact on the policy initiative of the Union to accord impetus to domestic industry, the ends of justice would warrant this Court ruling upon the scope and ambit of the MOOWR Regulations itself, even if it were to come to the conclusion that the impugned Instruction was invalid or ultra vires Section 151A of the Act. The learned ASG had urged us to holistically examine the scope and ambit of Sections 61 and 65 of the Act as well as the MOOWR Regulations and authoritatively rule on the question whether solar power generation

could be said to be an activity envisaged or permissible. Mr. Venkataraman stressed upon the imperative of such a course being adopted in light of multiple challenges which were pending before various Courts and the need for the controversy itself being rendered a quietus.

6. It is in the aforesaid light that counsels for respective sides proceeded to address submissions which were not merely confined to the validity of the impugned Instruction or the consequential SCNs' but also extended to the larger question of whether solar power generation could be said to be an operation or activity permissible under Section 65 of the Act.

B. THE FACTUAL BACKDROP

7. For the purposes of evaluating the challenge which stands raised, we deem it apposite to notice the following salient facts as they obtain in the lead petition, being W.P.(C) 10537/2022. The MOOWR Regulations which came to be promulgated on 01 October 2019 principally provided for a duty deferment on the import of capital goods and inputs intended to be used in manufacturing and other operations within a customs bonded warehouse in terms of Section 65 of the Act. Pursuant to the aforesaid Regulations, the petitioner moved two applications on 15 September 2021 for grant of requisite permissions. The applications for grant of licenses for two private bonded warehouses and to undertake manufacturing or other operations in the said warehouses as referable to Sections 58 and 65 of the Act respectively owed its genesis to an Agreement dated 21 August 2019 entered into between the petitioner and the **Maharashtra State**

Electricity Distribution Company Limited[5] for sale of 300 **Mega Watt**[6] electricity. A **Power Purchase Agreement**[7] is stated to have been executed between the petitioner and MSEDCL, in terms of which it is obliged to provide electricity to that governmental entity for a period of 25 years. Undisputedly, a failure on the part of the petitioner to commission the project or to falter in its obligations to supply electricity is liable to be construed as an "*Event of Default*" as per Clause 10.3.1 of the PPA.

8. The MOOWR Regulations, as noticed above, came into effect from 01 October 2019. They define the scope of eligibility and its application to those who have been granted a license for a warehouse under Section 58 of the Act along with permission to undertake manufacturing or other operations in that warehouse in accordance with Section 65 of the Act. A person desirous of obtaining the aforenoted license under the MOOWR Regulations is obliged to move the Principal Commissioner or the Commissioner of Customs in accordance with Regulation 4. Regulation 3 stipulates that those regulations would apply to all units currently operating under Section 65 as well as those which may apply for grant of permission to operate in accordance with Section 65 of the Act. The grant of permission is governed by Regulation 5 and which enables the competent authority of Customs, upon due verification of the application, to accord permission to the applicant to operate in terms of those Regulations. The permission is to subsist until it comes to be cancelled or surrendered in terms of the provisions of the Act and the rules and regulations framed

[5] MSEDCL
[6] MW
[7] PPA

thereunder.

9. Regulations 3 to 6 of the MOOWR Regulations are reproduced hereinbelow:-

> "**3. Application.—**These regulations shall apply to—
>
> (*i*) the units that operate under Section 65 of the Act, or
>
> (*ii*) the units applying for permission to operate under Section 65 of the Act,
>
> **4. Eligibility for application for operating under these regulations. -**
>
> (1) The following persons shall be eligible to apply for operating under these regulations, -
>
> (i) a person who has been granted a license for a warehouse under section 58 of the Act, in accordance with Private Warehouse Licensing Regulations, 2016.
>
> (ii) a person who applies for a license for a warehouse under section 58 of the Act, along with permission for undertaking manufacturing or other operations in the warehouse under section 65 of the Act.
>
> (2) An application for operating under these regulations shall be made to the Principal Commissioner of Customs or the Commissioner of Customs, as the case may be, along with an undertaking to, -
>
> (i) maintain accounts of receipt and removal of goods in digital form in such format as may be specified and furnish the same to the bond officer on monthly basis digitally;
>
> (ii) execute a bond in such format as may be specified; and
>
> (iii) inform the input-output norms, wherever considered necessary for raw materials and the final products and to inform the revised input-output norms in case of change therein.
>
> **5. Grant of permission. -**
>
> Upon due verification of the application made as per regulation 4, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, shall grant permission to operate under the provisions of these regulations.
>
> **6. Validity of permission. -**
>
> Any permission granted under regulation 5 shall remain valid unless it is cancelled or surrendered, or the license issued under

section 58 is cancelled or surrendered, in terms of the provisions of the Act or the rules and regulations made thereunder."

10. In terms of Regulation 13, a licensee is enabled to transfer warehoused goods to another warehouse or to a customs station for export subject to fulfilment of the conditions stipulated therein. Regulation 13 stands framed in the following words:-

> **"13. Transfer of goods from a warehouse. -**
>
> (1) A licensee shall allow transfer of warehoused goods to another warehouse or to a customs station for export, with due intimation to the bond officer on the Form for transfer of goods from a warehouse.
>
> (2) Upon intimation to the bond officer as sub-regulation (1), the licensee shall, -
>
> (i) allow removal of the goods and their loading onto the means of transport;
>
> (ii) affix a one-time-lock to the means of transport;
>
> (iii) endorse the number of the one-time-lock on the Form and retain a copy thereof;
>
> (iv) endorse the number of the one-time-lock on the transport document and retain a copy thereof;
>
> (v) take into record the removal of the goods; and
>
> (vi) cause to be delivered, copies of the retained documents to the bond officer."

11. The subject of removal of resultant goods for home consumption or for export is regulated by Regulations 14 and 15 respectively and which read as follows:-

> **"14. Removal of resultant goods for home consumption.-**
>
> (1) A licensee may remove the resultant goods from warehouse for home consumption:
>
> **Provided that** a bill of entry for home consumption has been filed in respect of the warehoused goods contained in so much of the resultant goods and the import duty, interest, fine and penalties payable, if any, in respect of such goods have been paid.
>
> (2) The licensee shall retain a copy of the bill of entry filed and take into record the goods removed.

15. Removal of resultant goods for export. -

(1) A licensee shall remove the resultant goods from the warehouse for export, upon, -

(i) filing a shipping bill or a bill of export, as the case may be; and

(ii) affixing a one-time-lock to the load compartment of the means of transport in which such goods are removed from the warehouse.

(2) The licensee shall take into record the goods removed."

12. In terms of Regulation 20, the Board stands empowered to exempt a class of goods from any of the provisions of the Regulations having regard to the nature thereof or the manner of their transportation or storage. The MOOWR Regulations essentially facilitate the housing of imported capital goods or imported raw materials in a duly designated warehouse and for a manufacturing process being undertaken in relation to and with the involvement of those goods till such time as they remain housed therein. This arrangement leads to the deferral of customs duty to the stage where either the resultant final product or the imported capital goods are cleared from the warehouse for home consumption.

13. This procedure of deferral of customs duty on imported capital goods and the policy of those goods being housed in a designated warehouse is founded upon the provisions of Sections 61 and 65 of the Act, which are reproduced hereinbelow:-

"**61. Period for which goods may remain warehoused**.—

(1) Any warehoused goods may remain in the warehouse in which they are deposited or in any warehouse to which they may be removed,—

(a) in the case of capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been

permitted under Section 65, till their clearance from the warehouse;

(b) in the case of goods other than capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under Section 65, till their consumption or clearance from the warehouse; and

(c) in the case of any other goods, till the expiry of one year from the date on which the proper officer has made an order under sub-section (1) of Section 60:

Provided that in the case of any goods referred to in this clause, the Principal Commissioner of Customs or Commissioner of Customs may, on sufficient cause being shown, extend the period for which the goods may remain in the warehouse, by not more than one year at a time:

Provided further that where such goods are likely to deteriorate, the period referred to in the first proviso may be reduced by the Principal Commissioner of Customs or Commissioner of Customs to such shorter period as he may deem fit.

(2) Where any warehoused goods specified in clause (c) of sub-section (1) remain in a warehouse beyond a period of ninety days from the date on which the proper officer has made an order under sub-section (1) of Section 60, interest shall be payable at such rate as may be fixed by the Central Government under Section 47, on the amount of duty payable at the time of clearance of the goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods:

Provided that if the Board considers it necessary so to do, in the public interest, it may,—

(a) by order, and under the circumstances of an exceptional nature, to be specified in such order, waive the whole or any part of the interest payable under this section in respect of any warehoused goods;

(b) by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section;

(c) by notification in the Official Gazette, specify the class of

goods in respect of which the interest shall be chargeable from the date on which the proper officer has made an order under sub-section (1) of Section 60.

Explanation.—For the purposes of this section,—
(i) "electronic hardware technology park unit" means a unit established under the Electronic Hardware Technology Park Scheme notified by the Government of India;
(ii) "hundred per cent export oriented undertaking" has the same meaning as in clause (ii) of Explanation 2 to sub-section (1) of Section 3 of the Central Excise Act, 1944 (1 of 1944); and
(iii) "software technology park unit" means a unit established under the Software Technology Park Scheme notified by the Government of India."

xxxx xxxx xxxx

"**65. Manufacture and other operations in relation to goods in a warehouse.**—(1) With the permission of the Principal Commissioner of Customs or Commissioner of Customs and subject to the provisions of Section 65-A and such conditions as may be prescribed, the owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods.

(2) Where in the course of any operations permissible in relation to any warehoused goods under sub-section (1), there is any waste or refuse, the following provisions shall apply—

(a) if the whole or any part of the goods resulting from such operations are exported, import duty shall be remitted on the quantity of the warehoused goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods exported:

Provided that such waste or refuse is either destroyed or duty is paid on such waste or refuse as if it had been imported into India in that form;

(b) if the whole or any part of the goods resulting from such operations are cleared from the warehouse for home consumption, import duty shall be charged on the quantity of the warehoused goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods cleared for home consumption."

14. Before we proceed further and set out the facts in greater detail,

we also deem it appropriate to reproduce Section 65A which though existing on the statute book is yet to be enforced. Section 65A of the Act is reproduced hereinbelow:

> "**65-A. Goods brought for operations in warehouse to have ordinarily paid certain taxes**.—(1) Notwithstanding anything to the contrary contained in this Act or the Customs Tariff Act, 1975 (51 of 1975), the following provisions shall, with effect from such date as may be notified by the Central Government, apply to goods in relation to which any manufacturing process or other operations in terms of Section 65 may be carried out, namely—
>
> (A) the dutiable goods, which are deposited in the warehouse shall be goods on which the integrated tax under sub-section (7) and the goods and services tax compensation cess under sub-section (9), of Section 3 of the Customs Tariff Act, 1975 (51 of 1975) have been paid, and only for the purpose of the duty payable, other than the said tax and cess paid, such dutiable goods shall be warehoused goods;
>
> (B) the dutiable goods shall be permitted to be removed for the purpose of deposit in the warehouse, where—
>
> (i) in respect of the goods, an entry thereof has been made by presenting electronically on the customs automated system, a bill of entry for home consumption under Section 46 and the goods have been assessed to duty under Section 17 or Section 18, as the case may be, in accordance with clause (a) of sub-section (1) of Section 15;
>
> (ii)the integrated tax under sub-section (7) and the goods and services tax compensation cess under sub-section (9), of Section 3 of the Customs Tariff Act, 1975 (51 of 1975) have been paid in accordance with Section 47;
>
> (iii) on removal of the goods from another warehouse in terms of Section 67, a bill of entry for home consumption under clause (a) of Section 68 has been presented and the integrated tax under sub-section (7), and the goods and services tax compensation cess under sub-section (9), of Section 3 of the Customs Tariff Act, 1975 (51 of 1975) have been paid before the goods are so removed from that other warehouse;
>
> (iv) the provisions of Section 59, subject to the following modifications therein, have been complied with, namely—

(a) for the words "bill of entry for warehousing", the words "bill of entry for home consumption" shall be substituted; and

(b) for the words "amount of the duty assessed", the words "amount of duty assessed, but not paid" shall be substituted;

(c) the duty payable in respect of warehoused goods referred to in clause (A), to the extent not paid, is paid before the goods are removed from the warehouse in such manner as may be prescribed.

(2) The provisions of sub-section (1) shall not apply for the purpose of manufacturing process or other operations in terms of Section 65 to dutiable goods which have been deposited in the warehouse or permitted to be removed for deposit in the warehouse prior to the date notified under that sub-section.

(3) The Central Government may, if it considers necessary or expedient, and having regard to such criteria, including but not limited to, the nature or class or categories of goods, or class of importers or exporters, or industry sector, exempt, by notification, such goods in relation to which any manufacturing process or other operations in terms of Section 65 may be carried out, as may be specified in the notification, from the application of this section."

15. As per the petitioners, of equal significance are the **Frequently Asked Questions**[8] issued by the Board seeking to explain the scope and ambit of the MOOWR Regulations. The petitioners in this respect drew our attention to those FAQs' and which explains the underlying intent of the MOOWR Regulations to be the facilitation of manufacturing activity being undertaken in a designated warehouse and the importer being enabled to bring into the country capital or non-capital goods without an upfront payment of customs duty and depositing the imported goods in the warehouse either as capital goods or as inputs for further processing.

16. Of significance are the responses framed with respect to

[8] FAQs

questions 8 to 10 of the FAQs' which are extracted hereunder:-

> **"8. Can a unit undertaking manufacture and other operations in a bonded warehouse import capital goods without payment of duty? If yes, whether only BCD or both BCD and IGST on imports is covered? For how long is duty deferment available? Is interest payable after some time?**
>
> **Response**: A unit licensed under Sections 58 and 65 can import capital goods and warehouse them without payment of duty. manufacture and other operations in a bonded warehouse is a duty deferment scheme. Thus both BCD and IGST on imports stand deferred. In the case of capital goods, the import duties (both BCD and IGST) stand deferred till they are cleared from the warehouse for home consumption or are exported. The capital goods can be cleared for home consumption as per Section 68 read with Section 61 of the Customs Act on payment of applicable duty without interest. The capital goods can also be exported after use, without payment of duty as per Section 69 of the Customs Act. The duty deferment is without any time limitation.
>
> **9. Would any customs duty be payable on the goods manufactured in the bonded premises using the imported capital goods (on which duty has been deferred) and sold into the domestic tariff area?**
>
> **Response**: The payment of duty on the finished goods is clarified in Para 8 and 9 of the Circular No. 34/2019. Duty on the capital goods would be payable if the capital goods itself are cleared into the domestic market (home consumption). Thus the duty on the capital goods does not get incorporated on the finished goods. Thus no extra duty in finished goods cleared into DTAs payable on account of imported capital goods on which duty has been deferred).
>
> **10. Can a unit undertaking manufacture and other operations in a bonded warehouse import inputs without payment of duty? If yes, whether only BCD or both BCD and IGST on imports is covered? For how long is duty deferment available? Is interest payable after some time?**
>
> **Response**: Manufacture and other operations in a bonded warehouse is a duty deferment scheme. Thus both BCD and IGST on imports stand deferred. Thus the case of goods other than capital goods, the import duties (both BCD and IGST) stand deferred till they are cleared from the warehouse for home consumption, and no interest is payable on duty. In case the finished goods are exported, the duty on the imported inputs (both

BCD and IGST) stands remitted i.e. they will not be payable. The duty deferment is without any time limitation."

17. As is manifest from the above, the Board explained the benefits of the MOOWR Regulations to be a deferral of both the **Basic Customs Duty**[9] as well as the **Integrated Goods and Service Tax**[10]. It was further stated and declared that duty, both BCD and IGST, would stand deferred till such time as the capital goods are cleared from the warehouse for home consumption. This aspect assumes added significance since supply of electricity is exempt from IGST.

18. On 20 and 26 October 2021, licenses came to be granted by the second respondent to the petitioner under the MOOWR Regulations. The terms of the license dated 20 October 2021 are reproduced hereinbelow:-

"**GOVERNMENT OF INDIA**
MINISTRY OF FINANCE, DEPTT. OF REVENUE
OFFICE OF THE COMMISSIONER OF CUSTOMS, JODHPUR
Hqrs.: NCR BUILDING, STATUE CIRCLE, C-SCHEME, JAIPUR-302005

Date: 20.10.2021

GRANT OF LICENSE FOR PRIVATE BONDED WAREHOUSE LICENSE UNDER SECTION 58 OF CUSTOMS ACT, 1962 WITH PERMISSION OF MOOWR UNDER SECTION 65 OF CUSTOMS ACT, 1962 GOVERNED BY THE PRIVATE WAREHOUSE LICENSING REGULATIONS, 2016 NOTIFIED BY NOTIFICATION NO. 71/2016 (N.T.) DATED 14.05.2016 AND 69/2019 DATED 01.10.2019.

LICENSE NO. 08/PBW-ACME HEERGARH Plot-1/Customs Jaipur/2021

This license is hereby granted to M/s Acme Heergarh Powertech

[9] BCD
[10] IGST

Private Limited, having registered address at Plot No. 152, Sector 44, Gurgaon, Haryana-122002 premises at Plot No. 1 located at Khasra No. 102, 102/1, 102/4, 102/5, 102/18, 103/1, 103/2, 103/3, 103/4, 103/5, 103/6, 103/7, 103/8, 103/10, 103/11, 103/12, Village Badisid, Tehsil Bap, Jodhpur-342307 under Section 58 of the Customs Act, 1962 governed by the Private Warehouse Licensing Regulations, 2016 notified by Customs Notification No. 71/2016-Cus (NT) dated 14.05.2016 in respect of private warehouse where dutiable goods imported by or on behalf of the licensee may be deposited along-with permission for undertaking manufacturing or other operations in the warehouse under section 65 of the Act, 1962 governed by the MOOWR Regulation notified by Customs Notification No. 69/2019-Customs dated 01.10.2019.

2. This license is not transferable and will remain in force unless specifically revoked under section 58 of the Customs Act, 1962 or is surrendered in terms of Regulation 8 of Private Warehouse Licensing Regulations, 2016 of the Customs Act, 1962. This license will not affect any right and remedies under the previous license or licenses.

3. The dimensions and measurements of the Private Bonded Warehouse are as follows:

Warehouse	**Measurement**
Total area available for storage	4.39 **acres**

4. This license is issued under the following conditions:

(i) The license holder shall be held strictly liable for the safe custody of bonded goods and for the strict observance of the provisions of Customs Act, 1962 and/or any other law for the time being in force and the amendments/ Instructions/ orders issued there under from time to time.

(ii)The license holder shall comply with regulations laid down in the Private Warehouse Licensing Regulation, 2016 issued vide notification No. 71/2016- Customs (NT) dated 14.05.2016.

(iii) The license holder shall comply with the regulation laid down in the warehoused goods (Removal) Regulation, 2016 issued vide 67/2016-Customs (NT) dated 14.05.2016.

(iv) The License holder shall comply with the regulations laid down in the Warehouse (Custody and Handling of Goods) Regulation, 2016 issued vide notification No. 68/2016-Customs (NT) dated 14.05.2016.

(v) The license would liable for cease to be valid whenever there is violation/ change of any clause as specified in the undertakings submitted by the licensee unless such change is approved by the competent authority.

(vi) The license holder shall provide annually an all risk insurance policy, that includes natural calamities, riots, fire, theft, skilful pilferage and commercial crime, in favour of the President of India, for a sum equivalent to the amount of duty involved on the dutiable goods proposed to be stored in the warehouse at any point of time. The insurance policy will be liable under the Customs Act, 1962 to compensate this department in the event of any loss or wrong release of the bonded goods.

(vii) The License holder binds himself to pay any duties, interest, fine and penalties arise/payable in respect of warehoused goods.

(viii) The license holder undertakes to indemnify the Pr. Commissioner/ Commissioner of Customs from any liability arising on account of loss suffered in respect of warehoused goods due to accident, damage, deterioration, destruction or any other unnatural cause during their receipt, delivery, storage, dispatch or handling.

(ix) The license holder shall appoint a person who has sufficient experience in warehousing operations and customs procedures as warehouse keeper.

(x) The license would cease to be valid whenever there is change in the constitution of the firm/company unless such change is approved by the competent authority.

(xi) If the license holder intends to cancel the license, they will be inform the proper officer will in advance the date from which they wish to cancel the license.

(xii) The license holder shall provide adequate facilities, equipment and personnel as are sufficient to control access to the warehouse and provide secure storage to the goods in it and also for the examination of goods by the officers of Customs.

(xiii) The packages and their deposition in the warehouse shall be such that every package is easily accessible for inspection. The goods shall be stacked in such a manner as the Assistant/ Deputy Commissioner of Customs may direct.

(xiv) The license holder shall keep record of each activity, operation or actions taken in relation to warehoused goods and produce the same to bond officer as and when required.

(xv) The license holder shall make arrangement for computerized system for accounting of receipt, storage, operation and removal of goods and preserve computerized data of all the records maintained by them for a minimum period of five years.

(xvi) The license holder shall file a monthly return of receipt, storage, operation and removal of goods in the warehouse, within ten days after the close of the month to which such return relates in the prescribed format.

(xvii) The license holder shall preserve updated digital copies of the records at a place other that the warehouse to prevent loss of records due to natural calamities, fire, theft, skill pilferage of computer malfunction as per Warehousing Regulation.

(xviii) The license holder shall regularly pay fees for supervision/services by the official signatory.

(xix) The bonded warehouse shall be visited from time to time by inspector/ and/or Superintendent and/or Assistant/Deputy Commissioner and other officer from the Customs Department. Outdoor travelling expenses shall be borne by the licensee.

5. The Private bonded warehouse will remain under the charge of M/s Acme Heergarh Powertech Private Limited, having registered address at Plot No. 152, Sector 44, Gurgaon, Haryana-122002 premises at Plot No. 1 located at Khasra No. 102, 102/1, 102/4, 102/5. 102/18, 103/1, 103/2, 103/3, 103/4, 103/5, 103/6, 103/7, 103/8, 103/10, 103/11, 103/12, Village Badisid, Tehsil Bap, Jodhpur-342307.

6. The permission is granted to licensee subject to the strict observation of terms and conditions such Instruction/regulations/orders that may be issued time to time.

(Rahul Nangare)
Commissioner

To,
M/s Acme Heergarh Powertech Private Limited (Plot No. 1),
Plot No. 152, Sector 44,
Gurgaon, Haryana-122002"

19. Pursuant to the aforesaid, the petitioner is also stated to have executed bonds for Plot Nos. 1 and 2 of the licensed warehouses upon deposit of INR 145,07,00,000/- and INR 25,00,000,00 insofar as Plot No.1 is concerned (totalling to INR 170.07 crores) and a corresponding amount of INR 329.93 crores being deposited for Plot No. 2.

20. Thereafter, the impugned Instruction dated 09 July 2022 came to be issued by the Board and which reads as follows:-

"**Instruction No.13/2022-Customs**

F.No.473/03/2022-LC
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Indirect Taxes & Customs)
*****

Room No 227-A, North Block

New Delhi, July 09, 2022

To,

All Pr. Chief Commissioners/Chief Commissioners, under CBIC
All Pr. Directors General/Directors General, under CBIC
All Pr. Commissioners/Commissioners, under CBIC

Subject: Warehousing of solar power generating units or items like solar panel, solar cell etc. for power plants with resulting goods 'electricity' - In-applicability of Manufacture and 'Other Operations in Warehouse (no.2) Regulations, 2019 under section 65 of the Customs Act, 1962 regarding.

Madam/Sir,

It is brought to notice of the Board that certain solar power generating units applied for permission under section 65 of the

Customs Act,1962 for warehousing of imported solar panels/solar modules and related accessories etc. declared as capital goods to generate electricity (from sunlight) as resulting/resultant goods for home consumption. Certain jurisdictional Commissioners have granted such permissions.

2. In this regard, the undersigned is directed to convey that a reading of section 65 shows that in relation to any particular goods, resulting from the operations, they can either be removed from warehouse for export or for home consumption. In respect of applications of the type referred in para 1 above, the resultant electricity is identical whether it be removed for home consumption or for export. In Manufacture and Other Operations in Warehouse (no.2) Regulations, 2019 (hereinafter referred as 'MOOWR 2019'), the Regulation 15 (removal of resultant goods from the warehouse for export) requires affixing a one-time-lock to the load compartment of the means of transport in which such goods are removed from the warehouse. As the identical goods, i.e. electricity, may also be cleared for home consumption, the provision for removal for export shows that those goods, i.e. electricity, which are of the nature to which it is incapable to affix one-time-lock to the load compartment of the means of transport in which such goods are removed, fall squarely outside the scope of MOOWR 2019 because of inability to satisfy the essence of the prescribed condition.

3. Moreover, the Regulation 20 is that the Board, having regard to the nature of goods, their manner of transport or storage, may exempt a class of goods from any of the provisions of the MOOWR 2019. Neither this power has been exercised by Board to exempt goods in the nature of electricity from any of the provisions of MOOWR 2019, nor separate regulations relating to removal of electricity have been issued.

4. Incidentally, it may also be noted that the resulting electricity is also not ordinarily capable of being deposited in a warehouse.

5. Accordingly, the undersigned is directed to convey that grant of permission, as referred in para 1 above, is not in accordance with the MOOWR 2019 provisions or principles which are the conditions prescribed by the Board in terms of section 65 of the Customs Act,1962. The permissions granted to the type of generating units referred herein above need to be immediately reviewed and the necessary follow up action taken. No further permissions in such cases should be granted in terms of section 65 of the Customs Act,1962.

(Bullo Mamu)

Under Secretary (LC)"

21. As is evident from a reading of paragraph 2, the Board took the view that Regulation 15 contemplates the removal of "*resultant goods*" upon affixation of a one-time-lock on the load compartment of the means of transport in which such goods are removed from the warehouse. The Board opined that since electricity, which may come to be cleared for home consumption, cannot possibly comply with the one-time-lock condition as imposed, it would consequently fall outside the scope of the MOOWR Regulations. As is evident from para 3 of the Instruction, it also took note of the fact that electricity as a class of goods had not been exempted in terms of Regulation 20 and thus reinforcing the applicability of the one-time-lock prescription. The Board also appears to have taken into consideration the fact that electricity is incapable of being deposited in a warehouse. It was in the aforesaid backdrop that the Board held that the grant of any permission under the MOOWR Regulations to solar power generating units which were operating from designated warehouses would not be in accordance with law and therefore the permissions, if any granted, are liable to be immediately reviewed and follow up action be taken.

22. On the basis of the aforenoted Instruction, a SCN dated 13 July 2022 came to be issued against the writ petitioner by the second respondent. The aforesaid SCN was assailed by way of an amendment application which was moved by the petitioner. While considering its application for interim relief, this Court on 13 July 2022 provided that the respondents would stand restrained from taking any coercive measures against the petitioner till the next date of listing. The aforesaid interim order was followed by another order dated 20 July 2022, pursuant to which further proceedings in terms of the impugned

SCN were also stayed. The aforesaid interim order dated 20 July 2023 staying the operation of the impugned SCN was confirmed and made absolute during the pendency of the writ petition on 26 August 2022.

C. SUBMISSIONS OF ACME AND AVAADA

23. Appearing for the ACME and AVAADA entities in the instant batch of petitions, Mr. Sujit Ghosh, learned senior counsel, advanced the following submissions. Mr. Ghosh, at the outset contended that the grant of a licence is essentially a judicial act. It was his submission that the grant of a licence is preceded by the officer of Customs conducting an investigation and inquiry in order to verify the particulars set out in an application. Subsequently, after due application of mind, the officer of Customs may grant a licence if it be satisfied that the conditions for grant are fulfilled. According to Mr. Ghosh, it can be discerned from the above that once an application is made, the officer of Customs is required to act in a quasi-judicial manner. It was submitted that where the law requires an authority to make the requisite inquiry before arriving at a decision, it partakes the character of a quasi-judicial function. In support of the aforesaid submission, Mr. Ghosh placed reliance upon the following observations as appearing in **Indian National Congress (I) vs. Institute of Social Welfare & Ors**[11]:

> **"27.** What distinguishes an administrative act from a quasi-judicial act is, in the case of quasi-judicial functions under the relevant law the statutory authority is required to act judicially. In other words, where law requires that an authority before arriving at a decision must make an enquiry, such a requirement of law makes the authority a quasi-judicial authority."

24. It was then contended that an authority which is vested with the power to determine questions or disputes affecting the rights of citizens

[11] (2002) 5 SCC 685

is bound to act judicially. According to learned senior counsel, the obligation to act judicially would mean that the decision which is arrived at must conform to an objective standard or criterion laid down or recognized by law. As a necessary corollary, according to Mr. Ghosh, the soundness or otherwise of the determination must be capable of being tested by the same external standard. According to Mr. Ghosh, for an act to be termed as judicial, the following tests as enunciated in **Jaswant Sugar Mills Ltd v. Lakshmi Chand & Ors**[12] must be met:

> "**13.** To make a decision or an act judicial, the following criteria must be satisfied:
>
> "(*1*) it is in substance a determination upon investigation of a question by the application objective standards to facts found in the light of pre-existing legal rules;
>
> (*2*) it declares rights or imposes upon parties obligations affecting their civil rights; and
>
> (*3*) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact."

25. Tested on the aforesaid principles, Mr. Ghosh would contend that the act of grant of the MOOWR license is a judicial function performed by an officer of Customs. A fortiori, the cancellation of a license would also be liable to be viewed as a judicial act since prior to the taking of that decision, the officer of Customs would be bound to carry out an inquiry and investigation in consonance with the principles of natural justice. Mr. Ghosh, in this respect invited our attention to the

[12] (1963) Supp 1 SCR 242

enunciation of the legal position as appearing in a decision rendered by the Madhya Pradesh High Court in **Sukhlal vs Collector, Satna**[13] and where the following observations were made:

> "With this background we now come back to the question raised in this case regarding the nature of the duty imposed on the licensing authority by section 31(1) of the Central Provinces Excise Act in the matter of cancellation or suspension of a licence. We are here essentially concerned with clause (b) of section 31(1) as the petitioner's licence was cancelled under that clause That provision enables the licensing authority to cancel a licence "in the event of any breach by the holder there of or by any of his servants, or by anyone acting on his behalf with his express or implied permission of any of the terms or conditions there of." It must be noticed that the charge or breach of terms or conditions of a licence is one which will require investigation before it is found as a fact and if the licensee against whom such a charge is levelled is given an opportunity to meet it, it may be possible for him to disprove the same. Cancellation of a licence is a serious matter as it deprives the licensee of his right to carry on business. In our opinion, the nature of the duty to determine whether the licensee has committed any breach of terms or conditions of his licence and whether for that reason the licence should be cancelled, imposes upon the authority the duty to act judicially. It necessarily follows that the authority must follow the requirements of natural justice and must give an opportunity to the licensee to meet the allegations of breaches of terms and conditions of the licence reported against him before cancelling the licence. As in the instant case, this opportunity was not given to the petitioner, it has to be held that the cancellation of his licence was invalid and void.
>
> Before concluding, we must notice the argument advanced by the learned Government Advocate that the petitioner should not be granted any relief, as he did not avail of the alternative remedy of going up in appeal against the order of the Collector. The existence of an alternative remedy is not always a bar for issuance of writ of *certiorari*. It is no doubt true that the High Court may refuse to exercise its jurisdiction under Article 226, if the petitioner did not avail of alternative remedies, but the rule requiring the exhaustion of alternative remedies before the writ will be issued is not a rule of law but is a rule of policy, convenience and discretion. The High Court will readily issue a writ of *certiorari* in a case where there has been a denial of

[13] 1968 SCC OnLine MP 44

> natural justice; *State of U.P.* v. *Mohd. Nooh*, [AIR 1958 SC 86]. In the instant case, we have already held that the Collector in cancelling the petitioner's licence, did not follow the requirements of natural justice. This defect is fundamental and it would not be a sound exercise of discretion to refuse to interfere simply on the ground that the petitioner could have gone up in appeal.
>
> The petition is allowed. The order of the Collector cancelling the petitioner's licence is quashed. There will be no order as to costs of this petition. The amount of security deposit shall be refunded to the petitioner."

26. Without prejudice to the above, Mr. Ghosh submitted that assuming without admitting that the licence granted to the petitioner to operate a solar power plant is a mere permission to operate as a warehouse under Section 65 of the Act, even then such permission is liable to be construed as a judicial action. Mr. Ghosh submitted that the grant of permission contemplated under Section 65 of the Act would be preceded by investigation, ascertainment and verification of facts disclosed by the applicant against objective standards. The submission was that the grant of permission is thus not liable to be understood as being based upon a mere subjective satisfaction of an officer of Customs. Accordingly, Mr. Ghosh contended, the grant of a license under the MOOWR Regulations must be held to be a judicial act. Learned senior counsel submitted that if the aforesaid precepts are borne in mind, it would be manifest that para 5 of the impugned Instruction essentially directs the officer of Customs to review permissions which had been granted and take necessary follow-up action.

27. Emphasis was also laid on the impugned Instruction mandating that no further permissions in respect of solar power projects should be granted under the MOOWR Regulations. Mr. Ghosh contended that the

net effect of the above would be that officers of Customs not only stand restrained from granting any future licenses, they are also compelled to review existing licences based on the Instruction which had already concluded that the MOOWR Regulations would be inapplicable to solar power projects. Learned senior counsel underscored the fact that an officer of Customs is bound by the view taken and expressed by the first respondent. This, according to the learned senior counsel would inevitably lead to the cancellation of licenses held by ACME and AVAADA. Mr. Ghosh submitted that the aforesaid apprehension of ACME and AVAADA stands fortified by the issuance of the SCNs' in terms of which the Customs authorities propose to cancel the licences held by the said petitioners. Mr. Ghosh further point out that in W.P.(C) 10838/2022, the license held by the petitioner therein has in fact come to be cancelled.

28. Mr. Ghosh submitted that it is trite law that if the power exercised by an authority is quasi-judicial, the same cannot be controlled by directives. It was his submission that no authority, howsoever high it may be placed, can control or dictate the decision-making function of a judicial or a quasi-judicial authority. According to learned senior counsel, any such dictate would clearly impinge upon the obligation of the quasi-judicial authority to act independently and impartially. Reliance in this respect was placed on the following observations as rendered by the Supreme Court in **Orient Paper Mills Ltd. vs Union of India**[14]:

> **"8.** If the power exercised by the Collector was a quasi-judicial power — as we hold it to be — that power cannot be controlled by the directions issued by the Board. No authority however high

[14] (1969) 1 SCR 245

> placed can control the decision of a judicial or a quasi-judicial authority. That is the essence of our judicial system. There is no provision in the Act empowering the Board to issue directions to the assessing authorities or the Appellate Authorities in the matter of deciding disputes between the persons who are called upon to pay duty and the department. It is true that the assessing authorities as well as the Appellate Authorities are judges in their own cause; yet when they are called upon to decide disputes arising under the Act they must act independently and impartially. They cannot be said to act independently if their judgment is controlled by the directions given by others. Then it is a misnomer to call their orders as their judgments; they would essentially be the judgments of the authority that gave the directions and which authority had given those judgments without hearing the aggrieved party. The only provision under which the Board can issue directions is Rule 233 of the Rules framed under the Act. That rule says that the Board and the Collectors may issue written Instructions providing for any supplemental matters arising out of these Rules. Under this rule the only Instruction that the Board can issue is that relating to administrative matters; otherwise, that rule will have to be considered as ultra vires Section 35 of the Act."

In view of the above, it was submitted that the direction as embodied in the impugned Instruction not to grant further licenses as well as to review existing licences would be in the teeth of the principles laid down in *Orient Paper Mills*.

29. Reliance was additionally placed on the following passages as appearing in the decision of the Delhi High Court in **Faridabad Iron & Steel Traders Association vs. Union of India**[15].

> "**92.** Now we propose to examine the other main issue involved in the case, whether in the guise of the Circular the respondents have in fact brought out a revenue legislation for imposing excise duty. The other obvious question which arises for adjudication is whether according to the ambit and scope of Section 37B Excise Duty can be imposed? In order to properly comprehend Section 37B of the Act it is necessary to reproduce Section 37-B, which reads as under:
>
> "Instructions to Central Excise Officers. - The Central Board

[15] 2003 SCC Online Del 1300

of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, Instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, Instructions and directions of the said Board:

Provided that no such orders, inst ructions or directions shall be issued—

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose off a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions."

93. Division Bench of Gujarat High Court in *Genset Engineers Pvt. Limited* v. *Union of India* reported as 1989 (43) E.L.T. 24 (Guj.) held that "It is clear from Section 37B that the Administrative orders Instructions and directions have to be observed by the excise authorities who are bound by such orders. Nevertheless, the section has taken particular care to see that the authorities who will be acting as *quasi judicial* authorities are protected from such type of directions or Instructions.

94. In *Orient Paper Mills* v. *Union of India* reported as 1978 (2) E.L.T. (J345) (S.C.) : AIR 1969 SC 48 their Lordships of the Supreme Court has laid down that *quasi judicial* authorities should not allow their judgment to be influenced by administrative considerations or by the Instructions or directions given by their superior. Therefore, Instructions issued by the Board are not binding upon the adjudicating authority.

95. The impugned Circular was issued by the executive and sent to all Chief Commissioners of Central Excise, all Director General of Central Excise, all Commissioners of Central Excise (Appeals) and all Commissioners of Central Excise. Some of these bodies discharge *quasi judicial* functions. It is the settled position of law that *quasi judicial* functions cannot be controlled by executive actions by issuing circulars. It is totally impermissible. According to the spirit of Section 37B circulars or directions can be issued in order to achieve the object of uniformity and to avoid discrimination. Such circulars bind the officers only when they act in their administrative capacity. It must be clearly understood that the Board's circulars Instructions

or directions cannot in any manner interfere with *quasi judicial* powers of the Assessing Officers. Officials exercising *quasi judicial* powers must ignore any circular or direction interfering with their *quasi judicial* functions.

96. Whenever any authority is conferred with the power to determine certain questions in judicial and/or *quasi judicial* manner, the authority is required to exercise the power conferred upon him as per his own discretion. This is the essence of judicial and *quasi judicial* function. The authority exercising such powers cannot be influenced by any directions, Instructions or the Circulars that may be issued by any other agency. Consequently, the Circular issued by the respondents cannot be permitted to interfere with the discretion of the judicial and *quasi judicial* authorities."

30. Yet another decision which was cited for our consideration in support of the aforenoted submission was of **Varsha Plastics Pvt. Ltd. vs. Union of India**[16] and where the Supreme Court had observed as under:

"**30.** The proviso to Section 151-A makes it abundantly clear that the Customs Officer who has to make a particular assessment is not bound by such orders or Instructions or directions of the Board. An assessing authority under the Act being a quasi-judicial authority has to act independently in exercise of his quasi-judicial powers and functions. Section 151-A does not in any manner control or affect the independent exercise of quasi-judicial functions by the assessing authority.

31. By the impugned Standing Order 7493 of 1999 dated 3-12-1999, the Chief Commissioner of Customs has given detailed guidelines and directions for the determination of valuation of plastic items in the light of international prices contained in the foreign finance journals. The direction issued to the assessing authorities is to apply what is described as the *Platt* rate which is explained as rates and prices maintained in the internationally reputed finance journal *Platt's Weekly Report*. It has also given direction as to how classification of mixed material like floor sweeping should be made.

32. The question now is whether the impugned Standing Order in any manner interferes with the independent quasi-judicial

[16] (2009) 3 SCC 365

> function to be discharged in the assessment of duty by the assessing officer. Whatever be the language employed in the Standing Order which may suggest that the said Instructions are in the nature of a mandate or command, the High Court has read down the impugned Standing Order purely as Instructions or guidelines and not as a mandate or command for being obeyed in each individual case of assessment before them.
>
> **33.** The High Court further held that the Standing Order is to be taken only as an assistance in exercise of the quasi-judicial power of determining value for the purpose of levying of customs duty. We agree with the view of the High Court. As a matter of fact, it is the case of the Department as well that the impugned Standing Order is not binding; it is just in the nature of guidelines to streamline the functioning of Customs Officers at various field formations."

31. The validity of the impugned Instruction was also assailed on the basis of the same impinging upon the right of the statutory authority to bear its own independent and unfettered judgment in exercise of its quasi-judicial powers, and any fetter, if placed on the exercise of those powers being liable to be declared as wholly illegal. In support of the aforesaid proposition, Mr. Ghosh drew our attention to the judgment in **Anirudhsinhji Karansinhji Jadeja vs. State of Gujarat**[17] and to para 11 of the report which is extracted hereinbelow:

> "**11.** The case against the appellants originally was registered on 19-3-1995 under the Arms Act. The DSP did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. Why? Was it because he was reluctant to exercise jurisdiction vested in him by the provision of Section 20-A(1)? This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's Instruction, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this

[17] (1995) 5 SCC 302

case by Section 20-A(1) was not exercised by the DSP at all."

32. Yet another decision which was cited in this connection was that of **Commissioner of Police, Bombay vs. Gordhandas Bhanji**[18] and where the Supreme Court had observed as under:

> "**14**. The Commissioner's reply dated 3-12-1947/4-12-1947, was:
>
> > "I write to inform you that permission granted to your client was cancelled under the orders of the Government who may be approached…."
>
> **15**. We are clear that this roundabout language would not have been used if the order of cancellation had been that of the Commissioner. We do not mean to suggest that it would have been improper for him to take into consideration the views and wishes of Government provided he did not surrender his own judgment and provided he made the order, but we hold on the material before us that the order of cancellation came from Government and that the Commissioner acted only as a transmitting agent.
>
> **xxxx xxxx xxxx**
>
> **28.** It is clear to us from a perusal of these Rules that the only person vested with authority to grant or refuse a licence for the erection of a building to be used for purposes of public amusement is the Commissioner of Police. It is also clear that under Rule 250 he has been vested with the absolute discretion *at any time* to cancel or suspend any licence which has been granted under the Rules. But the power to do so is vested in him and not in the State Government and can only be exercised by him at *his* discretion. No other person or authority can do it."

33. The Instruction was also assailed on the basis of it being in violation of the Proviso to Section 151A. Section 151A of the Act reads thus:

> "**151-A. Instructions to officers of customs.**—The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon or for the implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or

[18] 1952 SCR 135

> procedure for import or export of goods, issue such orders, Instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, Instructions and directions of the Board:
>
> Provided that no such order, Instructions or directions shall be issued—
>
> (a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or
>
> (b) so as to interfere with the discretion of the Principal Commissioner of Customs or Commissioner of Customs (Appeals) in the exercise of his appellate functions."

34. As is manifest from a reading of the aforenoted provision, Section 151A enables the Board, if it considers it necessary or expedient so to do, to issue orders, instructions and directions to officers of Customs, if it is necessary or expedient for achieving uniformity in the classification of goods and the levy of duty thereon or for the implementation of any provision of the Act. Any such instruction or directive, when issued by the Board would bind officers of Customs and all other persons employed in the execution of the provisions of the Act, and they consequently being liable to observe and follow the same. The Proviso to Section 151A regulates the extent to which those instructions and directions may operate, with it being provided that those directions cannot be issued so as to require an officer of Customs to make a particular assessment or decide a case in a particular manner or to interfere with the discretion of the Commissioner of Customs (Appeals) when exercising its appellate functions.

35. According to Mr. Ghosh, the Board in terms of the impugned

Instruction has taken the firm position that the MOOWR Regulations are inapplicable to generation of electricity by solar power plants. As per Mr. Ghosh, the Instruction not only embodies an unequivocal conclusion already reached by the Board with respect to the applicability of the MOOWR Regulations to solar power plants, it proceeds even further to make a declaration that past permissions and licences granted are liable to be viewed as being invalid. It is in the aforesaid backdrop that Mr. Ghosh submitted that the Instruction effectively directs officers of Customs to review all licences and also deprives them of the discretion otherwise conferred by the statute to examine whether a licence or permission had been validly granted. It was submitted that since it is ex facie evident that the Instruction affects the independent exercise of a quasi-judicial function otherwise conferred on the proper officer of Customs, the same is liable to be quashed bearing in mind the principles enunciated by the Supreme Court in *Varsha Plastics*.

36. Mr Ghosh also submitted that although *Faridabad Iron & Steel Traders Association* was concerned with Section 37B of the Central Excise Act, 1944, the same assumes significance bearing in mind the fact that the aforenoted provision is *pari materia* with Section 151A of the Act. It was the submission of Mr. Ghosh that while the power under Section 151A could have been invoked in order to make a particular provision workable within the scheme of the Act, it cannot be exercised or invoked so as to exclude a class of persons from the application of any provision. It was thus contended that the directive of the first respondent requiring the Customs authorities to review all permissions already granted and not to grant any licenses in the future is ultra vires

Section 151A and is liable to be set aside.

37. Without prejudice to the above, and on merits, Mr. Ghosh submitted that the first respondent has clearly erred in coming to the conclusion that solar power projects are outside the purview of the MOOWR Regulations. Mr. Ghosh submitted that a bare perusal of Section 65 of the Act evidences the intention of the Legislature to permit manufacturing operations within a warehouse. Learned senior counsel sought to underline the fact that Section 65 of the Act does not exclude any particular industry from its operation. It was submitted that the MOOWR Regulations were first introduced in 1966 vide a notification dated 30 July 1966. The scheme was thereafter updated and reintroduced in terms of a notification issued on 19 June 2019. Our attention was also drawn to the notification dated 01 October 2019 in terms of which the MOOWR Regulations were reintroduced albeit with certain changes. According to Mr. Ghosh, a bare reading of Section 65 of the Act as well as the relevant provisions contained in the MOOWR Regulations as promulgated from time to time will establish that the Legislature never intended to exclude any class or person or industry from its operation. Our attention was also drawn to the policy position taken by the Union Government insofar as the levy of duty on solar cells and modules is concerned. This was sought to be explained with reference to a chart which is extracted hereinbelow:

"S. No.	Date/ Period	Particular
1.	Till FY 2019-20	Import of Solar Modules and Solar Cells was free.
2.	FY 2020-21	Vide Finance Act 2020, duty on solar modules was introduced for the first time. The Section 117(b) of the Finance Act read with the Third Schedule amended

		the Chapter 85 (heading CTH 8541 40 11 and CTH 8541 40 12) and introduced a rate of 20% Basic Customs Duty on the import of Solar Modules and Solar Cells.
3.	FY 2020-21	Although Basic Customs Duty of 20% was introduced vide Finance Act 2020, the exemption under Notification No. 24/2005 - Cus dated 01.03.2005 (as amended) still operated and exempted basic customs duty on the import of solar cells and solar modules. Entry No. 23 of the said Notification exempted all goods under Chapter Heading CTH 8541, which includes Solar Cells and Solar Modules.
4.	FY 2022-23	Vide Finance Act 2022, duty on solar modules was increased from 20% to 40% and duty on solar cells was increased from 20% to 25%
5.	01.02.2022	Notification No. 15/2022 - Cus dated 01.02.2022 was issued wherein the exemptions granted to solar modules and solar cells under Entry 23 of Notification No. 24/2005 – Cus dated 01.03.2005 was withdrawn (through an amendment) with effect from 01.04.2022. Notification No. 15/2022 - Cus dated 01.02.2022 introduced a specific exclusion in Entry 23 to exclude solar cells and solar modules from the purview of the exemption with effect from 01.04.2022.
6.	01.04.2022	With effect from 01.04.2022, the import of solar cells and modules would be leviable to customs duty at 25% and 40% respectively."

38. It was highlighted that up to **Financial Year**[19] 2019-20, the import of solar cells and solar modules was free. Mr. Ghosh submitted that it was by virtue of the Finance Act, 2020 that for the first time a duty came to be imposed on solar modules. In terms of the provisions so introduced, a BCD of 20% came to be imposed on the import of

[19] FY

solar modules and solar cells. However, according to Mr. Ghosh, solar cells and modules continued to be exempted from BCD by virtue of **Notification No. 24/2005 dated 01 March 2005**[20]. It was pointed out by learned senior counsel that although and in terms of the Finance Act, 2022, the duty on the aforesaid articles came to be increased from 20% to 40% [solar modules] and 20% to 25% [solar cells modules], it was by virtue of Notification No. 15/2022- Cus. dated 01 February 2022 that the exemption granted to solar cells and solar modules by virtue of Entry 23 of the 2005 Notification came to be withdrawn and it was only thereafter that they became subject to the levy of BCD with effect from 01 April 2022. It was submitted that insofar as ACME is concerned, the grant of licence as well as certain imports which it made preceded the levy of BCD which came to be enforced with effect from 01 April 2022. Consequently, and according to Mr. Ghosh, it would be wholly incorrect to allege that the petitioner attempted to circumvent duty by availing the benefit of duty deferment under the MOOWR Scheme. According to Mr. Ghosh, this allegation would clearly not sustain bearing in mind the fact that the goods were imported at a time when they were outside the purview of BCD and consequently the question of circumvention would not arise.

39. Mr. Ghosh then submitted that in the absence of any terminal point having been constructed in relation to capital goods being housed in a warehouse, the stand of the respondents would not sustain. Mr. Ghosh laid stress upon Section 61(1)(a) contemplating imported capital goods being duly housed in a warehouse pursuant to a license for establishment of a private warehouse having been obtained under

[20] 2005 Notification

Section 58 along with the grant of permission for carrying on "*any manufacturing process or other operations*" under Section 65 and the duty consequently being deferred till such time as those goods are ultimately cleared from the warehouse.

40. Learned senior counsel also laid emphasis on the distinction which Section 61 itself creates between capital goods [Section 61(1)(a)] and "*any other goods*" [Section 61(1)(c)] and submitted that it is only in the case of the latter that Section 61 erects a maximum time frame during which they may be warehoused. It was also contended that insofar as "*any other goods*" are concerned, the statute creates a maximum window of one year in explicit terms as is evident from Section 61(1)(c) of the Act. The submission essentially was that in the absence of the statute creating an outer limit for capital goods being retained in a warehouse, it would be wholly incorrect for the respondents to assert that the MOOWR Regulations was being misused by the petitioners.

41. Mr. Ghosh then submitted that in the absence of generation of electricity being specifically excluded from Section 65, the stand as taken by the Board is rendered wholly unsustainable. Mr. Ghosh submitted that the statute creates no distinction between tangible or intangible products which may come into being consequent to a process of manufacture or other operations being undertaken in the warehouse. More fundamentally, it was submitted that the MOOWR Regulations do not exclude the subject of manufacture or generation of electricity from its ambit. According to learned senior counsel, in the absence of an explicit and unambiguous statutory exclusion, the impugned Instruction cannot sustain and it ought to be quashed and set aside.

42. In our opinion, this would be an appropriate juncture to record the submissions of Mr. Venkataraman, the learned ASG before we proceed to notice the arguments addressed by Mr. Datar, learned senior counsel appearing for Jakson Power in order to lend lucidity and context to the discussion which ensues.

D. SUBMISSIONS OF THE RESPONDENTS

43. The learned ASG firstly sketched out a brief history of the policy measures adopted by the Union Government in respect of solar energy. Mr. Venkataraman submitted that solar cells are classified under Tariff Entry 8541 42 00 whereas solar modules are placed in Tariff Entry 8541 43 00 of the First Schedule to **the Customs Tariff Act, 1975**[21]**.** It was pointed out that prior to 01 April 2022, solar cells and solar modules attracted "Nil" BCD. The learned ASG however drew our attention to Notification No. 01/2018-Customs (SG) dated 30 July 2018 and Notification No. 02/2020-Customs(SG) dated 29 July 2020 and in terms of which a safeguard duty was imposed in terms of Section 8B of the 1975 Act on both solar cells and solar modules. The trajectory and the manner in which the safeguard duty was imposed upon solar cells and solar modules was explained with the aid of the following table:-

"S. No	**Description of Goods**	**Time Period**	**Safeguard Duty Rate**	**Subject Countries**
1.	"Solar cells whether or not assembled in modules or panels"	30.7.2018 to 29.7.2019	25%	Developed Countries + China PR + Malaysia
2.		30.7.2019 to 29.1.2020	20%	
3.		30.1.2020 to 29.7.2020	15%	
4.	Note: Both	3.7.2020 to	14.9%	Developed

[21] 1975 Act

	solar cells & modules	29.1.2021		Countries + China PR + Vietnam +Thailand"
5.		30.1.2021 to 29.7.2021	14.5%	

44. The aforesaid submission is liable to be appreciated bearing in mind the findings which were returned by the Designated Authority (Directorate General of Trade Remedies) and which had proposed the imposition of a safeguard duty in terms of the legislative mandate of Section 8B of the 1975 Act in order to avoid serious injury to domestic industry. The learned ASG pointed out that although BCD on solar cells and modules was "Nil", they were subjected to a safeguard duty for the period 30 July 2018 to 29 July 2021.

45. The learned ASG apprised us that the **Ministry of New and Renewable Energy**[22] thereafter issued an **Office Memorandum**[23] dated 15 May 2020 proposing the introduction of a graded duty structure on solar cells and modules in order to promote domestic manufacturing. The aforesaid proposal of the MNRE came to be approved in an inter-ministerial meeting between the representatives of the Ministry of Finance, Ministry of Power, MNRE and the Ministry of Commerce and Industry. Mr. Venkataraman submitted that the decisions ultimately taken by the Union in the course of those deliberations came to be duly publicized by an OM dated 09 March 2021 and thus placing all on due notice of the proposed levy of BCD on solar modules and cells commencing from 01 April 2022 and thus almost a year before the levy was to come into effect. We were apprised by the learned ASG that based on the aforesaid proposal, the

[22] MNRE
[23] OM

Union Budget 2022-23 declared that BCD would be imposed on solar cells and modules at the rates of 25% and 40% respectively with effect from 01 April 2022.

46. Mr. Venkataraman pointed out that post the aforesaid developments, MNRE vide its OM dated 27 July 2022 also apprised the Department of Revenue of certain solar power developers misusing the provisions of the MOOWR Regulations so as to avoid customs duty and **Goods and Services Tax**[24] on import of solar cells and modules. Our attention in this respect was drawn to the aforesaid communication which is extracted hereinbelow for ready reference:-

"F. No. 283/31/2022-**GRID SOLAR**
Government of India
Ministry of New & Renewable Energy
Grid Solar Power Division

Block No. 14, C.G.O. Complex,
Lodhi Road, New Delhi -110003
Dated: 27th July, 2022

OFFICE MEMORANDUM

Sub: 'Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019 (MOOWR Scheme): Applicability to Solar PV Power Projects

1. It has been reported to Ministry of New & Renewable Energy (MNRE) that solar power developers are utilizing the provisions of 'Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019' (MOOWR) to avoid import duty and GST on imported solar equipment, while setting up solar power projects. The electricity thus generated from such projects into Domestic Tariff Area is without duty incidence of any kind, as electricity is not a physical good and is exempt from GST. A detailed note is attached at Annexure-I for consideration of Department of Revenue, Ministry of Finance.

[24] GST

2. A representation dated 25.05.2022 received from India Solar Manufacturers Association (ISMA), addressed to Hon'ble Minister (NRE & Power), on this subject is also enclosed for reference.

3. This issues with the approval of Hon'ble Minister (NRE & Power).

(Ayush Gupta)
Scientist-B
Email: ayush.mnre@gov.in

To: The Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi.
Copy for internal circulation to: Sr. PPS to Secretary/ Sr. PPS to AS (VK)/ DS(VD)/ Sci-D
(SK)"

47. The learned ASG highlighted the fact that solar power developers were abusing the MOOWR Regulations in continuing to house the imported capital goods and not clearing them for home consumption and consequently escaping the liability of 12% GST as well as 18% of the import GST in addition to BCD. MNRE along with that communication is also stated to have forwarded a representation of Indian Solar Manufacturers' Association requesting the Department of Revenue to prevent solar power producers from misusing the provisions of the MOOWR Regulations. The learned ASG submitted that it was in the aforesaid backdrop that the Board came to issue the impugned Instruction on 09 July 2022.

48. The intent of the MOOWR Regulations was explained by the learned ASG as being primarily concerned with a deferment of customs duty and IGST on input goods and capital goods when imported and housed in a warehouse for being used in a manufacturing process or other operations. It was submitted that when the resultant final goods

obtained in the course of manufacture from the imported inputs or raw materials are removed from the warehouse, the deferred BCD along with import GST on inputs is required to be paid along with the applicable GST on resultant final goods. It was submitted by Mr. Venkataraman that it is this underlying scheme which is being violated by the petitioners.

49. It was further pointed out by Mr. Venkataraman that it also came to the notice of the Department of Revenue that various solar power developers were circumventing the levy of BCD by routing their imports under Project Imports. It becomes pertinent to note that in the case of import of goods for a project and which may include setting up of a unit or substantial expansion of an existing unit, import of goods are allowed at a concessional BCD of 0%, 2.5%, 5%, 7.5% depending upon the nature of the projects notified and which also included power projects. It was pointed out by Mr. Venkataraman that Project Imports are classified under **Customs Tariff Heading**[25] 9801 of the First Schedule to the 1975 Act and assessment of imported goods is undertaken on the basis of the project as a whole under a single heading and irrespective of the classification of different components for ease of assessment and facilitation of trade.

50. Our attention was also drawn to a representation made by the North India Module Manufacturer Association dated 02 August 2022 and which had apprised the respondents that in the case of a power developer, more than 90% of the import content is in the form of a solar module. They had accordingly submitted that for solar power

[25] CTH

developers, the applicable Project Import rate of duty should be 40% in order to level the playing field between solar power developers who directly import and those which may use solar cells and modules manufactured in India.

51. Mr. Venkataraman submitted that it was bearing the aforesaid factors in mind that the Project Import Regulations, 1986 came to be amended vide notification dated 19 October 2022 to specifically exclude solar power projects and solar power plants from its purview. Similarly, and in furtherance of the aforesaid policy decision, the Union Budget 2023-24 also amended CTH 9801 and various Tariff Entries under the said heading so as to exclude solar power plants and solar projects from the purview of Project Imports. Solar power plants and solar power projects also came to be consequentially removed from the residual entry of "*Any other Plant and Project*" as appearing in the Project Import Regulations, 1986. According to Mr. Venkataraman, the aforesaid legislative and statutory changes were carried out in order to give effect to a conscious policy decision of the Union Government to incentivize domestic manufacturing of solar cells and modules in line with the Make in India and Atma Nirbhar Bharat initiatives.

52. The learned ASG also drew our attention to the avowed objective of the Union Government of achieving a target of 500 **Giga Watt**[26] by 2030 from renewable energy sources out of which 280 GW is targeted to be obtained from solar energy alone by 2030. The learned ASG also underlined the enhanced customs duty protection which has been extended to domestic manufacturers of solar cells and modules along with various other incentives which have been provided under the

[26] GW

Performance Linked Incentive[27] Scheme for those products. Details in respect of the aforesaid policy initiatives have also been elaborately set out in the written submissions filed by the respondents as would be evident from a reading of para nos. 1-15 thereof.

53. Mr. Venkataraman submitted that the complementary and corresponding policy objective underlying the aforesaid changes was to reduce import dependency. The learned ASG underscored the undisputed fact that until 2011, India was one of the largest exporters of best in-class solar modules. Thereafter, in 2012, in order to dampen the influx of cheap imports, a modified Special Incentive Package Scheme was launched to extend financial aid to local manufacturers coupled with the introduction of measures mandating and introducing domestic content requirements and a safeguard duty. It was in extension of the aforesaid objectives that schemes were launched to reserve 50% of a project's bid capacity for solar cells and modules which were manufactured indigenously and the remainder 50% capacity as comprising of those which could be set up with the use of imported modules. This reservation, we were informed, was ultimately removed in January 2018, consequent to a challenge which was raised by the United States of America in the World Trade Organization.

54. The learned ASG also drew our attention to the following data pertaining to import of solar cells and modules:-

"Imports	**2018-19**	**2019-20**	**2020-21**	**2021-22**	**2022-23**	**2023-24 (till Dec)**
Solar			3,211	6,499	9,896	8,010

[27] PLI

Cells						
Solar Modules			9,871	40,333	3,935	22,516
Solar Cells & Modules	15,106	11,900	13,090	46,832	13,831	

Source: Advait (DG Systems), DoC"

55. It was also pointed out that after imposition of BCD in 2022-23, the country had seen a reduction in imports. However, import of solar modules are stated to have increased in 2023-24. The data on import stands encapsulated in the following chart:-

"Year	**Capacity Addition (in GW)**	**Imports of Solar Modules (in Rs Cr)**	**Imports of Solar Modules (in GW)**
2020-21	5.63	9,871	3.95
2021-22	12.77	40,333	16.13
2022-23	12.78	3,935	1.57
2023-24 (till Dec)	6.54	22,516	9.00
Total	37.72	76,655	30.65

Source: MNRE, Advait (DG Systems), Doc"

56. From the aforesaid table, it was pointed out by Mr. Venkataraman that it would be apparent that while solar power production has increased by about 38 GW in the last four years, roughly 31 GW is based on imports and which thus evidences an over 80% dependence on imported solar modules required for establishment of solar power plants in India. The details pertaining to the PLI scheme relating to solar energy were also spelt out in some detail by the learned ASG. We were informed that a total integrated capacity of 8737 MW

was allotted under Tranche-I of the PLI scheme and which was thereafter enhanced to 39,600 MW of domestic solar PV module manufacturing capacity under Tranche-II of the PLI Scheme. The total number of successful bidders for Tranche-I of the PLI Scheme can be gleaned from the following chart which was placed on our record:

"S. No.	**Name of Company to whom letter of award has been issued**	**Extent of Integration**	**Manufacturing capacity to be installed (in MW)**	**Eligible Capacity (for claiming PLI) (in MW)**	**Cumulative PLI (Rs. crore)**
1	Shirdi Sai Electricals Limited	Polysilicon + Ingots-Wafers+Cells +Modules	4,000	2,000	1,875
2	Reliance New Energy Solar Limited		4,000	2,000	1,917
3	Adani Infrastructure Private Limited		737	368	663
	Total		**8,737**	**4,368**	**4,455"**

57. The list of successful bidders for Tranche II of the PLI Scheme as provided by the respondents is extracted hereinbelow:

"Capacity Allocation under RfS for Selection of Solar PV Module Manufacturers for Setting up Manufacturing Capacities for High Efficiency Solar PV Modules in India under the Production Linked Incentive Scheme (Tranche-II) (RfS No. SECl/C&P/Ml/00/0009/22-23 dated 18.11.2022)				
Basket-1 (P+W+C+M)				
Ranking of Bidders	**Name of Bidder**	**PLI Amount allocated (Rs. Cr.)**	**Manufacturing Capacity (MW)**	**PLI Eligible Capacity (MW)**
1	Indosol Solar Private Limited	3300	6000	3000

2	Reliance New Solar Energy Limited	3098.04	6000	3000
3	FS India Solar Ventures Private Limited	1177.573	3400	1700
	Total	**7575.613**	**15400**	**7700**
Basket-2 (W+C+M)				
Ranking of Bidders	**Name of Bidder**	**PLI Amount allocated (Rs. Cr.)**	**Manufacturing Capacity (MW)**	**PLI Eligible Capacity (MW)**
1	Waaree Energies Limited	1923.24	6000	3000
2	Avaada Ventures Private Limited	961.62	3000	1500
3	ReNew Solar (Shakti Four) Private Limited	1538.592	4800	2400
4	JSW Renewable Technologies Limited	320.54	1000	500
5	Grew Energy Private Limited	566.71	2000	1000
	Total	**5310.702**	**16800**	**8400**
Basket-3 (C+M)				
Ranking of Bidders	**Name of Bidder**	**PLI Amount allocated (Rs. Cr.)**	**Manufacturing Capacity (MW)**	**PLI Eligible Capacity (MW)**
1	Vikram Solar Limited	528.54	2400	1200
2	AMPIN Solar One Private Limited	139.72	1000	500

3	TP Solar Limited	383	4000	2000
Total		**1051.26**	**7400**	**3700**
Total PU allocated under PLI Tranche-II		**Rs. 13937.575 Cr,**		
Total Manufacturing Capacity allocated under PU Tranche-II		**39600MW"**		

58. Based on the aforesaid details, the learned ASG submitted that the total domestic solar power PV module manufacturing capacity is pegged at 48,337 MW with a cumulative support of more than INR 18,500 crores. All of the above steps, the learned ASG submitted, are essentially aimed at not only eliminating the existing price gap between imported and domestic cells and modules but also to make domestic modules more competitive as compared to imports.

59. It was in the aforesaid backdrop that the learned ASG submitted that irrespective of the outcome of the challenge to the impugned Instruction, bearing in mind the significance of the issues which arise, it would be expedient for the Court to render an authoritative determination on the scope of Section 65 read along with the MOOWR Regulations in the instant batch of petitions. This prayer stands reiterated in paragraph 16 of the Written Submissions which have been tendered.

60. Proceeding then to explain the scheme of the Act, the learned ASG advanced the following submissions. Mr. Venkataraman, at the outset, drew our attention to Section 12(1) of the Act which constitutes the charging section and contemplates the levy of customs duty at such rates as may be specified on goods imported into or exported from India. It was pointed out that the facet of levy of duty is caveated only

by the expression "*except as otherwise provided in this act*" as that phrase appears in Section 12(1). It was thus contended that in the absence of any exception having been shown, Section 12(1) would clearly be attracted and result in the imported goods being subject to a levy of customs duty. What the learned ASG sought to emphasise was that customs duty becomes leviable immediately upon import. Proceeding further, the learned ASG drew our attention to Sections 14 and 15 of the Act and which prescribe the manner in which the value of imported goods is to be determined. It was pointed out that while Section 14(1) embodies principles of transaction value, in case the same is unavailable, valuation is to be undertaken in accordance with the provisions comprised in the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and in the case of exports, the Customs Valuation (Determination of Value of Export Goods) Rules, 2007. The date for determination of rate of duty and tariff valuation is a subject which is regulated by Section 15. The said provision prescribes that the relevant rate of duty and tariff valuation would be that which is prevalent and in force on the date on which a **Bill of Entry**[28] for home consumption is presented and where the goods are cleared from a warehouse under Section 68, the relevant date would be the date on which a BOE for home consumption in respect of such "*warehoused goods*" is submitted. In terms of Section 15, the learned ASG submitted that "*in the case of any other goods*", it would be the rate and tariff valuation as prevalent on the date of payment of duty which would be determinative.

[28] BOE

61. The learned ASG contended that undisputedly the writ petitioners have imported solar cells and panels as capital goods into India. It was submitted that it is not the case of the writ petitioners that any raw material or inputs have been imported. The learned ASG also underscored the admitted fact that the writ petitioners draw solar energy from sunlight and with the use of the solar panels and cells generate solar energy. Consequently, it was submitted, the question of import of raw materials or inputs into India does not arise.

62. Proceeding then to explain the scope and ambit of the warehousing provisions under the Act, the learned ASG firstly drew our attention to the definition of "*warehouse*" and "*warehoused goods*" as appearing in Sections 2(43) and 2(44) respectively and which are reproduced hereinbelow:-

> "**2. Definitions**. —In this Act, unless the context otherwise requires,—
>
> xxxx xxxx xxxx
>
> (43) "warehouse" means a public warehouse licensed under Section 57 or a private warehouse licensed under Section 58 or a special warehouse licensed under Section 58-A";
>
> (44)"warehoused goods" means goods deposited in a warehouse;"

63. The learned ASG proceeded then to Section 57 and which enables the Principal Commissioner/Commissioner of Customs to license a public warehouse wherein dutiable goods may be stored. In addition to the above, reference was also made to Section 58 which enables the Customs authorities to grant a similar license for storage of imported goods in a private warehouse. Our attention was also drawn to Section 58A which deals with licensing of special warehouses.

64. Proceeding further, the learned ASG referred to Sections 59 and 60 of the Act, which are concerned with the submission of warehousing bonds and the permission that must be obtained for removal of goods stored in a warehouse respectively. It was submitted that under the scheme of the Act, upon goods being imported into India and thus becoming chargeable to duty under Section 12, an importer has the option to either obtain clearance permission for the imported goods for home consumption or submit a BOE for the purposes of transporting and housing those imported goods in a warehouse. In the latter situation, namely of the goods consequent to import being placed in a warehouse as opposed to home consumption, the importer is placed under the statutory obligation to execute a bond in a sum equivalent to thrice the amount of duty assessed on such goods. It is on the execution of a bond under Section 59 that the proper officer may make an order permitting the movement of those goods from a custom station to a licensed warehouse.

65. The learned ASG submitted that on a cumulative reading of the aforesaid provisions, the position which would emerge would be as follows. An importer can warehouse only such goods which are dutiable and have been imported into India. It was submitted that should an importer opt for warehousing the goods, it becomes obligated to execute a bond for a sum equal to thrice the amount of duty assessed on such goods. Only if the said bond is executed, would the proper officer permit the removal of the imported goods from the customs station to the bonded warehouse. According to the learned ASG, the applicability of Sections 61 and 65 would have to be appreciated bearing in mind the following indubitable facts.

66. Mr. Venkataraman submitted that a bare perusal of Section 61(1)(a) would establish that it is concerned with capital goods which are imported and intended for use in a hundred percent export-oriented unit, an electronic hardware technology park unit, a software technology park unit "*or any warehouse wherein manufacture or other operations have been permitted under Section 65*" till those goods are cleared therefrom. Mr. Venkataraman pointed out that Section 61(1)(b) extends a complementary facility to "*goods other than capital goods*" and which can be retained in a warehouse till consumption or clearance therefrom. According to the learned ASG, Section 61(1)(b) would be applicable to raw materials or inputs. It would therefore, according to the learned ASG, be manifest that solar cells and panels which have been imported would be deemed to be capital goods falling squarely within the ambit of Section 61(1)(a) of the Act.

67. Proceeding then to Section 65 itself, the learned ASG submitted that a deconstruction of that provision would reveal that the principal expressions which merit consideration are (a) "*warehoused goods*" ; (b) the carrying on of "*any manufacturing process or other operations*" and (c) of vital significance and import being the expression "*in relation to such goods*". It was submitted by Mr. Venkataraman that the phrase "*such goods*" can only mean the "*warehoused goods*". Consequently, according to the learned ASG, an importer would become entitled to claim the benefit of Section 65 provided it had "*warehoused goods*" and had undertaken a "*manufacturing process or other operations*" in relation to the said "*warehoused goods*". The submission in essence was that it is the "*warehoused goods*" themselves which must undergo manufacturing or other operations and

the benefit of Section 65 being attracted only in such a scenario. It was submitted that the solar panels imported into India by the writ petitioners themselves do not undergo any "*manufacturing process*" in the bonded warehouse. It was in the aforesaid backdrop that the learned ASG submitted that the benefit of Section 61(1)(a) would be attracted only where manufacturing operations under Section 65 are undertaken in connection with the warehoused raw materials or inputs and those being subjected to a process of manufacture. It was contended that is only in such an eventuality that capital goods imported and warehoused could be extended the benefit of Section 65.

68. In order to buttress the aforesaid submission, the learned ASG also resorted to the following illustration: -

> "If importer 'A' imports plastic granules into India for use in the manufacture of HDPE sacks, and the said importer 'A' imports both capital goods in the form of plant or machinery, and also plastic granules, the capital goods (plant and machinery) can be warehoused under Section 61(a) and the plastic granules can be warehoused under Section 61(b). The conversion of the plastic granules into plastic tapes, plastic circular bags and into HDPE sacks would qualify as manufacture or other operations of the warehoused goods, namely plastic granules. And the capital goods (plant and machinery) employed in the manufacture of HDPE sacks out of the plastic granules imported and warehoused would also qualify for the benefit."

69. The learned ASG submitted that undisputedly sunlight would not qualify as "*imported goods*" or "*warehoused goods*" as defined in Section 2(44) of the Act. It was contended that since no "*manufacturing process or other operations*" is carried out on the "*warehoused goods*", the question of extending the benefit of Section 65 to the imported solar panels and cells would not arise. Seeking to explain the meaning liable to be ascribed to the expression "*in relation to*" as appearing in Section

65, the learned ASG relied upon the following passages as appearing in **M/s. Doypack Systems Private Limited v. UOI & Ors**[29]:-

> "**49.** The words "arising out of" have been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word "pertain" is synonymous with the word "relate", see *Corpus Juris Secundum*, Volume 17, page 693.
>
> **50.** The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context, see *State Wakf Board* v. *Abdul Azeez* [AIR 1968 Mad 79, 81, paras 8 and 10] , following and approving *Nita Charan Bagchi* v. *Suresh Chandra Paul* [66 Cal WN 767] , *Shyam Lal* v. *M. Shyamlal* [AIR 1933 All 649] and 76 *Corpus Juris Secundum* 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 *Corpus Juris Secundum* at pages 620 and 621 where it is stated that the term "relate" is also defined as meaning to bring into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction."

70. Our attention in this respect was also drawn to the following observations as appearing in the judgment of the Supreme Court in **Maxopp Investment Limited v. CIT, New Delhi**[30]:-

> "**41.** In the first instance, it needs to be recognised that as per Section 14-A(1) of the Act, deduction of that expenditure is not to be allowed which has been incurred by the assessee "in relation to income which does not form part of the total income under this

[29] (1988) 2 SCC 299
[30] (2018) 15 SCC 523

Act". Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includible in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income.

42. There is no quarrel in assigning this meaning to Section 14-A of the Act. In fact, all the High Courts, whether it is the Delhi High Court on the one hand or the Punjab and Haryana High Court on the other hand, have agreed in providing this interpretation to Section 14-A of the Act. The entire dispute is as to what interpretation is to be given to the words "in relation to" in the given scenario viz. where the dividend income on the shares is earned, though the dominant purpose for subscribing in those shares of the investee company was not to earn dividend. We have two scenarios in these sets of appeals. In one group of cases the main purpose for investing in shares was to gain control over the investee company. Other cases are those where the shares of investee company were held by the assessees as stock-in-trade (i.e. as a business activity) and not as investment to earn dividends. In this context, it is to be examined as to whether the expenditure was incurred, in respective scenarios, in relation to the dividend income or not.

43. Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting Section 14-A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Ltd. may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section 14-A of the Act in mind, the said provision has to be interpreted, particularly, the word "in relation to the income" that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle

which is engrained in Section 14-A of the Act. This is so held in *Walfort Share and Stock Brokers (P) Ltd.* [*CIT* v. *Walfort Share and Stock Brokers (P) Ltd.*, (2010) 8 SCC 137 : (2010) 326 ITR 1] , relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom: (SCC p. 151, paras 34 & 36)

> "*34. … The next phrase is, "in relation to income which does not form part of total income under this Act". It means that if an income does not form part of the total income, then the related expenditure is outside the ambit of the applicability of Section 14-A.*
> ***
> *36. The theory of apportionment of expenditures between taxable and non-taxable (sic income) has, in principle, been now widened under Section 14-A.*"

71. Mr. Venkatraman then sought to draw sustenance from a decision rendered by a Full Bench of the Allahabad High Court in **Haji Ismail Noor Mohammad & Company v. State of Uttar Pradesh & Anr**[31] while seeking to explain the meaning to be assigned to the expression "*such*" and reliance in this regard was placed on the following paragraphs of the said decision:

> "**11.** In my opinion, the phrase "subject to such conditions as may be prescribed" in the sentence "the assessing authority shall grant to the dealer in respect of such goods a recognition certificate in such form and subject to such conditions as may be prescribed" is intimately and integrally connected with the phrase "if the applicant satisfies such requirements and conditions as may be prescribed" occurring in the immediately preceding clause of sub-section (2). The prescribed requirements and conditions which the applicant has to satisfy are the conditions to which the recognition certificate can be made subject under the last clause of sub-section (2). The Legislature does not seem to intend that the recognition certificate is to be subject to conditions which the applicant may not be required to satisfy.
>
> **12.** Clause (f) of section 2 of the Act defines "prescribed" to mean prescribed by Rules made under this Act. Section 24 of the Act confers upon the State Government power to make rules to carry

[31] 1973 SCC Online All 3

> out the purposes of the Act. In view of the provisions of sub-section (2) of section 4-B, the rule-making authority could lay down only such conditions to which the recognition certificate may be subject as the applicant is required to satisfy and no other. If the rules require or lay down some other condition, the rules will not be carrying out the object of section 4-B of the Act, but would be going beyond its purview or may even be contravening the plain object thereof."

72. The learned ASG then referred to the following passages from yet another decision of the Allahabad High Court in **Suresh Kumar v. State of Uttar Pradesh & Ors**[32]:

> "**11.** The same view was earlier taken in the case of Dharambeer Singh Vs. State of U.P. and Ors. reported in 2004 (4) ESC 2838 (Alld.) wherein this Court has repelled the similar argument that Teaching Training Course mentioned in Rule 4 (2) (b) of 1978 Rules, is illustratative and not exhaustive, therefore, B.Ed. which is also a Training Course has to be treated equivalent to the courses mentioned in the Rules. Relevant paras 7, 8, 9, 10, 11, 12 and 13 of the said judgment is being quoted below :
>
> *"7. Education qualification of the respondent No. 4 is M.Sc., B.Ed. He is graduate and has three years teaching experience. He passed B.Ed. teacher's training course. The question is whether B.Ed. teachers training certificate could be treated to be minimum qualification for appointment on the post of head master of a recognized Junior High School as envisaged by Rule 4 (2) (b) of the Rules, 1978. For better understanding of the dispute Rule 4 of the Rules, 1978 is extracted below :--*
>
> *"Minimum Qualifications.--(1) The minimum qualifications for the post of assistant teacher of recognized School shall be Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or equivalent examination (with Hindi and teacher's training course recognizsed by the State Government or the Board such as (Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teaching Certificate or Certificate of Training).*
>
> *(2) The minimum qualification for the appointment to the post of Headmaster of a recognized School shall be as followed:--*

[32] Judgment dated 19 April 2019 in Writ (A) No. 27260/2018

(a) A degree from a recognized University or an equivalent examination recognized as such;
(b) A teacher's training course recognized by the State Government or the Board such as (Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teaching Certificate, or Certificate of Training); and
(c) Three years teaching experience in a recognized schools."

8. A perusal of this Rule indicates that a teachers training certificate is essential qualification for the post of head master. The use of expression such as in Rule 4 (2) (b) was relief in support of the submission that it would include B.Ed. The expression 'such' has been defined in Webster's Third New International Dictionary as below:--
"1. Or a kind or character about to be indicated, suggested or exemplified.
2. Having a quality already or just specified; used to avoid repletion of a descriptive term.
3. Of the same class, type, or sort: in a same category: similar."

9. The expression 'such' has been defined in Black's Law Dictionary, Fifth Edition as below :--
"Of that kind having particular quality or character specified. Identical with, being the same as what has been mentioned. A like similar, of the like kind. "Such" represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word referring to the last antecedent."

10. The expression 'such as' has been used to mean teachers training courses of the similar type of category as mentioned in Rule 4 (2) (b). The teachers training course, therefore, must satisfy the condition of being recognised by the State Government of Board. And the course must be similar to certificate mentioned in the Rule. The State Government or the Board has not recognized or declared training qualifications of B.Ed. or L.T. to be the equivalent qualification as enumerated in Rule 4 (2) (b), therefore, it cannot be accepted that the petitioner possessed the teachers training qualification envisaged by Rule 4 (2) (b) of Rules, 1978.

11. It may now be considered whether B.Ed. or L.T. is equivalent to teachers training courses such as Hindustani Teaching Certificate, Junior Teaching Certificate, Certificate of Training or Basic Teaching Certificate. The expression 'such' as, explained earlier means courses of similar type.

Since B.Ed. is not a course of similar type the respondent was not qualified to be appointed as head master. The submission of Shri Khare appears to be based on Government treating B.Ed. as sufficient for appointment in Basic Schools in 1998. But the submission proceeds on misapprehension. In Junior Basic Schools managed by U.P. Basic Education Board. Education is imparted from Classes 1 to V. In Senior Basic Schools education is imparted from classes VI to VIII. Service Conditions of teachers and head master of these Schools are governed by the provisions of U.P. Basic Education (Teachers) Service Rules, 1981 (in brief Rules, 1981). Rule 8 prescribes essential qualification for appointment to the post of teacher or head master. The essential teachers training qualification which has been prescribed is the same as was provided in Rules, 1978. It provides teachers training qualification consisting of a Basic Teacher's Certificate, Hindustani Teacher's Certificate, Certificate of Training or any other training course recognized by the Government as equivalent thereto. The essential qualification for appointment of head master of Junior Basic Schools is five years teaching experience as assistant master of Junior or Senior Basic Schools. After for appointment of head master of Senior Basic Schools three years teaching experience as permanent head master of Junior Basic Schools; or permanent assistant teacher of Senior Basic Schools. Therefore, only that assistant teacher who possessed the essential teachers training qualification as provided by the Rule 8 could be appointed head master. Teachers training qualifications prescribed by Rule 4(2)(b) of Rules, 1978 and Rule 8 of Rules, 1981 are same. In 1998 there were large number of vacancies of about twenty eight thousand assistant teachers in basic Schools, but candidates with B.T.C. or equivalent training qualifications were not available. The candidates were available who had L.T. and B.Ed. or other equivalent qualifications which are essential teachers training qualifications for appointment of assistant teacher L.T. Grade for teaching High School Classes 0-10 as provided by Appendix "A" to Regulation 1, Chapter II to the Regulations framed under the U.P. Intermediate Education Act, 1921. In view of large number of vacancies the State Government decided to fill the posts of assistant teachers from the candidates who had passed L.T./B.Ed./ C.P.Ed./D.P.Ed./B.P.Ed. The Government framed a scheme for one time selection for the academic session 1997-1998. It issued a Government Order on 9.1.1998 that looking to the experience of candidates who had passed L.T./B.Ed./C.P.Ed./ D.P Ed./B.P.Ed. These candidates would be eligible for 10 appointment in basic Schools. But the candidates were

required to undergo B.T.C. Special Training Course of six months. And after completion of the course they would be treated to be eligible for appointment as assistant teachers in the Schools managed by the Board. This Court upheld the validity of Government Order dated 9.1.1998 in Civil Misc. Writ Petition No. 29107 of 1999, Alok Kumar Pandey Vs. State of U.P. and Ors., decided on 19.7.1999. The candidates who had passed L.T./ B.Ed./C.P.Ed./D.P.Ed./B.P.Ed., training courses filed writ petitions before this Court claiming that they possessed L.T./B.Ed. training certificates which was higher than B.T.C. and in any case it has to be treated to be equivalent to B.T.C. training certificate. This Court did not accept that L.T./B.Ed. training certificates were higher or equivalent to B.T.C. training certificate. In Nirmal Chandra Mishra and Ors. v. State of U.P. and Ors., 1997 (1) ESC 412, it was held that B.Ed. training course is not equivalent to B.T.C. as the State Government has not declared L.T. or B.Ed., training course to be equivalent to B.T.C. training course. I another decision in B.Ed. Berozgar Sangh, Sonnhadra and Ors Vs. State of U.P. and other, 1997 (30) ALR 737, it had been held that B.Ed. or L.T. cannot be treated to be equivalent to B.T.C. The Court further held that B.Ed. and B.T.C. are different training courses for teaching different type of children; therefore, B.Ed. is neither higher nor lower than B.T.C. It is thus, clear that neither the State Government nor the Court treated B.Ed. to be a course recognized under Rule 8 of Rules, 1981. Teachers training qualification mentioned in Rule 8 of Rules 1981 and Rule 4(2)(b) of Rule, 1978 are same, therefore, B.Ed. training qualification of petitioner cannot be treated to be equivalent or higher, to teachers training qualification "envisaged by Rule 4(2)(b) of Rules 1978. Therefore, the respondent No. 4 was not qualified to be appointed as head master of the institution and his appointment is liable to be quashed.

12. Shri Khare learned Counsel for respondent No. 4 has argued that where a minimum qualification has been prescribed under the Rules candidates who possess higher qualification cannot be left out from the zone of consideration. He placed reliance on decision of the Apex Court in Mohd. Riazul Usman Gani and Ors. Vs. District and Session Judge, Nagpur and Ors. 2000 (2) ESC 956 (SC). This decision of the Apex Court is not of any held to the respondents. In paragraph 21 of the Apex Court observed that the law laid down was on its own facts and it was not laying down any Rule for universal application. The Court said so as minimum 11 qualification laid down for peon was making the provision for promotion of

> *a peon as clerk and Regional (Language) Section Writers under the recruitment Rules nugatory. It was held that criteria which had the effect of denying a candidate his right to be considered for the post of the principal that he was having higher qualification than prescribed would be irrational. It is not so in Basic Schools. An assistant teacher can be appointed as head master only if he holds teachers training certificate as provided in Rules and not because he is B.Ed. Further this Court has held that B.Ed. is not higher than B.T.C. It has been explained earlier that even the Government while permitting B.Ed. and L.T. candidates to be appointed in Basic Schools in 1998 directed that they shall have to take Special B.T.C. training course for six months. The assumption, therefore, made by the learned Counsel that B.Ed. is higher qualification is not correct. In either view the submission does not have any merit. 13. I have held that respondent No. 4 did not possess minimum qualification for the post of head master of Junior High Schools and his appointment is liable to be quashed, therefore, it is not necessary for me to consider the other questions raised by learned Counsel for the parties*."

73. According to the learned ASG, the submission that the imported goods themselves must undergo a process of manufacture stands further fortified from Section 65 using the expression "*carry on*". It was in the aforesaid backdrop that the learned ASG submitted that the clear and unequivocal intent of Section 65 is of the "*warehoused goods*" themselves going through a process of manufacture or other operations. It was submitted that since the solar panels and solar cells undergo no such process and are merely used for converting sunlight into solar energy, the petitioners cannot possibly claim the benefit of Section 65. It was consequently submitted that since the activities undertaken by the petitioners do not fall within the ambit of Section 65, the question of applicability of the MOOWR Regulations does not arise.

74. In summation, the learned ASG submitted that the petitioners have clearly contravened both Section 65 and MOOWR Regulations and consequently the challenge as raised should be negated. It was

submitted that when tested on the anvil of the MOOWR Regulations also, the challenge and the stand as taken by the writ petitioners is liable to be rejected, bearing in mind the evident absence of a connection between the "*warehoused goods*" and "*resultant goods*". It was submitted that the Proviso to Regulation 14 also lends credence to the stand of the respondents when it speaks of "*resultant goods*" being cleared for home consumption.

75. It was thus submitted that consequently the expression "*warehoused goods*" can only be construed to be raw materials or inputs on which a manufacturing operation has been carried out. The aforesaid position, according to the learned ASG also comes to the fore on a reading of Regulation 14 of the MOOWR Regulations and which introduced the concept of the "*warehoused goods contained in so much of the resultant goods*" and the said aspect being required to be duly filled in the BOE for home consumption. This too, according to the learned ASG, would lead one to the irresistible conclusion that the capital goods which are spoken of and are contemplated can be only those which constitute a raw material or input which gets subsumed in a process of manufacture or other operation while they are present in the warehouse.

E. SUBMISSIONS OF JAKSON POWER PRIVATE LIMITED

76. Controverting the submissions which were addressed by the learned ASG, Mr. Datar, learned senior counsel, who appeared for Jakson Power Private Limited submitted as under. It was at the outset pointed out that Chapter IX of the Act read along with the MOOWR Regulations would establish that it relates and extends to all types of "*warehoused goods*", be it capital goods, inputs or raw materials. Mr.

Datar submitted that while Section 61 of the Act speaks of "*capital goods*", "*goods other than capital goods*" and "*any other goods*" for the purposes of prescribing the period of warehousing, Section 65 makes no distinction. According to learned senior counsel, Section 65 enables any "*warehoused goods*" to be used for any "*manufacturing process or other operations*". Learned senior counsel laid stress on the solitary requirement as erected in terms of Section 65 being that the "*manufacturing process or other operations*" must be "*in relation to such goods*". It was submitted that solar panels which are the "*warehoused goods*" in question are undisputedly used in the "*manufacturing process*" for producing electricity. It was submitted that since the production of electricity is by a manufacturing process carried out "*in relation to such goods*", the requirements of Section 65 are fully complied with. Mr. Datar contended that since the generation of electricity indisputably qualifies as manufacturing and that the petitioner is undertaking manufacturing of electricity within the warehouse using the imported capital goods, the requirements of Section 65 are satisfied.

77. Mr. Datar also questioned the correctness of the contention of the learned ASG when it was submitted that since capital goods in the present case do not undergo any manufacturing, the same would fall outside the ambit of Section 65. According to Mr. Datar, the said contention is clearly misplaced when one bears in mind that under the MOOWR Regulations, duty would be paid only upon clearance of the capital goods for home consumption and till such time that event occurs, duty stands deferred. It was submitted that neither Sections 61 and 65 nor the MOOWR Regulations prescribe an outer time limit with

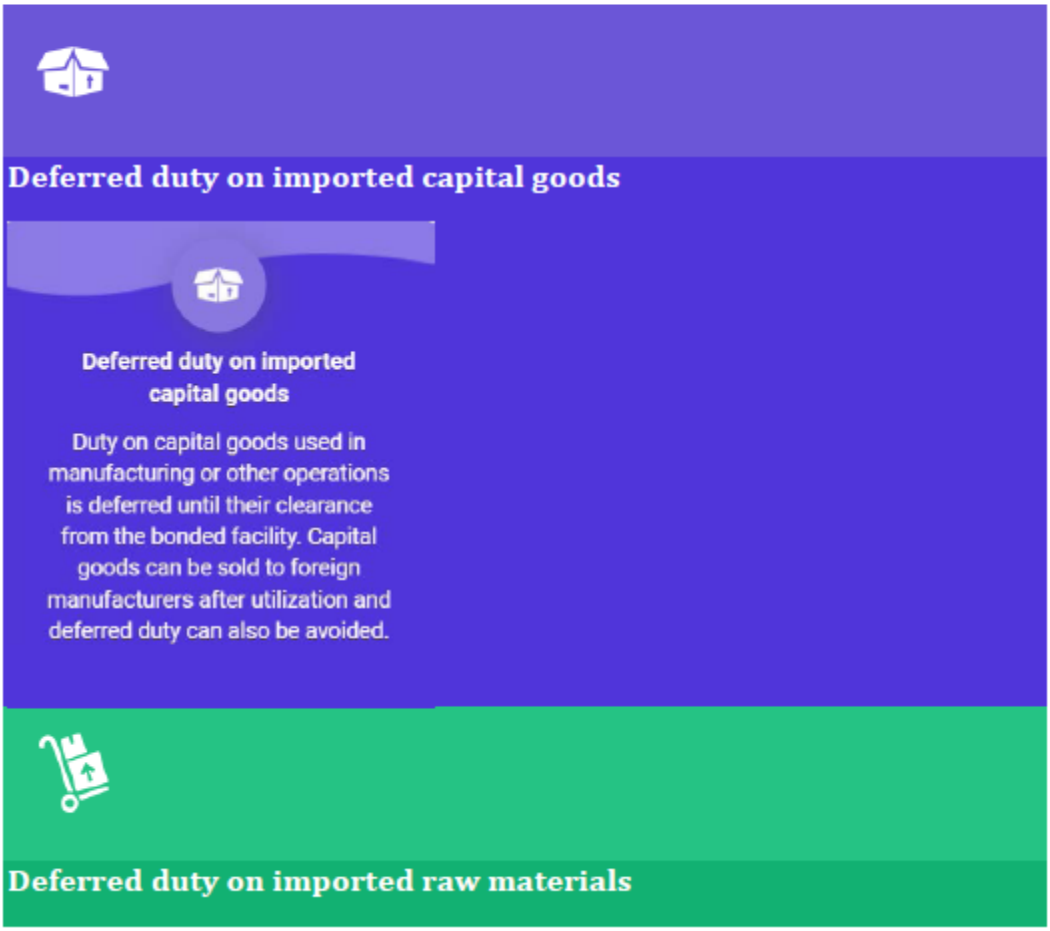
respect to duty deferral. Emphasis was also laid on the statutory scheme not seeking to restrict the duty deferral benefit to the import of raw materials alone. It was submitted that since Section 65 uses the word "*goods*", it should include all kinds of goods including raw materials, capital goods, spares or even accessories. Reliance in this respect was also placed on the **Circular No. 34/2019-Customs dated 01 October 2019**[33] issued by the Customs authorities and which had specifically declared that units operating under Section 65 read with Section 58 of the Act would be entitled to import capital goods, machinery as well as inputs.

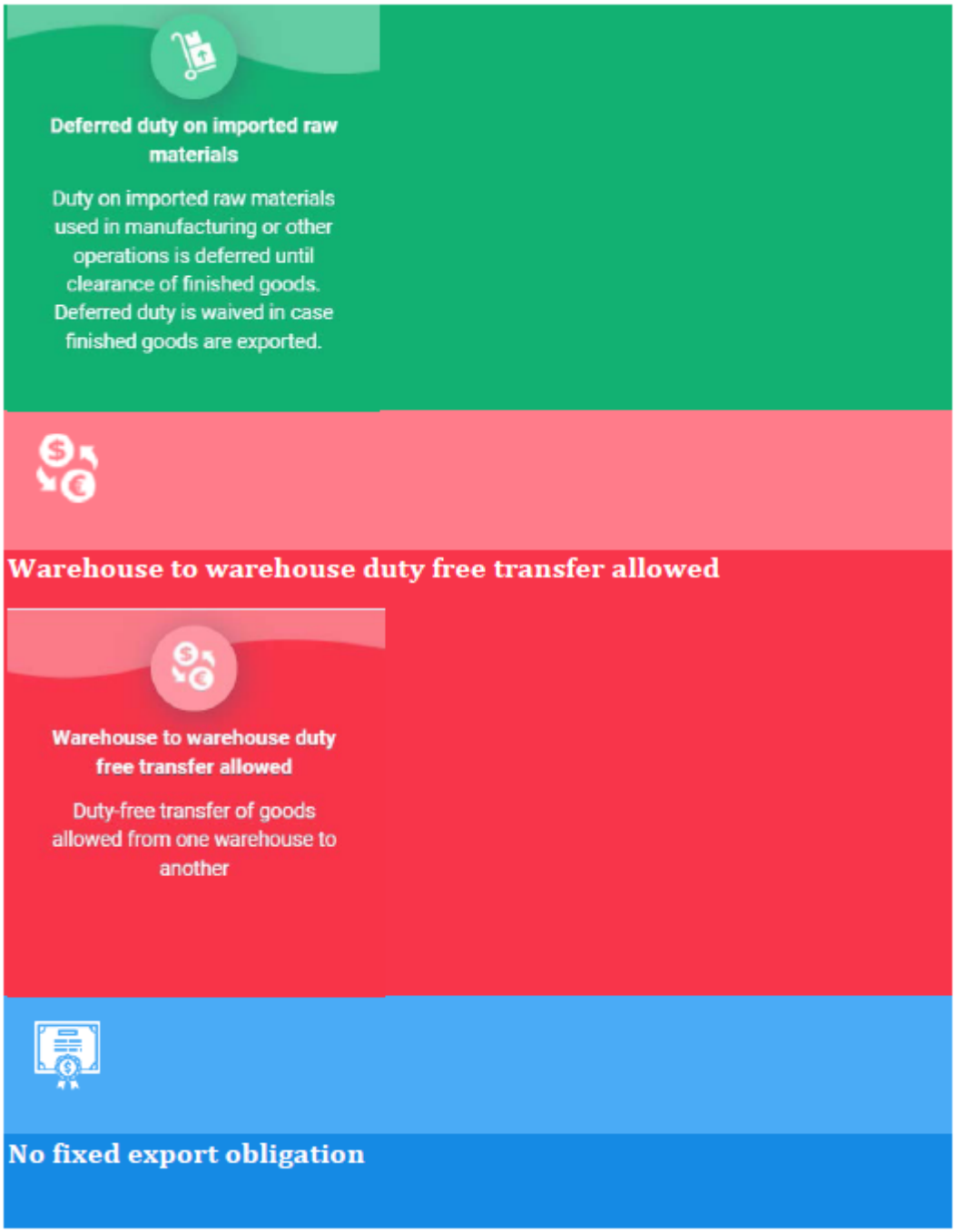
78. Mr. Datar then drew our attention to the promotional material appearing on the "Invest India" portal to submit that even the Union Government had taken the unequivocal position that import duty on capital goods would be payable only once those goods are cleared to the domestic market. In this regard, Mr. Datar referred to the following slides which sought to highlight the advantages of bonded warehousing and manufacturing:

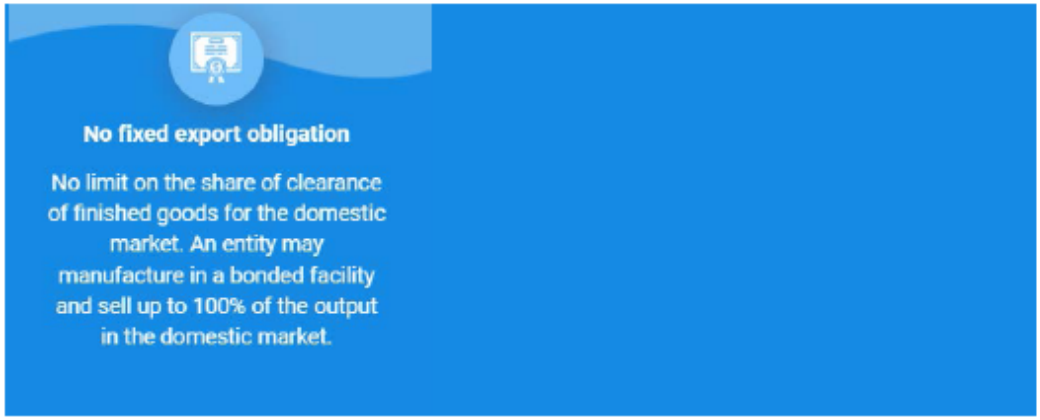
[33] 01 October 2019 Circular

Advantages of bonded warehousing

Highlights







Ease of bonded manufacturing

Single point of approval
Commissioner of Customs acts as the single point of contact for all approvals

Common form
Common application cum approval form for a license for private bonded facility and permission for manufacturing and other operations

Unlimited period of warehousing
Capital and non-capital goods (raw materials, components, etc.) can remain warehoused until clearance or consumption

No geographical restriction
New manufacturing facility can be set up or an existing facility can be converted into a bonded manufacturing facility irrespective of its location in India

Easy compliance
Maintain all records of manufacturing and other operations digitally in a single format as per **Annexure B**

79. Emphasis was also laid on the unequivocal stance taken by the Union Government and which had in unqualified terms held out that capital and non-capital goods could remain warehoused until clearance or consumption. According to Mr. Datar, in the absence of Sections 61 and 65 or for that matter the MOOWR Regulations excluding a particular category of goods from its ambit, it would be wholly incorrect for the respondents to assert that generation of electricity from within a warehouse with the aid of imported capital goods would not be eligible for benefits under the Act and the MOOWR Regulations.

F. SUPPLEMENTAL SUBMISSIONS OF THE PETITIONERS

80. Mr. Ghosh, learned senior counsel appearing for ACME and AVAADA also questioned the interpretation of Sections 61 and 65 of the Act as was advocated by the learned ASG and advanced the following additional contentions. It was submitted by Mr. Ghosh that once it is admitted that solar panels and modules are capital goods, the period for which they may be retained in a warehouse would be governed solely by Section 61(1)(a) of the Act and consequently the duty thereon standing deferred till their ultimate clearance from those facilities. It was further emphasized that in the absence of the statute removing the subject of generation of electricity from Section 65, the stand as struck by the respondents is rendered wholly untenable.

81. Mr. Ghosh also questioned the argument revolving around the phrase "*in relation to such goods*" and submitted that the phrase "*in relation to*" is intended to convey a sense of comprehensiveness which may have a direct or indirect significance depending upon the context in which it is used. It was Mr. Ghosh's submission that the aforesaid phrase is synonymous with the expression "pertain to". Our attention in this respect was drawn to paras 14 -16 from the decision of the Supreme Court in **Mansukhlal Dhanraj Jain v. Eknath Vithal Ogale**[34].

> "**14.** So far as the first condition is concerned, a comprehensive reading of the relevant averments in the plaints in both these cases leaves no room for doubt that the plaintiffs claim relief on the basis that they are licensees on monetary consideration and the defendants are the licensors. The first condition is clearly satisfied. Then remains the question whether the third condition, namely, that the suits must relate to the recovery of possession of immovable property situated in Greater Bombay is satisfied or not. It is not in dispute that the suit properties are immovable properties situated in Greater Bombay but the controversy is around the question whether these suits relate to recovery of possession of such immovable properties. The appellants contended that these are suits for injunction simpliciter for protecting their possession from the illegal, threatened acts of the respondents/defendants. Relying on a series of decisions of this Court and the Bombay High Court, Guttal, J., Pendse, J. and Daud, J. had taken the view that such injunction suits can be said to be relating to the possession of the immovable property. Sawant, J. has taken a contrary view. We shall deal with these relevant decisions at a later stage of this judgment. However, on the clear language of the section, in our view, it cannot be said that these suits are not relating to the possession of the immovable property. It is pertinent to note that Section 41(1) does not employ the words "suits and proceedings for recovery of possession of immovable property". There is a good deal of difference between the words "relating to the recovery of possession" on the one hand and the terminology "for recovery of possession of any immovable property". The words 'relating to' are of wide import

[34] (1995) 2 SCC 665

and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally recover possession from the plaintiff-licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the wide sweep of the words "relating to recovery of possession" as employed by Section 41(1). In this connection, we may refer to *Blacks' Law Dictionary*, Super Deluxe 5th Edition. At page 1158 of the said Dictionary, the term 'relate' is defined as under:

> "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with; 'with to'."

It cannot be seriously disputed that when a plaintiff-licensee seeks permanent injunction against the defendant-licensor restraining the defendant from recovering the possession of the suit property by forcible means from the plaintiff, such a suit does have a bearing on or a concern with the recovery of possession of such property. In the case of *Renusagar Power Co. Ltd.* v. *General Electric Co.* [(1984) 4 SCC 679 : (1985) 1 SCR 432] a Division Bench of this Court had to consider the connotation of the term 'relating to', Tulzapurkar, J. at page 471 of the report (SCC pp. 703-04, para 25) has culled out propositions emerging from the consideration of the relevant authorities. At page 471 proposition 2 has been mentioned as under: (SCC p. 704, para 25)

> "Expressions such as 'arising out of' or 'in respect of' or 'in connection with' or 'in relation to' or 'in consequence of' or 'concerning' or 'relating to' the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement."

15. In *Doypack Systems (P) Ltd.* v. *Union of India* [(1988) 2 SCC 299], another Division Bench of this Court consisting of Sabyasachi Mukherji (as he then was) and G.L. Oza, JJ. had an occasion to consider this very question in connection with the provisions of Sections 3 and 4 of the Swadeshi Cotton Mills Co. Ltd. (Acquisition and Transfer of Undertakings) Act, 1986. Sabyasachi Mukherji, J. speaking for the Court, has made the following pertinent observations in paras 49 and 50 of the report: (SCC p. 329)

> "The words 'arising out of' have been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words 'pertaining to' and 'in relation to' have the same wide

> meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word 'pertain' is synonymous with the word 'relate', see *Corpus Juris Secundum*, Vol. 17, page 693. The expression 'in relation to' (so also 'pertaining to'), is a very broad expression which presupposes another subject-matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context, see *State Wakf Board* v. *Abdul Azeez* [AIR 1968 Mad 79 : (1967) 1 MLJ 190] , following and approving *Nitai Charan Bagchi* v. *Suresh Chandra Paul* [66 CWN 767] , *Shyam Lal* v. *M. Shyamlal* [AIR 1933 All 649 : 1933 All LJ 728] and 76 *Corpus Juris Secundum* 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject-matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 *Corpus Juris Secundum* at pages 620 and 621 where it is stated that the term 'relate' is also defined as meaning to bring into association or connection with. It has been clearly mentioned that 'relating to' has been held to be equivalent to or synonymous with as to 'concerning with' and 'pertaining to'. The expression 'pertaining to' is an expression of expansion and not of contraction."
>
> **16.** It is, therefore, obvious that the phrase "relating to recovery of possession" as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently in the light of the averments in the plaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Cause Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits."

82. Viewed in light of the above, Mr. Ghosh submitted that the phrase "*in relation to such goods*" would cover all aspects of manufacturing and would bear the same meaning as "having a

connection with", "association with" or "relation" with the "*warehoused goods*". According to Mr. Ghosh, the aforesaid phrase would also extend to "*manufacturing process or other operations*", which may have some "concern" with the "*warehoused goods*". According to learned senior counsel, the aforesaid phrase cannot be conferred a restrictive meaning and must be understood as extending to a variety of situations based upon the purpose for which the input is being used. Reliance in this respect was placed on the observations appearing in para 38 of **Maruti Suzuki Limited v. Commissioner of Central Excise, Delhi**[35].

> "**38.** In each case it has to be established that inputs mentioned in the inclusive part are "used in or in relation to the manufacture of final product". It is the functional utility of the said item which would constitute the relevant consideration. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The said expression "used in or in relation to the manufacture" has many shades and would cover various situations based on the purpose for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of final product."

83. Mr. Ghosh thus submitted that the phrase "*in relation to*" when used in conjunction with manufacture, would extend to actual uses in manufacture as well as where the goods may be used for assisting a process of manufacture. Mr. Ghosh also sought to draw a distinction between the expression "in manufacture of", and which according to learned counsel would denote direct participation, while the phrase "*in relation to*" would denote indirect participation.

[35] (2009) 9 SCC 193

84. In conclusion, Mr. Ghosh submitted that it is apparent from a plain reading of Section 61 that capital goods could remain warehoused till they are ultimately cleared therefrom. It was highlighted that contrary to the above, goods other than capital goods are ordained by the statute to be entitled to be warehoused till such time as they are ultimately consumed or cleared from the warehouse. According to learned senior counsel, the only qualifying criteria which stands erected in terms of Section 65 is that the "*manufacturing process or other operations*" should have a "nexus", "connection with", "association with", "relation with" or concerned with the "*warehoused goods*". In view of the aforesaid, it was the submission of Mr. Ghosh that the meaning sought to be ascribed to Section 65 by the respondents is erroneous and is liable to be rejected.

G. THE STATUTORY SCHEME

85. In order to appreciate the aforenoted submissions, we deem it apposite to notice the following statutory provisions. Section 12, which has been rightly described to be the charging provision reads as follows:

> "**12. Dutiable goods**.—(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from India.
>
> (2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government."

86. The date with respect to which the rate of duty and tariff valuation of the imported goods are to be ascertained is regulated by Section 15, and which reads thus:

> "**15. Date for determination of rate of duty and tariff valuation of imported goods**.—(1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force,—
>
> (a) in the case of goods entered for home consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section;
>
> (b) in the case of goods cleared from a warehouse under Section 68, on the date on which a bill of entry for home consumption in respect of such goods is presented under that section;
>
> (c) in the case of any other goods, on the date of payment of duty:
>
> Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft or the vehicle by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.
>
> (2) The provisions of this section shall not apply to baggage and goods imported by post."

87. Chapter VII of the Act pertains to clearance of imported and exported goods and for the purposes of considering the issues which stand raised, we deem it apposite to extract Sections 47 and 48 hereunder:

> "**47. Clearance of goods for home consumption**.— (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.

(2) The importer shall pay the import duty—

(a) on the date of presentation of the bill of entry in the case of self-assessment; or

(b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or

(c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf,

and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent but not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette.

Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Provided further that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section :

Provided also that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section."

"**48. Procedure in case of goods not cleared, warehoused, or transhipped within thirty days after unloading**.—If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within thirty days from the date of the unloading thereof at a customs station or

within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer, be sold by the person having the custody thereof:

Provided that—

(a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;

(b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

Explanation.—In this section, "arms" and "ammunition" have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959)."

88. The subject of warehousing is regulated by Chapter IX of the Act and the principal provisions with which we are concerned are Sections 61 and 65. Section 61 stipulates the period for which the "*warehoused goods*" may be deposited in a bonded warehouse. We in this respect also deem it apposite to take note of certain significant amendments which were made to that provision vide Act 28 of 2016 (with effect from 14 May 2016). A comparative table is set out hereinbelow:

Section 61 of the Act, as it existed prior to Act 28 of 2016	**Section 61 of the Act, as it exists post the enactment of Act 28 of 2016**
"**61. Period for which goods may remain warehoused**.—(1) Any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed,— (a) in the case of capital goods intended for use in any hundred per cent export-oriented undertaking, **till the expiry of five years**; (aa) in the case of goods other than capital goods intended for use in any hundred per cent. export-oriented	"**61. Period for which goods may remain warehoused**.—(1) Any warehoused goods may remain in the warehouse in which they are deposited or in any warehouse to which they may be removed,— (a) in the case of capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any

undertaking, **till the expiry of three years**; and (b) in the case of any other goods, **till the expiry of one year**, after the date on which the proper officer has made an order under Section 60 permitting the deposit of the goods in a warehouse: Provided that,— (i) in the case of any goods which are not likely to deteriorate, the period specified in clause (a) or clause (aa) or clause (b), may, on sufficient cause being shown, be extended— (A) in the case of such goods intended for use in any hundred per cent export-oriented undertaking, by the Principal Commissioner of Customs or Commissioner of Customs, for such period as he may deem fit; and (B) in any other case, by the Principal Commissioner of Customs or Commissioner of Customs, for a period not exceeding six months and by the Chief Commissioner of Customs for such further period as may be deem fit; (ii) in the case of any goods referred to in clause (b), if they are likely to deteriorate, the aforesaid period of one year may be reduced by the Commissioner of Customs to such shorter period as he may deem fit: Provided further that when the licence for any private warehouse is cancelled, the owner of any goods warehoused therein shall, within seven days from the date on which notice of such cancellation is given or within such extended period as the proper officer may allow, remove the goods from such warehouse to another	warehouse wherein manufacture or other operations have been permitted under Section 65, **till their clearance from the warehouse**; (b) in the case of goods other than capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under Section 65, **till their consumption or clearance from the warehouse**; and (c) **in the case of any other goods, till the expiry of one year** from the date on which the proper officer has made an order under sub-section (1) of Section 60: Provided that in the case of any goods referred to in this clause, the Principal Commissioner of Customs or Commissioner of Customs may, on sufficient cause being shown, extend the period for which the goods may remain in the warehouse, by not more than one year at a time: Provided further that where such goods are likely to deteriorate, the period referred to in the first proviso may be reduced by the Principal Commissioner of Customs or Commissioner of Customs to such shorter period as he may

warehouse or clear them for home consumption or exportation. Where any warehouse goods— (i) specified in sub-clause (a) or sub-clause (aa) of sub-section (1), remain in a warehouse beyond the period specified in that sub-section by reason of extension of the aforesaid period or otherwise, interest at such rate as is specified in Section 47 shall be payable, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of Section 15 on the warehouse goods, for the period from the expiry of the said warehousing period till the date of payment of duty on the warehoused goods; (ii) specified in sub-clause (b) of sub-section (1), remain in a warehouse beyond a period of ninety days interest shall be payable at such rate or rates not exceeding the rate specified in Section 47, as may be fixed by the Board, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of Section 15 on the warehoused goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods. Provided that the Board may, if it considers it necessary so to do in the public interest, by order and under circumstances of an exceptional nature, to be specified in such order, waive the whole or part of any interest payable under this section in respect of any warehoused goods: Provided further that the Board may, if it is satisfied that it is necessary so to do in the public interest, by	deem fit. (2) Where any warehoused goods specified in clause (c) of sub-section (1) remain in a warehouse beyond a period of ninety days from the date on which the proper officer has made an order under sub-section (1) of Section 60, interest shall be payable at such rate as may be fixed by the Central Government under Section 47, on the amount of duty payable at the time of clearance of the goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods: Provided that if the Board considers it necessary so to do, in the public interest, it may,— (a) by order, and under the circumstances of an exceptional nature, to be specified in such order, waive the whole or any part of the interest payable under this section in respect of any warehoused goods; (b) by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section; (c) by notification in the Official Gazette, specify the class of goods in respect of which the interest shall be chargeable from the date on which the proper officer has made an order under sub-section (1) of Section 60.

notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section. Explanation.—For the purposes of this section, "hundred per cent export-oriented undertaking" has the same meaning as in Explanation 2 to sub-section (1) of Section 3 of the Central Excises and Salt Act, 1944."	Explanation.—For the purposes of this section,— (i) "electronic hardware technology park unit" means a unit established under the Electronic Hardware Technology Park Scheme notified by the Government of India; (ii) "hundred per cent export oriented undertaking" has the same meaning as in clause (ii) of Explanation 2 to sub-section (1) of Section 3 of the Central Excise Act, 1944 (1 of 1944); and (iii) "software technology park unit" means a unit established under the Software Technology Park Scheme notified by the Government of India."

89. Section 65 of the Act and which deals with "*manufacturing and other operations*" with respect to goods housed in a warehouse is extracted hereinbelow:

> "**65. Manufacture and other operations in relation to goods in a warehouse**.—(1) With the permission of the Principal Commissioner of Customs or Commissioner of Customs and [subject to the provisions of Section 65-A and] such conditions] as may be prescribed, the owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods.
>
> (2) Where in the course of any operations permissible in relation to any warehoused goods under sub-section (1), there is any waste or refuse, the following provisions shall apply—
>
> (a) if the whole or any part of the goods resulting from such operations are exported, import duty shall be remitted on the

quantity of the warehoused goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods exported:

Provided that such waste or refuse is either destroyed or duty is paid on such waste or refuse as if it had been imported into India in that form;

(b) if the whole or any part of the goods resulting from such operations are cleared from the warehouse for home consumption, import duty shall be charged on the quantity of the warehoused goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods cleared for home consumption."

90. Of equal significance is Section 68 of the Act and which stands constructed in the following terms:

"**68. Clearance of warehoused goods for home consumption**.— Any warehoused goods may be cleared from the warehouse for home consumption, if—

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty, interest, fine and penalties payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer:

Provided that the order referred to in clause (c) may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon :

Provided also that the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force."

91. The MOOWR Regulations framed in terms of the powers conferred by Sections 157, 143AA read along with Section 65 came to

be promulgated on 01 October 2019. The scope of those Regulations and its application is defined by Regulation 3 which reads thus:

> **"3. Application.—**These regulations shall apply to—
>
> (*i*) the units that operate under Section 65 of the Act, or
>
> (*ii*) the units applying for permission to operate under Section 65 of the Act,"

92. The eligibility criteria is prescribed by Regulation 4 and which reads as follows:

> **"4. Eligibility for application for operating under these regulations.** - (1) The following persons shall be eligible to apply for operating under these regulations, -
>
> (i) a person who has been granted a licence for a warehouse under section 58 of the Act, in accordance with Private Warehouse Licensing Regulations, 2016.
>
> (ii) a person who applies for a licence for a warehouse under section 58 of the Act, along with permission for undertaking manufacturing or other operations in the warehouse under section 65 of the Act.
>
> (2) An application for operating under these regulations shall be made to the Principal Commissioner of Customs or the Commissioner of Customs, as the case may be, along with an undertaking to, -
>
> (i) maintain accounts of receipt and removal of goods in digital form in such format as may be specified and furnish the same to the bond officer on monthly basis digitally;
>
> (ii) execute a bond in such format as may be specified; and
>
> (iii) inform the input-output norms wherever considered necessary for raw materials and the final products and to inform the revised input-output norms in case of change therein."

93. After verification of an application for permission, the Principal Commissioner of Customs or the Commissioner of Customs, as the case may be, may accord permission in terms of the powers conferred by Regulation 5 of the MOOWR Regulations and which provision is extracted hereinbelow:

> **"5. Grant of permission. -** Upon due verification of the application made as per regulation 4, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, shall grant permission to operate under the provisions of these regulations."

94. The permission granted in terms of the MOOWR Regulations is to remain valid, unless it be cancelled or surrendered or the corresponding license issued under Section 58 be cancelled or surrendered in terms of the provisions of the Act or the rules and regulations framed thereunder. Rule 6 of the MOOWR Regulations which deals with the validity of permission is set out hereinunder:

> "**6. Validity of permission**.- Any permission granted under regulation 5 shall remain valid unless it is cancelled or surrendered, or the license issued under section 58 is cancelled or surrendered, in terms of the provisions of the Act or the rules and regulations made thereunder."

95. Regulation 10 of the MOOWR Regulations spells out the procedure to be followed once goods are received from the custom station and reads thus:

> **"10. Receipt of goods from customs station. -** (1) Upon receipt of goods at a warehouse from a customs station, the licensee shall, -
>
> (i) verify the one-time-lock affixed by the proper officer at the customs station on the load compartment of the means of transport carrying the goods to the warehouse;
>
> (ii) inform the bond officer immediately if the one-time-lock is not found intact, and refuse the unloading of the goods;
>
> (iii) allow unloading, provided the one-time-lock is found intact and verify the quantity of goods received by reconciling with the bill of entry for warehousing;
>
> (iv) report any discrepancy in the quantity of the goods within twenty-four hours to the bond officer;
>
> (v) endorse the bill of entry for warehousing with the quantity of goods received and retain a copy thereof;

(vi) acknowledge the receipt of the goods by endorsing the transportation document presented by the carrier of the goods and retain a copy thereof; and

(vii) take into record the goods received.

(2) Upon taking into record the goods received in the warehouse, the licensee shall cause to be delivered an acknowledgement to the proper officer referred to in sub-section (1) of section 60 and to the bond officer regarding the receipt of the goods in the warehouse."

96. The MOOWR Regulations also contemplate movement of goods between two warehouses and which aspect is regulated by Regulation 11:

"11. Receipt of goods from another warehouse. - Upon receipt of goods from another warehouse, the licensee shall, -

(i) verify the one-time-lock affixed on the load compartment of the means of transport carrying the goods to the warehouse;

(ii) inform the bond officer immediately if the one-time-lock is not found intact and refuse the unloading of the goods;

(iii) allow unloading, provided the one-time-lock is found intact and verify the quantity of goods received by reconciling with, -

(a) in case of goods received from a unit operating under section 65, the Form appended to these regulations;

(b) in case of goods received from a warehouse not operating under section 65, the Form as prescribed under the Warehoused Goods (Removal) Regulations, 2016;

(iv) report any discrepancy in the quantity of the goods within twenty-four hours to the bond officer;

(v) endorse the Form for transfer of goods from a warehouse with quantity received and retain a copy thereof;

(vi) *acknowledge* the receipt of the goods by endorsing the transportation document presented by the carrier of the goods and retain a copy thereof;

(vii) take into record the goods received; and

(viii) cause to be delivered, copies of the retained documents to the bond officer and to the warehouse keeper of the warehouse from where the goods have been received."

97. Similar provisions stand enshrined in Regulation 13, which deals with the transfer of goods from a warehouse:

> **"13. Transfer of goods from a warehouse.** - (1) A licensee shall allow transfer of warehoused goods to another warehouse or to a customs station for export, with due intimation to the bond officer on the Form for transfer of goods from a warehouse.
>
> (2) Upon intimation to the bond officer as sub-regulation (1), the licensee shall, -
>
> (i) allow removal of the goods and their loading onto the means of transport;
>
> (ii) affix a one-time-lock to the means of transport;
>
> (iii) endorse the number of the one-time-lock on the Form and retain a copy thereof;
>
> (iv) endorse the number of the one-time-lock on the transport document and retain a copy thereof;
>
> (v) take into record the removal of the goods; and
>
> (vi) cause to be delivered, copies of the retained documents to the bond officer."

98. Regulations 14 and 15 of the MOOWR Regulations are concerned with the subject of removal of "*resultant goods*" either for home consumption or for export and are framed as follows:

> **"14. Removal of resultant goods for home consumption.** - (1) A licensee may remove the resultant goods from warehouse for home consumption:
>
> **Provided** that a bill of entry for home consumption has been filed in respect of the warehoused goods contained in so much of the resultant goods and the import duty, interest, fine and penalties payable, if any, in respect of such goods have been paid.
>
> (2) The licensee shall retain a copy of the bill of entry filed and take into record the goods removed."

> **"15. Removal of resultant goods for export.** - (1) A licensee shall remove the resultant goods from the warehouse for export, upon, -
>
> (i) filing a shipping bill or a bill of export, as the case may be; and
>
> (ii) affixing a one-time-lock to the load compartment of the means of transport in which such goods are removed from the warehouse.
>
> (2) The licensee shall take into record the goods removed."

99. Since the power of the Board to exempt a certain class of goods had also been alluded to by respective counsels in the course of their oral submissions, the same is reproduced hereinbelow:

> **"20. Power to exempt.** - The Board, having regard to the nature of the goods, their manner of transport or storage, may exempt a class of goods from any of the provisions of these regulations."

H. RELATED DEVELOPMENTS

100. The scope and ambit of the aforesaid Regulations was also explained by the respondent themselves in terms of its 01 October 2019 Circular. We deem it apposite to extract paragraphs 4, 5, 7, 8, 9, 11, 13, 14 & 15.1 of the aforesaid Circular hereunder:

> "**4.** It is to be noted that an applicant desirous of manufacturing or carrying out other operations in a bonded warehouse under section 65 read with MOOWR, 2019 must also have the premises licensed as a private bonded warehouse under section 58 of the Customs Act. The applicants can seek a license under section 58 and permission to operate under section 65 synchronously, or request for permission under section 65, if they already have a warehouse licensed under section 58.
>
> **5.** For the sake of uniformity, ease of doing business and exercising due diligence in grant of permission under section 65, the form of application to be filed by an applicant before the jurisdictional Principal Commissioner/ Commissioner of Customs is prescribed as in **Annexure A**. The form of application has been so designed that the process for seeking grant of license as a private bonded warehouse as well as permission to carry out

manufacturing or other operations stands integrated into a single form. The declaration to be made to satisfy regulation 5 of Private Warehouse Licensing regulations 2016 and the undertaking to be made by the applicant as per regulation 4 of MOOWR 2019 is included in the application format (Part II). The warehouse in which section 65 permission is granted shall also be declared by the Licensee as the principal/additional place of business for the purposes of GST.

xxxx xxxx xxxx

7. To the extent that the resultant product manufactured or worked upon in a bonded warehouse is exported, the licensee shall have to file a shipping bill and pay any amounts due. A GST invoice shall also be issued for such removal. In such a case, no duty is required to be paid in respect of the imported goods contained in the resultant product as per the provisions of section 69 of the Act.

8. To the extent that the resultant product (whether emerging out of manufacturing or other operations in the warehouse) is cleared for domestic consumption, such a transaction squarely falls within the ambit of "supply" under Section 7 of the Central Goods and Service Tax Act,2017 (hereinafter referred to as the, "CGST Act"). It would therefore be taxable in terms of section 9 of the CGST Act, 2017 or section 5 of the Integrated Goods and Services Tax Act, 2017 depending upon the supply being intra-state or inter-state. The resultant product will thus be supplied from the warehouse to the domestic tariff area under the cover of GST invoice on the payment of appropriate GST and compensation cess, if any. As regards import duties payable on the imported goods contained in so much of the resultant products are concerned, same shall be paid at the time of supply of the resultant product from the warehouse for which the licensee shall have to file an ex-bond Bill of entry and such transactions shall be duly reflected in the accounts prescribed under Annexure B. As per MOOWR, 2019, the applicant shall also inform the input-output norms, wherever considered necessary, for raw materials and final products and shall also inform the revised input-output norms in case of change therein.

9. The waste generated during the course of manufacture of the resultant product may be cleared for home consumption as per clause (b) to sub-section (2) of section 65 of the Customs Act on payment of applicable duties of customs and GST.

xxxx xxxx xxxx

11. It may be noted that units operating under section 65 read with section 58 of the Customs Act, are entitled to import capital goods, machinery, inputs etc. by following the provisions under Chapter IX. In so far as domestic procurement is concerned, applicable rates of taxes shall be payable and exemptions, if any, can also be availed. By virtue of simply being a unit operating under section 65, they shall not be entitled to procure goods domestically, without payment of taxes. The records in respect of such domestically procured goods shall be indicated in the form for accounts (Annexure B).

xxxx xxxx xxxx

13. As per Regulation 3(2)(e)(i) of the Private Warehouse Licensing Regulations, 2016, the Principal Commissioner or Commissioner has to be satisfied that the site or building of the proposed private warehouse is suitable for secure storage of dutiable goods. Regulation 8 of MOOWR 2019 requires the licensee to provide such facilities, equipment and personnel as are sufficient to control access to the warehouse, provide secure storage of the goods and ensure compliance to the regulations. Thus, the regulations do not mandate that a structure fully closed from all sides is a pre-requisite for grant of license. What is important is that the site or building is suitable for secure storage of goods and discharge of compliances, such as proper boundary walls, gate(s) with access control and personnel to safeguard the premises. Moreover, depending on the nature of goods used, the operations conducted and the industry, some units may operate without fully closed structures. Therefore, Principal Commissioner/Commissioners should take into consideration the facilities, equipment and personnel put in place for secure storage of goods, while considering grant of license.

14. The issue of procurement of imported goods that are exempt from duty or are chargeable to nil rate of duty into a warehouse operating under section 65 has also been raised. The objective of section 65 is to enable manufacture and other operations in customs bonded warehouses. For this purpose, the units should be able to procure required raw materials, consumables, capital goods etc., imported or procured from domestic market. The goods may include dutiable goods, exempt goods or those chargeable to nil rate of duty. Denial of the facility to exempt goods or those chargeable to nil rate of duty, which may be required for manufacturing, would defeat the objective of Section 65. It is therefore clarified that imported goods, that are exempt from duty or are chargeable to nil rate of duty, may be brought into the warehouse, upon filing a bill of entry for home consumption and clearance, at the customs station of import. Such

goods shall not be considered as warehoused goods in terms of section 60 of the Act.

xxxx xxxx xxxx

15.1 Given the continuous nature of operations in warehouses under section 65, and the potential need to clear resultant goods expeditiously, the requirement to obtain prior permission of the proper officer for each clearance could pose a challenge to making clearances on time to meet delivery schedules. Therefore to facilitate such timely clearances and for convenience of the trade, recourse has been taken to the powers vested under Section 143 AA, and it is provided under regulation 13, 14 and 15 of MOOWR 2019 that while a licensee shall file the due documentation (such as the Form for transfer of goods from a warehouse, bill of entry and shipping bill, respectively) and pay the duties due, prior permission of the proper officer is not an essential condition for removal of the warehoused goods (as part of the resultant goods). The licensees who wish to avail self-sealing facility for exports can avail the facility made available under circular 26/2017 customs dated 01.07.2017 and its linked circulars."

101. Para 16 of the aforesaid Circular also directed desirous applicants to the "Invest India" portal in order to fully appreciate the initiative which had been launched by the Board along with the Department for Promotion of Industry and Internal Trade falling within the Ministry of Commerce and Industry in the Union Government. We also deem it appropriate to notice some of the details which were liable to be disclosed by an applicant desirous of obtaining permission in terms of Sections 58 and 65 and which stands embodied in the application format. Serial No. 9 of Part -II of the application format (Annexure-A to the 01 October 2019 Circular) requires an applicant to provide the following details:

"**9.** Goods proposed to be manufactured or other operations proposed to be carried out (if necessary, additional sheets may be attached).

Details of	**Description**	**Classification as**	**Briefly detail,**

goods:	**of goods**	**per Customs Tariff**	**input- out norms (if applicable) Please attach any supporting publication /document, if available.**
proposed to be imported			
proposed to be domestically procured			
intermediate product			
final product			
details of waste & scrap			

In case of any change in the nature of operations subsequent to the grant of permission, the same shall be informed to the Jurisdictional Commissioner of Customs within 15 days."

102. In compliance with the aforesaid requirement, the petitioner in W.P.(C) 10537/2022 – ACME Heergarh Powertech Private Limited had while moving its application made the following declarations:

"DESCRIPTION OF GOODS PROPOSED TO BE MANUFACTURED OR OTHER OPERATIONS PROPOSED TO BE CARRIED OUT

FINAL PRODUCT	
Description of finished goods out o manufacturing or other operations undertaken	**Classification as Customs Tariff**
Electrical energy	2716
GOODS PROPOSED TO BE IMPORTED	
Description of goods	**Classification as Customs Tariff**
Capital goods required for setting up the facility	Likely to be imported under Chapter 85

GOODS PROPOSED TO BE DOMESTICALLY PROCURED	
Description of goods	**HSN Classification**
Capital goods required for setting up the facility	Likely to be procured under Chapter 32, 38, 72, 85, 90, 94 etc.
BRIEF DESCRIPTION OF THE PROPOSED FACILITY	
The company is going to set up solar power plant with the generation capacity of around 300 MV. For this purpose, the Company shall import and procure capital goods such as solar panels, PV modules, inverters etc. required for setting up the facility."	

103. As is evident from the communication dated 27 July 2022 addressed by MNRE to the Department of Revenue, the issue with respect to eligibility of solar generation appears to have fallen for the consideration of that Ministry consequent to various representations received from domestic industry and upon a review of the scheme undertaken by it. Annexure -I to that communication and which would have some bearing on the manner in which the respondents construed the scope and ambit of Section 65 and the MOOWR Regulations is extracted hereunder:

"**Annexure-I**

Sub: 'Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019' (MOOWR Scheme): Applicability to Solar PV Power Projects

I. **Framework of MOOWR, 2019**

1. 'Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019' (MOOWR). MOOWR, 2019 is based upon Section 65 of the Customs Act, 1962, which enables conduct of manufacture and other operations in a 'Customs Bonded Warehouse'. Under this program a unit can import goods (both inputs and capital goods) under customs duty deferment with no interest liability. There is no investment threshold or export obligation. The duties are fully remitted if the goods resulting from such operations are exported. Import duty is payable only if

the resulting goods or imported goods are cleared in the domestic market (ex-bonding).

2. A person who has been granted a license for a warehouse under Section 58 of the Customs Act, in accordance with Private Warehouse Licensing Regulations, 2016, can apply for manufacture and other operations in a bonded warehouse. A person can also make a combined application for license for a warehouse under Section 58, along with permission for undertaking manufacturing or other operations in the warehouse under Section 65 of the Act.

3. The benefits under the scheme can be claimed by a unit, by declaring any secure identifiable area with access control/ security arrangements as a 'Customs Bonded Warehouse' and obtaining a License for the same from the office of Principal Commissioner / Commissioner of Customs.

II. Solar Projects obtaining Warehouse License and availing benefits under MOOWR,2019

4. It has come to the notice of Ministry of New & Renewable Energy (MNRE) that solar PV power project developers are obtaining warehouse licenses under the said MOOWR 2019.

5. Solar PV power projects / solar parks are developed for generation of renewable energy (electricity). While such projects/ parks are identifiable and have secure boundaries with entry- exit checks and other criteria, thus technically satisfying the definition of a 'customs bonded warehouse', it is to be noted that these solar power projects use duty deferred solar equipment to generate electricity, which is ultimately sold in the Domestic Tariff Area (DTA). Thus, the regulation is being used for avoidance of duty incidence on imported solar equipment thus lowering the cost of setting up the solar power plant.

6. For solar PV power project developers, solar equipment required for generation of electricity, when imported to a solar PV power project having the license of 'Customs Bonded Warehouse' under MOOWR, will qualify as capital goods, for which BCD and IGST will be deferred till the time such goods remain within the Customs Bonded Warehouse. Solar Modules will remain within the Solar Power Project (Customs Bonded Warehouse) for their useful life of 25 years and generate electricity which will be supplied to DTA. Under the MOOWR scheme, no customs duty is payable on the domestic clearance of 'resultant product' per se. Duty is payable only w.r.t. 'raw materials physically contained in resultant product', which is NIL in the case of electricity. Further,

there shall not be any liability of GST on domestic supply of 'electricity', because it is exempted from GST.

III. Implementation of Basic Customs Duty (BCD) Solar Projects obtaining Warehouse License and availing benefits under MOOWR, 2019

7. It is pertinent that Basic Customs Duty of 40% on import of solar PV modules (HSN code 85414300) and BCD of 25% on import of solar PV cells (HSN Code 85414200), has been implemented with effect from 01.04.2022 to provide a level playing field to and encourage nascent domestic solar PV manufacturing industry. If a solar power project developer, receives the benefit of MOOWR, while importing solar equipment for generation of electricity, will not be required to pay either customs duty or GST. On the contrary, a module manufactured in India, will reach solar power project developers, with incidence of GST as well as duties of customs on imported components, and thus might not be preferred by solar power project developers.

8. Solar PV power project developers claiming benefits of MOOWR, 2019 is also against the spirit of MOOWR, 2019 which is intended to promote Make in India.

IV. Recommendation:

9. In view of the above, MNRE hereby requests Department of Revenue, Ministry of Finance, to examine the matter and take urgent appropriate steps by way of issuance of circular/ notification/ amendment, as may be required, to explicitly clarify that, solar PV power generation projects which supply electricity generated by them in DTA, would not be eligible for benefits under 'Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019' (MOOWR Scheme)."

104. The respondents had also alluded to certain representations made by industry associations like the Indian Solar Manufacturers' Association and which had in turn alluded to the imbalance being created as a consequence of the MOOWR Regulations being availed of by entities engaged in generation of solar power with the aid of imported capital goods. The aforesaid representation appears to have preceded the issuance of the impugned Instruction. The learned ASG in

this respect had also drawn our attention to the amendments introduced in the Project Import Regulations, 1986 and as a consequence of which from 20 October 2022, solar power projects and power plants came to be excluded from the purview of the said Regulations. Reference in this respect was also made to the Union Budget introduced for 2023-24 and in terms of which CTH 9801 also came to be amended, so as to exclude solar power plants and solar power projects from the purview of Project Imports. We were also referred to yet another amendment introduced in the Project Import Regulations, 1986, whereby the omnibus entry "*Any other Plant and Project*" was amended to exclude solar power plants and solar power projects and the amended omnibus entry reads as "*Any other Plant and Project, other than solar power plant or solar power project*".

105. All of this, according to the learned ASG, was indicative of the policy decision taken by the Union Government to incentivize domestic manufacturing of solar cells and modules and to thus give impetus to domestic industry engaged in the manufacture of solar cells and modules. The incentives extended under the PLI scheme was explained to be an extension of the aforesaid decision. However, and before we proceed to consider the merits of the submissions addressed from a policy perspective, it would be necessary to firstly examine the validity of the impugned Instruction based purely on a consideration of the statutory position as it prevails.

I. THE VALIDITY OF THE IMPUGNED INSTRUCTION

106. The impugned Instruction is stated to have been issued in exercise of the powers conferred upon the Board in terms of Section

151A of the Act. Although extracted in an earlier part of the judgment, we deem it apposite for purposes of continuity and coherence to notice that provision again:

> "**151-A. Instructions to officers of customs**.—The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon or for the implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or procedure for import or export of goods, issue such orders, Instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, Instructions and directions of the Board:
>
> Provided that no such order, Instructions or directions shall be issued—
>
> (a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or
>
> (b) so as to interfere with the discretion of the Principal Commissioner of Customs or Commissioner of Customs (Appeals) in the exercise of his appellate functions."

107. As was noticed hereinabove, the said provision enables the Board to issue appropriate instructions or clarifications where it is found to be necessary and expedient to deal with the subject of classification of goods or any other measure pertaining to implementation of the provisions of the Act, and which clarifications, directions or Instructions may be considered necessary by the Board to obtain uniformity. However, the Proviso in unambiguous terms proscribes the issuance of orders, instructions or directions, which may require an officer of Customs to "*make a particular assessment or to dispose of a particular case in a particular manner*". The Board also stands restrained from framing instructions, orders or directions which may

interfere with the discretion vested with the Principal Commissioner of Customs or Commissioner of Customs (Appeals) in exercise of its appellate functions.

108. As we read Section 151A of the Act, it is manifest that it stands confined to broad policy directives concerning the working of the Act and which alone could form the subject matter of the exercise of power. Para 2 of the impugned Instruction embodies the opinion of the Board that since electricity may also be cleared for home consumption in the course of a manufacturing process undertaken in the warehouse, it would be incapable to comply with the affixation of the one-time-lock provision contained in the MOOWR Regulations. The Board appears to have understood the scope of the MOOWR Regulations as invariably requiring the affixation of a one-time-lock at the stage when the "*resultant goods*" are being removed from the warehouse. The stand appears to be that since electricity cannot possibly be housed in a load compartment or be contained with the affixation of a one-time-lock, it would fall outside the scope of the MOOWR Regulations. The Board also refers to the provisions contained in Regulation 20 of the MOOWR Regulations to state that since electricity as a category of goods had not been exempted from the operation of those Regulations, the same should be viewed as being indicative of solar power generating units not being envisaged under Section 65 of the Act or the MOOWR Regulations.

109. While we would have been inclined to countenance a broad policy directive with respect to the subject of solar generation under Section 65 being framed by the Board, we find ourselves unable to sustain the peremptory directions which stand embodied in paragraph 5

of the impugned Instruction. As was noticed hereinabove, in para 5, the Board takes an unabashed stand that all permissions granted with respect to solar power generating units under Section 65 or the MOOWR Regulations are liable to be viewed as being contrary to law. It proceeds further to direct the proper authorities of Customs to undertake an immediate review of all permissions granted to solar power generating units and to take necessary follow-up action.

110. In our considered opinion, the framing of those directions clearly impinges upon the discretion which otherwise stood placed in the hands of licensing authorities to independently consider whether licenses or permissions granted earlier were liable to be either suspended or cancelled. It becomes pertinent to note that the power to cancel a license stands conferred upon the proper officer of Customs by virtue of Section 58B of the Act and which reads thus:

> "**58-B. Cancellation of licence**.—(1) Where a licensee contravenes any of the provisions of this Act or the rules or regulations made thereunder or breaches any of the conditions of the licence, the Principal Commissioner of Customs or Commissioner of Customs may cancel the licence granted under Section 57 or Section 58 or Section 58-A:
>
> Provided that before any licence is cancelled, the licensee shall be given a reasonable opportunity of being heard.
>
> (2) The Principal Commissioner of Customs or Commissioner of Customs may, without prejudice to any other action that may be taken against the licensee and the goods under this Act or any other law for the time being in force, suspend operation of the warehouse during the pendency of an enquiry under sub-section (1).
>
> (3) Where the operation of a warehouse is suspended under sub-section (2), no goods shall be deposited in such warehouse during the period of suspension:
>
> Provided that the provisions of this Chapter shall continue to apply to the goods already deposited in the warehouse.

> (4) Where the licence issued under Section 57 or Section 58 or Section 58-A is cancelled, the goods warehoused shall, within seven days from the date on which order of such cancellation is served on the licensee or within such extended period as the proper officer may allow, be removed from such warehouse to another warehouse or be cleared for home consumption or export:
>
> Provided that the provisions of this Chapter shall continue to apply to the goods already deposited in the warehouse till they are removed to another warehouse or cleared for home consumption or for export, during such period."

111. Significantly, the power to cancel a license duly granted would be liable to be exercised where it is found that the licensee has either contravened any of the provisions of the Act, the rules or the regulations made thereunder, or where it is found to have breached any of the conditions of the license. The respondents cannot possibly argue that the petitioners had either contravened any provision of the Act or had acted contrary to any of the conditions as imposed or contained in the license. In fact, it was not even argued that they had in fact contravened the conditions of the license which stood granted. We therefore seriously doubt whether the licenses were liable to be cancelled in purported exercise of the Section 58B power.

112. It is pertinent to note that this was not a case where the petitioners had either failed to disclose or concealed the purpose for which the capital goods were being imported or their intended purpose and utility. As is evident from the extracts of the application which was moved, the petitioners had in no uncertain terms declared that the resulting goods of the manufacturing or other operations which were proposed to be undertaken would be electrical energy and that the imported capital goods were required to set up a power plant with generation capacities as disclosed therein.

113. The impugned Instruction, as would be manifest from a plain reading thereof, appears to place the licensing authorities under a clear mandate to proceed on the basis that generation of electricity as a subject *per se* falls outside the ambit of the MOOWR Regulations. The Instruction proceeds further to hold that all licenses granted as well as applications which may be made thereafter would be guided by the view expressed by the Board. This clearly appears thus to travel far beyond the advisory and clarificatory function which stands placed in the Board by virtue of Section 151A of the Act.

114. We note that like Section 151A of the Act, similar provisions which run on *pari materia* terms stand embodied in the Central Excise Act, 1944 and other cognate statutes. The power to frame a direction or to issue a circular and which may extend to a broad and general interpretation of the provisions of a statute and the manner in which it is to be administered have been duly enunciated in various decisions. We, for the present purposes deem it apposite to firstly notice the decision handed down by a Division Bench of this Court in **The Bullion and Jewellers Association (Regd.) vs. UOI & Ors**[36] and which was concerned with the issuance of circulars referable to Section 151A of the Act. In terms of the circulars which formed the subject matter of that decision, the Board had framed directives that gold jewellery imported by members of the petitioner association from Indonesia should be denied the benefit of preferential custom duty and that provisional assessments in respect of the imported gold jewellery from Indonesia were required to be made in a particular manner. While

[36] 2016 SCC Online Del 2437

dealing with the question of whether such directions could have in fact been issued, the Court had held as follows: -

> "**49.** The Court next proceeds to examine if in issuing the Impugned Circular and subsequent Instructions the Respondents exceeded the scope of their authority under Section 151A of the Act. The proviso (a) to Section 151A of the Act does not permit the issuance of Instructions, orders, and directions which might require an Officer of Customs to make a particular assessment or to dispose of a particular case in a particular manner. This prohibition is not different from Section 119 of the Income TaxAct, 1961 and section 37B of the Central Excise Act, 1944. The legal position governing the above provisions of the Income-tax Act, 1961 as well as the Central Excise Act, 1944 as explained in Faridabad Iron and Steel Traders Association v. Union of India (2004) 178 ELT 1099 (Delhi) would apply to section 151A of the Act as well. The decision in Union of India v. Madras Steel Re-rollers Association (2012) 278 ELT 584 (SC) explains that the Central Board of Excise and Customs is empowered to issue circulars for the "guidance of quasi- judicial authorities". Also in Collector of Central Excise v. Dhiren Chemical Industries [2002] 254 ITR 554 (SC) ; [2002] 126 STC 122 (SC) it was explained that the Central Board of Excise and Customs could disseminate interpretative findings or procedures or such other Instructions to its officers for "ensuring equity and uniformity in assessment practices". However, on that pretext the power under section 151A cannot be used to whittle down the scope of an exemption. This has been explained in a large number of decisions which will be discussed hereafter.
>
> **50.** In Union of India v. Karvy Stock Broking Ltd. (2015) 39 STR 705 (SC) a circular was issued by the Central Board of Excise and Customs interpreting a notification issued by the Government exempting "business auxiliary services provided by a commission agent" from the levy of service tax under sub-section (2) of section 66 of the Finance Act, 1994. The said circular clarified that the commission received by distributors on mutual fund distribution would be liable to service tax as it would not fall within the expression "business auxiliary services". That circular was struck down on the ground that it "amounts to foreclosing discretion or judgment that may be exercised by the quasi-judicial authority while deciding a particular lis under particular circumstances". It was held to be contrary to section 37B of the Central Excise Act.

51. The decision in Union of India v. Inter Continental (India) (2008) 226 ELT 16 (SC) reiterates the settled legal position that by issuing a circular subsequent to an exemption notification, the Department cannot add conditions restricting the scope of the exemption. In Sandur Micro Circuits Ltd. v. CCE (2008) 11 RC 615 ; (2008) 229 ELT 641 (SC) the Supreme Court explained as under (page 616 of 11 RC) :

> "5. The issue relating to effectiveness of a circular contrary to a notification statutorily issued has been examined by this court in several cases. A circular cannot take away the effect of notifications statutorily issued. In fact in certain cases it has been held that the circular cannot whittle down the exemption notification and restrict the scope of the exemption notification or hit it down. In other words it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed. The principle is applicable to the instant cases also, though the controversy is of different nature."

52. In UCO Bank v. CIT [1999] 237 ITR 889 (SC), it was held that (page 899 of 237 ITR):

> "Such circulars, however, are not meant for contradicting or nullifying any provision of the statute. They are meant for ensuring proper administration of the statute, they are designed to mitigate the rigours of the application of a particular provision of the statute in certain situations by applying a beneficial interpretation to the provision in question so as to benefit the assessee and make the application of the fiscal provision, in the present case, in consonance with the concept of income and in particular, notional income as also the treatment of such notional income under accounting practice."

53. Recently in a decision dated February 1, 2016 in Writ Petition (Civil) No. 4665 of 2014 (Allen Diesel India P. Ltd. v. Union of India [2016] 37 GSTR166 (Delhi)) this court noted that section 151A of the Act is for a very limited purpose of issuing of Instructions to officers of customs for the purpose of "uniformity in the classification of goods or with respect to the levy of duty thereon". The above provision does not envisage any amendment being made to an exemption notification that may have been issued in exercise of powers under section 25(1) of the Act. This court, in the above decision, also referred to the decision in Modi Rubber Ltd. v. Union of India (1978) 2 ELT 127 (Delhi) wherein

it was held that Central Board of Excise and Customs cannot impose any condition for availing of exemption without amending the original exemption notification.

The impugned circulars are ultra vires Section 151A

54. Examined in light of the legal position explained in the above decisions, it is plain that the impugned circulars dated October 6, 2015 and January 20, 2016 do in fact whittle down the scope of the exemption available for import of gold jewellery from Indonesia, across the board, only because, according to the Department, the certificates of origin issued by the issuing authority in Indonesia could not be verified. The circular dated October 6, 2015 requires an Officer of the Customs who has issued a show-cause notice not to pass orders of provisional assessments. It requires the original certificates of origin along with "appealable orders" to be sent to the Central Board of Excise and Customs. Clearly the circular does not, as was sought to be explained by Mr. Dubey, merely elaborate the procedures. It interferes with the discretion to be exercised by the customs officer who is performing a quasi-judicial function. Paragraph 7.1 of the said circular requires the importers to present facts in support of the certificates of origin, which is not a requirement in the original exemption notification. There is considerable merit in the contention that this goes beyond the mandate of the Customs Tariff Origin Rules and constitutes an unreasonable and onerous condition as far as the importers are concerned.

55. As far as the circular dated January 20, 2016 is concerned, regulation 2(2) of the Customs (Provisional Duty Assessment) Regulations, 2011 provides for a maximum payment of only 20 per cent of duty differential in the case of a provisional assessment. The insistence on a bank guarantee for the entire differential duty appears to be contrary to regulation 2(2). The court is unable to accept the plea of Mr. Dubey that the above circular emerges from the regulation 4 and is intended to adequately secure the Revenue and ensure uniformity of provisional assessments across all ports. The said circular does not leave the issue of what conditions should be imposed for provisional assessment to the concerned customs officer. It requires the officer to demand 100 per cent. bank guarantee even in respect of those bills of entries which have been provisionally assessed under section 18 of the Act. It certainly is contrary to proviso (a) to section 151A inasmuch it dictates to the customs officer in what manner he should complete a provisional assessment. The consequent impugned letter dated January 22,

> 2016 came to be issued to M/s. J. B. Overseas only on the basis of the said circular."

115. As was succinctly explained in *Bullion and Jewellers Association*, the power under Section 151A is essentially concerned with ensuring uniformity in assessment practices and providing guidance to quasi-judicial authorities. However, and as the Court observed in *Bullion and Jewellers Association*, the scope and ambit of an exemption being claimed could not have been whittled down on the basis of an instruction issued by the Board. While coming to the aforesaid conclusion, the Court in *Bullion and Jewellers Association* had also noticed the decision rendered by the Supreme Court in **Union of India & Ors vs. Karvy Stock Broking Ltd.**[37] and which had significantly held that a circular which amounts to foreclosing or impinging upon the discretional judgment that may otherwise be exercised by a quasi-judicial authority would not sustain.

116. Yet another decision which proceeds on similar lines is that of *Faridabad Iron & Steel Traders Association*. The Court on that occasion had to deal with the validity of a direction issued by the Board pertaining to the cutting of iron and steel coils into sheets and slitting of iron coils and steel sheets into strips and whether the same would amount to "manufacture". An answer to the above would have had a direct bearing on classification under the excise tariff and the consequential power to levy duty as vested upon the Central Excise officials. While examining that challenge, the Court in *Faridabad Iron & Steel Traders Association* had observed as follows: -

> "**93.** In *Orient Paper Mills* v. *Union of India* reported as 1978 (2) E.L.T. (J345) (S.C.) : AIR 1969 SC 48 their Lordships of the

[37] 2015 SCC Online SC 1788

Supreme Court has laid down that *quasi judicial* authorities should not allow their judgment to be influenced by administrative considerations or by the Instructions or directions given by their superior. Therefore, Instructions issued by the Board are not binding upon the adjudicating authority.

94. The impugned Circular was issued by the executive and sent to all Chief Commissioners of Central Excise, all Director General of Central Excise, all Commissioners of Central Excise (Appeals) and all Commissioners of Central Excise. Some of these bodies discharge *quasi judicial* functions. It is the settled position of law that *quasi judicial* functions cannot be controlled by executive actions by issuing circulars. It is totally impermissible. According to the spirit of Section 37B circulars or directions can be issued in order to achieve the object of uniformity and to avoid discrimination. Such circulars bind the officers only when they act in their administrative capacity. It must be clearly understood that the Board's circulars Instructions or directions cannot in any manner interfere with *quasi judicial* powers of the Assessing Officers. Officials exercising *quasi judicial* powers must ignore any circular or direction interfering with their *quasi judicial* functions.

95. Whenever any authority is conferred with the power to determine certain questions in judicial and/or *quasi judicial* manner, the authority is required to exercise the power conferred upon him as per his own discretion. This is the essence of judicial and *quasi judicial* function. The authority exercising such powers cannot be influenced by any directions, Instructions or the Circulars that may be issued by any other agency. Consequently, the Circular issued by the respondents cannot be permitted to interfere with the discretion of the judicial and *quasi judicial* authorities.

96. The power to impose tax is essentially a legislative function and according to our constitutional scheme it cannot be delegated. The Excise Duty which the legislature intends to impose must be imposed directly in accordance with law. By issuing the impugned circular the respondent cannot introduce revenue legislation indirectly. The impugned circular also deserves to be quashed on this ground also.

97. Consequently, the impugned circular dated 7-9-2001 issued by the Ministry of Finance, Department of Revenue, Central Board of Excise & Customs is quashed and proceedings emanating from the said Circular also stand quashed. These writ petitions are

> accordingly allowed. In the facts and circumstances of the case, we direct the parties to bear their own costs."

117. *Faridabad Iron & Steel Traders Association* thus again lays emphasis on the Board clearly not having or being conceived to have the power to frame directions or issue a circular which may bind subordinate authorities in the discharge of their quasi-judicial functions or otherwise influence and dictate the exercise of their powers. The impugned Instruction clearly has the effect of deterring the licensing authorities from either independently examining or considering any contention that may be addressed or for that matter any stand that may be taken by the petitioners with respect to the generation of solar electricity under the MOOWR Regulations. Viewed in that light, it is manifest that the impugned Instruction would not sustain.

118. We find ourselves unable to uphold the validity of the impugned Instruction bearing in mind the well settled precepts of administrative law and which abhor abdication of an independent decision making power as well as a quasi-judicial authority being compelled to act under the dictates of a superior authority. **Wade and Forsyth** in their seminal work on **Administrative Law**[38] explain the legal position as follows: -

> "Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative

[38] Administrative Law, Wade, William, Forsyth, Christopher, 10th Edition, Paperback (2009)

arrangements which must seem quite natural and proper to those who make them."

The subject of abdication is more lucidly explained in **De Smith's Judicial Review**[39] in the following words: -

> **"Acting under dictation**
>
> An authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person….. Where a minister entertaining a planning appeal dismissed the appeal purely on the strength of policy objections entertained by another minister, it was held that his decision had to be quashed because he had, in effect, surrendered his discretion to another minister. Authorities directly entrusted with statutory discretions, be they executive officers or members of distinct tribunals, are usually entertained and are often obliged to take into considerations of public policy, and in some contexts the policy of a minister or of the Government as a whole may be a relevant factor in weighing those considerations; but this will not absolve them from their duty to exercise their personal judgment in individual cases, unless explicitly statutory provision has been made for them to be given binding instructions by a superior, or (possibly) unless the cumulative effect of the subject-matter and their hierarchical subordination (in the case of civil servants and local government officers) make it clear that it is constitutionally proper for them to receive and obey instructions conveyed in the proper manner and form."

119. The aspect of abdication of discretion was succinctly explained by the Supreme Court in *Anirudhsinghji Karansinhji Jadeja* in the following terms: -

> "**11**. The case against the appellants originally was registered on 19-3-1995 under the Arms Act. The DSP did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. Why? Was it because he was reluctant to exercise jurisdiction vested in him by the provision of

[39] De Smith's Judicial Review, Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, Catherine Donnelly, Ivan Hare, Sweet & Maxwell, 7th edition (2013)

> Section 20-A(1)? This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20-A(1) was not exercised by the DSP at all.
>
> **12**. Reference may be made in this connection to *Commr. of Police* v. *Gordhandas Bhanji* [1951 SCC 1088 : 1952 SCR 135 : AIR 1952 SC 16] , in which the action of Commissioner of Police in cancelling the permission granted to the respondent for construction of cinema in Greater Bombay at the behest of the State Government was not upheld, as the rules concerned had conferred this power on the Commissioner, because of which it was stated that the Commissioner was bound to bear his own independent and unfettered judgment and decide the matter for himself, instead of forwarding an order which another authority had purported to pass."

120. Undisputedly, the power to consider whether a license is liable to be cancelled under Section 58B of the Act would place the licensing authority under the obligation to examine whether a licensee had either acted in violation of the Act or contravened a statutory provision or command. In light of the impugned Instruction, the petitioners now face the inevitable specter of the license being cancelled consequent to the peremptory directions as contained in the communication of the Board. Since the directive of the Board binds the licensing authorities, the exercise of calling upon the petitioners to show cause is essentially rendered otiose and a mere formality. This, more so when the Board has already come to the definitive conclusion that solar power generation is an activity which would fall outside the ambit of Section 65 of the Act as well as the MOOWR Regulations. The Instruction thus clearly amounts to a dictate binding the licensing authority to cancel all subsisting licenses and thus falling foul of the principles noticed above.

121. Regard must also be had to the fact that the petitioner had clearly declared that they would be importing and procuring capital goods, such as solar panels PV modules, inverters etc., for setting up a solar power generation facility. It was the respondents who on due consideration of that application had proceeded to grant permissions and licenses. This was therefore clearly not a case where the petitioners had either concealed or misrepresented facts. It was therefore clearly impermissible for the Board by way of the impugned Instruction to have trampled over the power of cancellation as independently placed in the hands of the proper officer of Customs by virtue of Section 58B of the Act. The fact that the proper officer of Customs clearly perceived and understood the intent of the impugned Instruction to be the initiation of proceedings for cancellation of the license is evident from the following extracts of one of the impugned SCNs':

> "Sub: -Cancellation of License issued under the MOOWR Scheme, 2019 C/r
>
> Sirs,
>
> Please refer to the Instruction No. 13/2022-Custom dated 09.07.2022 issued by the Central Board of Indirect Taxes & Customs under F.No. 473/03/2022-LC, GOI, MOF, Department of Revenue, New Delhi on the above subject.
>
> The following MOOWR licenses were issued to you under Manufacture and Other Operations in Warehouse (no.2) Regulations, 2019 (MOOWR Scheme-2019) under section 65 read with Section 58 of the Customs Act, 1962.

S. No.	File No.	License No.	Place of MOOWR License
1	CUS/LIC/MISC/183/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	08/PBW/ACME Heergarh Plot-1/ Customs Jaipur/2021 dated 26.10.2021	Total Area 393.39 Acres at Village Badisid, Tehsil- Bap, Dist- Jodhpur (Raj.)
2	CUS/LIC/MISC/184/2021- Tech-O/o Commr-	09/PBW/ACME Heergarh Plot-2/	Total Area 843.90 Acres at Village

	Cus-Prev- Jodhpur	Customs Jaipur/2021 dated 26.10.2021 and Addendum dated 30.06.2022	Badisid, Tehsil- Bap, Dist- Jodhpur (Raj.)
3	CUS/LIC/MISC/185/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	10/PBW/ACME Aklera Plot-1/ Customs Jaipur/2021 dated 27.10.2021	Total Area 399.68 Acres at Village Aarang, Tehsil- Shiv, Dist- Barmer (Raj.)
4	CUS/LIC/MISC/186/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	11/PBW/ACME Aklera Plot-2/ Customs Jaipur/2021 dated 31.10.2021	Total Area 235.6868 Acres at Village Aarang, Tehsil- Shiv, Dist- Barmer (Raj.)
5	CUS/LIC/MISC/187/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	12/PBW/ACME Aklera Plot-3/ Customs Jaipur/2021 dated 31.10.2021	Total Area 269.16 Acres at Village Aarang, Tehsil- Shiv, Dist- Barmer (Raj.)
6	CUS/LIC/MISC/188/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	13/PBW/ACME Aklera Plot-4/ Customs Jaipur/2021 dated 31.10.2021	Total Area 81.16 Acres at Village Aarang, Tehsil- Shiv, Dist- Barmer (Raj.)
7	CUS/LIC/MISC/189/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	14/PBW/ACME Deoghar/ Customs Jaipur/2021 dated 05.11.2021	Total Area 1046.88 Acres at Village Sanwada, Tehsil- Pokaran, Dist- Jaishalmer (Raj.)
8	CUS/LIC/MISC/190/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	15/PBW/ACME Phalodi / Customs Jaipur/2021 dated 05.11.2021	Total Area 999.168 Acres at Village Sanwada, Tehsil- Pokaran, Dist- Jaishalmer (Raj.)
9	CUS/LIC/MISC/191/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	16/PBW/ACME Dhaulpur Plot-1/ Customs Jaipur/2021 dated 05.11.2021	Total Area 719.51 Acres at Village Sanwada, Tehsil- Pokaran, Dist- Jaishalmer (Raj.)
10	CUS/LIC/MISC/192/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	17/PBW/ACME Dhaulpur Plot-2/ Customs Jaipur/2021 dated 05.11.2021	Total Area 392.99 Acres at Village Sanwada, Tehsil- Pokaran, Dist- Jaishalmer (Raj.)
11	CUS/LIC/MISC/193/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	18/PBW/ACME Raisar Plot-1/ Customs Jaipur/2021 dated 05.11.2021	Total Area 353.16 Acres at Village Sanwada, Tehsil- Pokaran, Dist- Jaishalmer (Raj.)
12	CUS/LIC/MISC/194/2021- Tech-O/o Commr-	19/PBW/ACME Raisar Plot-2/	Total Area 341.02 Acres at Village

	Cus-Prev- Jodhpur	Customs Jaipur/2021 dated 05.11.2021	Sanwada, Tehsil-Pokaran, Dist-Jaishalmer (Raj.)
13	CUS/LIC/MISC/195/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	20/PBW/ACME Raisar Plot-13/ Customs Jaipur/2021 dated 05.11.2021	Total Area 138.72 Acres at Village Sanwada, Tehsil-Pokaran, Dist-Jaishalmer (Raj.)
14	CUS/LIC/MISC/196/2021- Tech-O/o Commr-Cus-Prev- Jodhpur	21/PBW/ACME Raisar Plot-4/ Customs Jaipur/2021 dated 05.11.2021	Total Area 179.22 Acres at Village Sanwada, Tehsil-Pokaran, Dist-Jaishalmer (Raj.)

In light of the said Instruction, you are hereby called upon to explain to the Commissioner of Customs, having his office N.C.R. Building, Statue Circle, C-Scheme, Jaipur within two weeks of receipt of this letter, as to why the above MOOWR licenses granted to you, should not be Cancelled under section 58 read with section 65 of Customs Act 1962 on the following Grounds:

i. The imported solar panels/solar modules and related accessories which have been declared as Capital goods would be utilized to generate electricity from sunlight. The resultant product i.e. electricity would be generated which is not ordinarily capable of being deposited in the warehouse.

ii. As per the Regulation 15 (removal of resultant goods from the warehouse for export) of Manufacture and Other Operations in Warehouse (No.2) Regulations, 2019 (hereinafter referred as 'MOOWR 20I9) requires filing of shipping bill or a bill of export as the case may be and affixing a one-time-lock to the load compartment of the menus of transport in which such goods arc removed from the warehouse. In the case of resultant product i.e. electricity, the conditions laid down in the regulations are not satisfied.

iii. Similarly, for removal of resultant goods for Home Consumption, provision are laid down in of Regulation 14 (removal of resultant goods from the warehouse for home consumption) of Manufacture and Other Operations in Warehouse (No.2) Regulations, 2019. The licensee is required to file a bill of entry for home consumption in respect of warehoused goods taking into account the goods removed. Since Electricity so generated cannot be deposited in warehouse/warehoused it is not feasible to file the proper Bill of Entry.

> iv. Further, looking to the nature of resultant goods, their manner of transport or storage, Board has also not given any exemption from any of the provisions of MOOWR, 2019 and also has not framed any Regulations relating to removal of electricity.
>
> v. In view of the above electricity falls squarely outside the scope of MOOWR 20J9 because of inability to satisfy the essence of the prescribed conditions.
>
> You are also required to state whether you would like to avail the opportunity to be heard in person, before final decision is taken. If no mention is made in the written explanation and reply, it would be presumed that you do not desire any personal hearing in the case."

The SCN is clear evidence of the licensing authority having understood the Instruction as requiring it to cancel the existing license.

J. THE INTERPLAY BETWEEN SECTIONS 61 AND 65

122. That then takes us to the principal question pertaining to the scheme of Sections 61 and 65 of the Act. As was noticed by us hereinabove, Section 61 enables a person to import capital or other goods and to place them in a licensed warehouse pursuant to permission that may be granted and to undertake "*manufacturing process or other operations*" therein. Prior to the amendments which were introduced in Section 61 by Act 28 of 2016, capital goods, "*goods other than capital goods*" and "*any other goods*" could have been placed in a warehouse for periods stipulated in that provision. In the case of capital goods, Section 61(1)(a) placed an outer time limit of five years subject to extensions that the Principal Commissioner of Customs or Commissioner of Customs could grant upon sufficient cause being shown. Therefore, prior to 2016, there was a specified time limit of five years for which capital goods could have been housed or placed in a warehouse. Post the 2016 amendments, an importer of capital goods

now stands enabled to retain them in a warehouse till they are ultimately cleared for home consumption. In terms of Section 61(1)(a), the aforesaid facility is extended to capital goods intended for use in either a 100% export-oriented undertaking, an electronic hardware technology part unit, a software technology part unit or "*any warehouse wherein manufacture or other operations may have been permitted*" in terms of Section 65. The 2016 Amendments thus constitute a radical departure from the position which obtained under Section 61 prior thereto.

123. The second aspect of significance which strikes us is the absence of any avowed intent imbuing Section 65 and which could be justifiably construed as an intendment to exclude a particular category of manufacturing activity from its ambit in clear or unequivocal terms. As we read Section 65, it becomes apparent that the owner of "*any warehoused goods*" may in terms of the permission granted, store or house those goods and carry on "*any manufacturing process or other operations*". A plain reading of Section 65 suggests that a manufacturing process may be undertaken in a licensed warehouse and the same could extend to any category of goods. The provision does not use words of qualification or limitation insofar as either the nature of goods or manufacturing activity is concerned. The aforesaid aspect is liable to be appreciated additionally in light of Section 61 extending its application to capital goods, non-capital goods as well as other goods. The said provision thus contemplates contingencies where any of the three categories of goods may be imported and housed in a warehouse for purposes which are spoken of in Section 65. The position which thus emerges is that the expanse of Section 61 and 65 cannot be

recognised as being either restricted or limited to a particular or compartmentalized genre of goods or type of manufacturing activity.

124. Sub-section (2) of Section 65 principally deals with the subject of waste or refuse which may be generated in the course of manufacture or other operations. It is in that backdrop that sub-section (2) speaks of identification of the percentage of the imported goods that may be contained in the resultant goods which may be cleared for home consumption. Similar is the position which comes to the fore when one reads Regulations 14 and 15 of the MOOWR Regulations as well. Here too, the statute deals with contingencies where an importer or a licensee may remove resultant goods for home consumption. Since in the present case we are not concerned with the subject of export, Regulation 15 would clearly have no application. Regulation 14 prescribes that where a BOE for home consumption has been filed at the stage of clearance of resultant goods, the same would have to clearly indicate the ratio or the percentage of the warehoused goods which may constitute a part of the resultant goods.

125. However, Regulations 14 of the MOOWR Regulations clearly appears to cater to a situation where the resultant goods may contain or be comprised of goods which had otherwise been imported and placed in the warehouse. It does not appear to extend to a situation where the imported goods either do not form part of the resultant goods or remain unused in the course of manufacture. One cannot be unmindful of the fact that a statute is generally framed in order to deal with myriad contingencies. Since the Act undoubtedly contemplates the import of non-capital goods, raw materials, ingredients and other consumables, it had to necessarily provision for the fixation of an input-output ratio.

However, the said prescriptions cannot be read as the embodiment of an intent to place a restriction on the type of goods that may be imported and used in the course of manufacture. It would thus be wholly incorrect to understand the scope of Section 61 and 65 as being limited only to those categories of goods which ultimately get subsumed in the resultant goods or which may be compliant with the requirement of an input-output classification.

126. A manufacturing activity which is undertaken with the aid of capital goods may not necessarily or invariably result in those goods being consumed or used up in the course of manufacture. One must bear in mind that the principal objective of the MOOWR Regulations was to provide a fillip to domestic manufacturing albeit with the aid of imported goods. The scheme is thus primarily concerned with the activity of manufacturing within the country as opposed to the nature of the end product that may be obtained. This becomes evident when one bears in consideration the focus of the scheme being manufacturing in India and the statutory provisions desisting from confining the benefits flowing therefrom to a particular line of industry or the nature of the resultant product. The mere fact, therefore, that in the case of solar generation it would be impossible to stipulate an input-output ratio would hardly be decisive or determinative of the question that stands posited.

127. Take for instance a situation where capital goods come to be placed in a warehouse for the manufacture of specialized textiles. While the capital goods would undoubtedly be used in relation to the manufacture of those textiles, the resultant product would contain no element of those goods. Similar would be the position which would

obtain in the case of manufacture of an automobile accessory. In such a scenario too, while the capital goods would have been used in the manufacture of the end product, they would not get subsumed. It would thus be wholly incorrect to assume that such types of manufacturing activity are either forbidden or were intended to be excluded from the purview of Section 65 of the Act. At least the statute fails to construct such an embargo.

128. We are thus of the considered opinion that the mere fact that input-output ratio norms may not apply in the case of generation of electricity would not be determinative of the controversy which stands raised. This, since those norms are prescribed to take care of contingencies where a part of the imported goods get consumed in the process of manufacture. They would similarly also not be attracted in the case of manufacture of textiles or automotive parts as discussed hereinabove. The inapplicability of those factors in the case of generation of electricity, thus is neither an oddity nor can it be said to be a legislative oversight.

129. One must bear in mind that Section 61 contemplates a whole array of goods which may be imported and placed in a warehouse pursuant to permissions granted in terms of Section 65. While some may get consumed in the course of manufacture, others may not. This situation would invariably arise since the statute contemplates both capital as well as other goods being imported and placed in a warehouse. Capital goods, in light of their inherent characteristic need not be self-consuming. In fact, they are normally understood to be goods which are durable and capable of repetitive and continuous use.

130. It becomes pertinent to note that the expression "*capital goods*" is not unique to the Act with which we are concerned in this batch of writ petitions. It is an expression which is found in various statutes. For instance, under the Central Goods and Services Tax Act 2017, the words "*capital goods*" and "*inputs*" are defined as follows:-

> "**2. Definitions**.—In this Act, unless the context otherwise requires,—
>
> **xxxx xxxx xxxx**
>
> **(19)**"capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;
>
> **xxxx xxxx xxxx**
>
> **(59)** "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;"

131. Under the **Foreign Trade Policy**[40], 2004-09, the term "*capital goods*" stood defined as under: -

> "**9.12.** 'Capital goods' means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. Capital goods also include packaging machinery and equipment, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in the services sector."

[40] FTP

132. The expression "*capital goods*" has also been defined under the FTP 2015-20 in the following terms:

> "**9.08** "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control.
>
> Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector."

133. Rule 3(aa) of the Customs (Import of goods at Concessional Rate of Duty) Rules, 2017 defines capital goods in the following terms:

> " 3. **Definition**.— In these rules, unless the context otherwise requires,—
> xxxx xxxx xxxx
> (*aa*) "capital goods" means goods, the value of which is capitalised in the books of account of the importer;"

134. The said expression has also been defined under Rule 3(b) of the Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022 as under:

> "**3. Definition**.—(1) In these rules, unless the context otherwise requires,—
> xxxx xxxx xxxx
> b. "capital goods" means goods, the value of which is capitalized in the books of account of the importer;"

135. We also deem it apposite to extract the meaning assigned to the expression "*capital goods*" in P. Ramanatha Aiyar's, *"***The Major Law Lexicon**"[41]:

[41] P. Ramanatha Aiyar, The Major Law Lexicon, 4th edition, 2010

> "Goods that are not themselves consumed in the actual manufacturing as raw materials, *etc*., but are used over a long period of time to aid in the production of other goods, e.g. items of plant and machinery, vehicles, *etc*."

136. It becomes pertinent to observe that the statutory scheme underlying Sections 61 and 65 is concerned with the import of capital goods and captive utilization of those goods in a process of manufacturing. The capital goods so imported enjoy the benefit of duty deferment till they be ultimately released for domestic consumption. Capital goods are those assets which are used to produce goods or services. They are understood to mean goods which are durable and capable of repetitive use in the course of manufacture. They could take the form of machinery, equipment or even technology infrastructure. Viewed in that backdrop, it could also represent a component which acts as an aid to manufacture or may itself get consumed in the resultant product. While a component may constitute capital goods, it need not necessarily be one which constitutes an integral part of the resultant good. It may remain a permanent fixture or a component which aids the process of manufacture. The submission, therefore, that capital goods must necessarily form part of the "*resultant goods*" is clearly misconceived. It becomes pertinent to note that a component may often form an essential part of machinery or equipment. It may also constitute an element having an independent character or perform a distinctive function in aid of the ultimate product. While in the case of the former, it may get integrated in the resultant goods, it could also have the attribute of repetitive use and functionality. Consequently, it would not get absorbed in the resultant product and yet be an integral part of the manufacturing process.

137. If an article be a part of a process of manufacture and be concerned with the creation of goods and services, it would remain in the genre of capital goods answering to the description of tangible assets which are concerned with the creation of goods or the provision of services. The submission that Section 65 only contemplates those categories of goods which are capable of being consumed in the "*manufacturing process*" or those which are worked upon in the course of manufacture is fundamentally flawed and misconceived. This submission further falters when one bears in mind the provision using the expression "*manufacturing process or other operations*". The phrase "*other operations*" is clearly intended to be expansive and thus travelling beyond the meaning that we usually ascribe to the word manufacture. When viewed alongside the phrase *"in relation to"*, it clearly suggests the provision alluding to a capital asset which is concerned with or related to a manufacturing or other process. The argument that the provision necessarily means the imported capital good itself getting consumed in the course of manufacture, thus appears to be wholly untenable.

138. On a conjoint reading of Sections 61 and 65, we note that the statute not only contemplates the warehousing of capital goods but also those which may not fall in that category and in that sense be described as non-capital goods. It is only in the case of such goods that the period for which those may be warehoused can stretch up to the stage of their consumption and clearance from the warehouse. The aspect of consumption is one which is spoken of only in respect of goods which are non-capital in nature. The period of warehousing insofar as capital goods is concerned is not connected or correlated to consumption as is

manifest from a reading of Section 61(1)(a). Capital goods can remain in a warehouse till they are ultimately cleared therefrom. The same leads one to the irresistible conclusion that capital goods once imported could be validly and legitimately placed in a warehouse and thus be exempt from the payment of duties and taxes till they are cleared from those facilities.

139. In our considered opinion, Section 65 clearly stops short of making an exception or excluding a certain category of manufacturing activities from its ambit. It also fails to exclude from its application the manufacture of intangible goods in explicit terms. Section 61 clearly envisages both capital and non-capital goods being imported and housed in a warehouse for the purposes of manufacturing activity being undertaken in terms of permissions granted under Section 65 of the Act. The statute enables capital goods being housed in the warehouse till such time as they may be cleared for home consumption. While Section 61, prior to the 2016 amendments envisaged the maximum retention period to be five years, post amendment, that stipulation came to be substituted with the Legislature permitting the retention of those goods without any maximum time frame operating. The clear and unambiguous scheme which thus emerges from a reading of Sections 61 and 65 is of the importer being enabled to bring into the country capital goods which may be utilized in connection with manufacture or other operations in a licensed warehouse and the resultant goods alone being subjected to tax.

140. The Circular of the Board, the FAQs', the declarations of intent appearing on the "Invest India" portal unerringly point towards capital goods being capable of being warehoused for an indefinite period of

time and the duty element thus getting deferred till the time those goods are ultimately cleared for entry into the domestic zone. We find ourselves unable to read Sections 61 and 65 as contemplating only such capital goods which themselves undergo a process of manufacture or those which may get consumed in the resultant product. Acceptance of that submission would amount to placing an extremely narrow construction on the words "*manufacturing process or other operations*". The words "*other operations*" must be acknowledged as representing the legislative intent to be the undertaking of an activity which may not necessarily answer to the attributes of manufacturing as generally understood. As observed hereinbefore, the use of that expression in fact is intended to expand the scope of the applicability of Section 65.

141. The fact that capital goods so imported were placed in a distinct category is also evident from the promotional material which appears on the "Invest India" portal as well as the 01 October 2019 Circular issued by the first respondent. As is manifest from a reading of the aforesaid circular, the first respondent had in unequivocal terms held out that units operating under Section 65 would be entitled to import capital goods without prescribing a determinate point. Similar is the position which comes to the fore when one views the FAQs which were framed and which unambiguously spoke of the duty deferment being without any time limitation. Those FAQs declared that duty on the imported capital goods would be payable only once they are cleared from the warehouse or are moved into the domestic market. This was further explained with the respondents taking the unequivocal position that the duty on the capital goods does not get incorporated in the

finished goods. The MOOWR Regulations themselves were explained to be one relating to deferment of duty with it being held out that both BCD and IGST on imports would stand deferred and that such deferment would be without any time limitation.

142. Till this point, the respondents do not appear to have harboured any doubt with respect to either the applicability of the scheme or its width and area of operation. The representations made by the respondents neither restricted the scheme with reference to a particular category of goods nor did they limit or confine the applicability of the scheme to a particular genre of manufacturing activity that could be legitimately undertaken. However, and whether their experience of the working of the scheme and the larger policy objectives are relevant considerations to hold against the petitioners is an aspect which we propose to consider in the latter parts of this decision.

K. THE "IN RELATION TO" QUESTION

143. That leads us to consider the submissions which were addressed on behalf of the respondents and which pertained to the usage of the expression "*in relation to*" as appearing in Section 65 of the Act. The learned ASG had vehemently contended that neither the MOOWR Regulations nor for that matter Sections 61 and 65 had comprehended a manufacturing activity being undertaken in a bonded warehouse with the employment of imported capital goods for time immemorial. It was submitted that Section 65 clearly contemplated the "*manufacturing process*" being undertaken upon the imported capital goods itself. The submission essentially proceeded on the basis that the imported capital goods must themselves undergo a process of manufacture and be

worked upon while being present in the warehouse. According to Mr. Venkataraman, unless the aforesaid aspects of the MOOWR Scheme are appreciated, it would lead to unscrupulous importers abusing the benefits that were intended to be extended.

144. The learned ASG had relied upon the judgment of the Supreme Court in *Doypack Systems* to submit that the words "*in relation to*" must draw colour and meaning bearing in mind the context in which they are used in a statutory provision. It was his submission that Section 65 must be read as intending to conceive of a manufacturing process in which the capital goods or at least a part thereof gets subsumed in the resultant goods.

145. It becomes pertinent to note that the aforesaid submission bids us to construe the expression "*in relation to*" in an extremely narrow and confined sense. This, we so observe since the judgment in *Doypack* itself explains that phrase to be one seeking to convey comprehensiveness. After noticing various lexicons and authoritative treatises, the Supreme Court in *Doypack* held that the expression "in relation to" essentially seeks to bring two subjects into association or connection with each other. "*Relating to*" was explained as being synonymous with the expressions "*concerning with*" and "*pertaining to*". The expression "*relation*" had also been explained to mean "*in connection with another*" or "*any connection, correspondence or association which can be conceived as naturally existing between things*" as per the **Oxford English Dictionary**[42].

[42] The Oxford English Dictionary, Quemadero-Roaver, Clarendon Press, Oxford, Second Edition, Volume XIII (2001)

146. P. Ramanatha Aiyar in *"The Major Law Lexicon"* explains the meaning of that phrase in the following terms:

> "The phrase 'in relation to' is, ordinarily, of wide import, but in the context of its use in the expression 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purpose of assessment' in Section 129-C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment. *Navin Chemicals Mfg. and Trading Co. Ltd. v. Collector of Customs,* (1993) 4 SCC 320, 324. [Customs Act (52 of 1962), S. 129-C (3)]. "

147. The said expression "*in relation to*" has also been construed to mean "*words of comprehensiveness*" as explained in **Wharton's Law Lexicon**[43]. The relevant extract from the said lexicon is reproduced hereinbelow:

> "The expression 'in relation to' are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed [*State of Karnataka v. Azad Coach Builders (P) Ltd.*, (2010) 9 SCC 524 (534-35), para 27]"

148. If that be the accepted position in law, we fail to find any justification to accept the contention of the learned ASG that the expression "*in relation to*" is intended to mean that the capital goods themselves must undergo a process of manufacture. This, since as long as the imported capital goods are concerned with or are relatable or referable to a process of manufacture or "*other operations*", the activity so undertaken would qualify the statutory conditions as placed by Section 65(1) of the Act and qualify the test of eligibility. The expression "*in relation to*" only appears to suggest a causal link

[43] Wharton's Law Lexicon, Revised, Updated and Enlarged by Dr. Justice AR Lakshmanan, 16th edition (Reprint), 2015

existing between the imported capital goods and the manufacturing activity that may be undertaken in the warehouse. If the words "*in relation to*" are acknowledged to convey an intent to establish a connection or an association between two things or pertain to an article or goods, it would be apparent that Section 65 clearly intended to create an indelible link between the "*manufacturing process or other operations*" that may be undertaken with the imported goods. Those goods, as we have found hereinabove, could be either capital or non-capital goods, consumables, components or even raw materials. The provision thus essentially connects the manufacturing process and the imported article. However, bearing in mind the intrinsic characteristics of capital goods, we would be unjustified in reading Section 65 as envisaging capital goods themselves undergoing a process of transformation or manufacture. As long as those goods are found to have contributed to or formed part of a process of manufacture, the qualifying criteria for the applicability of Section 65 would stand fulfilled.

149. Regard must also be had to the fact that if the provision intended that capital goods must inevitably be consumed in the process of manufacture there would have been no necessity for the amendments which were introduced in Section 61 in 2016. Similarly, Section 61 would have extended its application only to consumables, raw materials or components. It would have stopped short of provisioning for the import of capital goods which as explained above are commonly understood to be goods of continuous utility and repetitive use.

L. MOOWR REGULATIONS AND THE CONTEMPORANEOUS MATERIAL

150. As was noticed by us hereinbefore, the principal argument of the respondents was that the MOOWR Regulations were never intended to extend to a situation where imported capital goods do not get subsumed in the final product which may emerge out of a licensed warehouse and that Section 65 was meant to apply only to manufacturing operations being undertaken on the imported capital goods itself. We have in the preceding parts of this decision already found that neither Section 61 nor Section 65 would warrant such a meaning being ascribed to those statutory provisions. This, in light of the plain text of the provisions neither impliedly nor in explicit terms excluding any particular category of manufacture or basing the extent of the applicability of those provisions dependent upon the nature of the resultant goods which may be obtained at the end of a manufacturing process.

151. While we had an occasion to review some of the contemporaneous policy announcements and circulars pertaining to the MOOWR Regulations in the preceding parts of this decision, we deem it apposite to revisit and review that material in brief so as to sketch a broad summary. We firstly go back to the FAQs which had been issued by the first respondent themselves. Apart from the FAQs which have been extracted in the previous parts of this decision, we deem it apposite to additionally take note of the following FAQs.

152. Question 2 dealt with a query as to whether a factory solely engaged in manufacturing goods and intending to sell the said goods in the domestic market would be eligible to apply under the MOOWR Scheme. The response to the aforesaid query was as follows:-

> "**Response**: The eligibility of a factory for manufacture and other operations in a bonded warehouse does not depend upon whether

> the final goods will be sold in the domestic market or exported. There is no quantitative restriction on sale of finished goods in the domestic market. Any factory can avail a license under Section 58 of the Customs Act along with permission under Section 65 if they intend to import goods without upfront payment of Customs duty at point of import and deposit them in the warehouse, either as capital goods or as inputs for further processing."

153. As is manifest from a reading of the above, the respondents clearly represented that the eligibility of a factory to undertake manufacture and other operations in a bonded warehouse is not dependent upon whether the final goods will be sold in the domestic market or exported. The respondents proceeded further to assert that any factory could obtain a license under Section 58 of the Act as well as permission under Section 65, if they intended to import goods without an upfront payment of customs duty at the point of import. It was further held out that such an import would be permissible, leading to the goods being deposited in the bonded warehouse either as capital goods or as inputs for further processing.

154. The aforesaid response thus clearly establishes that the MOOWR Scheme was concerned with both imported goods which may be used in the course of manufacture or as inputs for further processing. This clearly demolishes the contention of the respondents that the expression "*in relation to*" necessitates the capital goods themselves being worked upon.

155. Query 8 pertained to a unit undertaking manufacture or other operations in a bonded warehouse and whether that unit could import capital goods without payment of duty. It also dealt with the aspect of the period for which duty would stand deferred. Answering the aforesaid, the respondents represented that in the course of imports

effected by a unit licensed under Sections 58 and 65 of the Act, capital goods would be freed from the imposition of duty, since the MOOWR Scheme was principally envisaged to be a duty deferment scheme. It was further explained that the levy of both BCD as well as IGST on such imports would be deferred. It was thereafter and more specifically explained that duty deferment is "*without any time limitation*".

156. The question of when the imported capital goods would become subject to the payment of duties imposed under the Act was dealt with in Query 9, and which stated that the same would be payable when the capital goods itself are cleared into the domestic market. It was significantly clarified that the duty on the capital goods would not get incorporated or attached to the finished goods.

157. This too is indicative of the capital goods not being subject to the payment of duty as long as they remained in the warehouse and were used in the course of a manufacturing process or other operations. The fact that capital goods could be housed in a licensed warehouse without any limitation of time being applicable was further underscored by the response to Question 10, which again emphasized that the duty deferment was "*without any time limitation*".

158. Of equal significance were the benefits of the MOOWR Regulations which were highlighted on the "Invest India" portal. We deem it appropriate to extract the following page from that portal, and which sought to broadly indicate the prominent benefits of the scheme:-

Bonded Manufacturing

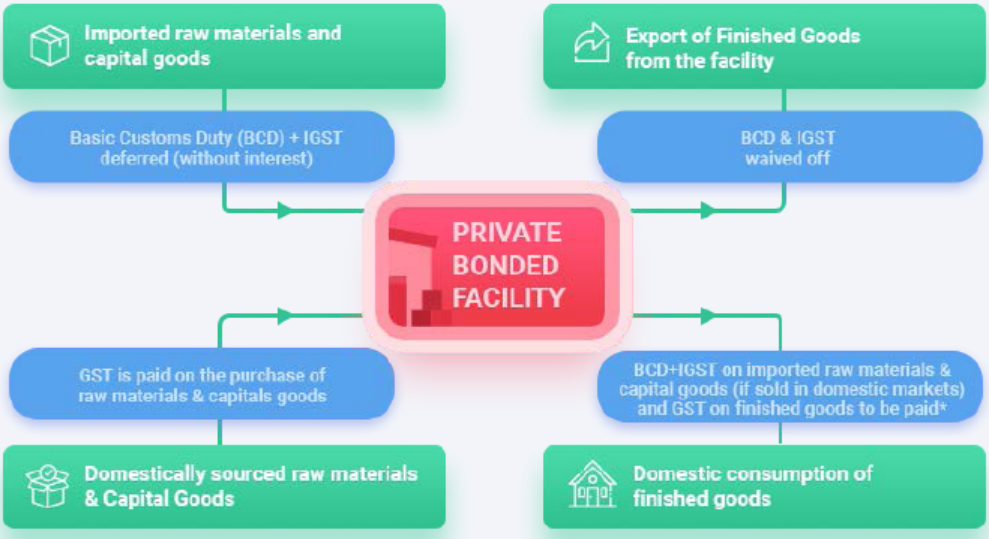
Scheme for Manufacturing and Processing in a Bonded Facility

Overview

India allows manufacturing and other operations in a bonded manufacturing facility.

With the Government's continuous efforts to promote India as the manufacturing hub globally and the commitment towards ease of doing business, another initiative in this direction by the Central Board of Indirect Taxes (CBIC) is **allowing import of raw materials and capital goods without payment of duty** for manufacturing and other operations in a bonded manufacturing facility.

When the raw materials or capital goods are imported, the import duty on them is deferred. If these **imported inputs are utilised for exports**, the **deferred duty is exempted**. Only when the **finished goods are cleared to the domestic market, import duty is to be paid** on the imported raw materials used in the production. Import duty on capital goods is to be paid if and when the capital goods are cleared to the domestic market.



Note : When the raw materials or capital goods are imported, the import duty on them is deferred. If these imported inputs are utilised for exports, the deferred duty is exempted. Only when the finished goods are cleared to the domestic market, import duty is to be paid on the imported raw materials used in the production. Import duty on capital goods is to be paid if and when the capital goods are cleared to the domestic market

*When finished goods are exported, in addition to the waiver of BCD + IGST on the imported goods used, the GST on the finished goods can be zero-rated.
Recent Announcement: Government Notice relating to CAAR- Customs Authority for Advance Rulings

159. As is evident from the above, the respondents clearly held out that both raw materials and capital goods could be imported and that in both contingencies, the import duty would stand deferred. The duty element and the time when the same would get attracted was explained to be when finished goods are cleared for the domestic market, and in which case, import duty would stand attracted on the imported raw materials used in production of the finished goods. It was further clarified that import duty on capital goods would be payable only when they are cleared to the domestic market. This too is indicative of the underlying imperatives of input-output ratio declarations being made and those being principally concerned with imported raw materials.

160. The "Invest India" portal also spoke of the unlimited period of warehousing which would be applicable in the case of capital as well as non-capital goods and non-capital goods being described to include raw materials, components, etc. It is thus manifest that the contemporaneous material and literature gave no indication of an avowed intent of the MOOWR Regulations being inapplicable to a manufacturing process which may have continued without any prescription of a maximum period for which capital goods could have been warehoused. The promotional material, the FAQs, as well as the 01 October 2019 Circular issued by the Board also did not speak of an exclusion of any particular genre of manufacturing activity or the nature of the "*resultant goods*" which may be produced with the aid of capital goods housed in a licensed warehouse.

161. Viewed in light of the above, we come to the firm conclusion that neither Section 61 nor Section 65 can be justifiably construed as incorporating an inherent or implied exclusion of solar power generation. The material that was placed for our consideration cannot possibly be interpreted as indicative of an intent of a particular type of self-consuming capital goods alone being intended for import. Neither the statutory provisions nor the contemporaneous material embodies an underlying policy intent for capital goods themselves being worked upon in the warehouse and constituting a part of the resultant goods. In fact, and to the contrary as we have found, the primary objective of the scheme was to give a fillip to domestic manufacturing albeit with the aid of imported capital goods. On an overall conspectus of the above, we find ourselves unable to accede to the submissions addressed by the learned ASG.

M. DISTORTION OF THE LEVEL PLAYING FIELD

162. The learned ASG had vehemently contended that the activity of solar power generation has led to the creation of inequalities between domestic manufacturers and those like the petitioner who have claimed undue benefit of the MOOWR Regulations. It was in the aforesaid context that the respondents had sought to urge that we must interpret Section 65 in a manner which would subserve the larger policy objectives and the impetus sought to be accorded to domestic generation of solar power.

163. The avowed benefits underlying the aim of the Union and the emergent need to switch to solar power as a source of renewable energy cannot possibly be doubted. Undoubtedly, solar energy constitutes a

central piece of India's National Action Plan on Climate Change and the National Solar Mission. The adoption of those policy initiatives and the measures chosen to be adopted by India in discharge of its various treaty obligations were exhaustively noticed by the Supreme Court in its recent decision in **M K Ranjitsinh & Ors vs. Union of India & Ors**[44]. We deem it appropriate to extract the following passages from that decision:-

> "**31.** The 2015 United Nations Environment Programme report also outlined five human rights obligations related to climate change, including both mitigation and adaptation efforts. In 2018, the UN Special Rapporteur on Human Rights and the Environment emphasized that human rights necessitate states to establish effective laws and policies to reduce greenhouse gas emissions, aligning with the framework principles on human rights and the environment.
>
> **32.** The Inter-American Court of Human Rights issued an advisory opinion in 2017 affirming the right to a healthy environment as a fundamental human right. The IACTHR delineated state obligations regarding significant environmental harm, including cross-border impacts, recognizing the inherent relationship between environmental protection and the enjoyment of various human rights. Violations of the right to a healthy environment can reverberate across numerous rights domains, including the right to life, personal integrity, health, water, and housing, as well as procedural rights such as information, expression, association, and participation.
>
> **33.** In her comprehensive study exploring climate obligations under international law, Wewerinke-Singh underscores the imperative for states to both adapt to and mitigate the impacts of climate change in alignment with human rights principles. This resonates deeply with the burgeoning recognition of the right to a healthy environment as a fundamental human right within the global discourse on environmental protection and sustainability. When discussing the right to a healthy environment, it is crucial to address access to clean and sustainable energy. Clean energy aligns with the human right to a healthy environment, as first recognized by the UN Special Rapporteur on Human Rights and the Environment in 1994.

[44] 2024 SCC OnLine SC 570

34. Unequal energy access disproportionately affects women and girls due to their gender roles and responsibilities such as through time spent on domestic chores and unpaid care work. Women in many developing countries spend on average 1.4 hours a day collecting fuelwood and four hours cooking, in addition to other household tasks that could be supported by energy access. The importance of prioritizing clean energy initiatives to ensure environmental sustainability and uphold human rights obligations cannot be understated.

35. India faces a number of pressing near-term challenges that directly impact the right to a healthy environment, particularly for vulnerable and indigenous communities including forest dwellers. The lack of reliable electricity supply for many citizens not only hinders economic development but also disproportionately affects communities, including women and low-income households, further perpetuating inequalities. Therefore, the right to a healthy environment encapsulates the principle that every individual has the entitlement to live in an environment that is clean, safe, and conducive to their well-being. By recognizing the right to a healthy environment and the right to be free from the adverse effects of climate change, states are compelled to prioritize environmental protection and sustainable development, thereby addressing the root causes of climate change and safeguarding the well-being of present and future generations. It is imperative for states like India, to uphold their obligations under international law, including their responsibilities to mitigate greenhouse gas emissions, adapt to climate impacts, and protect the fundamental rights of all individuals to live in a healthy and sustainable environment.

III. Importance of solar power as a source of renewable energy

36. There are many sources of air pollution which harm public health and infringe upon the right to a healthy environment. High levels of pollution caused by industries and vehicular pollution has left Indian cities amongst those with the poorest air quality in the world, posing significant health risks to citizens. Addressing these challenges requires prioritizing the transition to clean and sustainable energy sources, ensuring a healthier environment for all individuals in India, and safeguarding the well-being of future generations, with particular attention to the rights and needs of vulnerable communities. Therefore, while speaking about climate change, the importance of solar power cannot be overstated. In addition to being sustainable and renewable, solar energy stands out as a pivotal solution in the global transition towards cleaner energy sources. Its significance lies in its capacity to significantly

reduce reliance on fossil fuels, thereby curbing greenhouse gas emissions responsible for global warming and climate change.

37. India is endowed with vast solar energy potential and receives about 5,000 trillion kWh per year of solar energy, with most regions receiving 4-7 kWh per sqm per day. Solar photovoltaic power offers immense scalability in India, allowing for effective harnessing of solar energy. Moreover, solar energy facilitates distributed power generation, allowing for rapid capacity addition with short lead times. The impact of solar energy on India's energy landscape has been tangible in recent years. Decentralized and distributed solar applications have brought substantial benefits to millions of people in Indian villages, addressing their cooking, lighting, and other energy needs in an environmentally friendly manner. These initiatives have led to social and economic benefits, including reducing drudgery among rural women and girls, minimizing health risks associated with indoor air pollution, generating employment at the village level, and ultimately improving living standards and fostering economic activities. Additionally, the solar energy sector in India has emerged as a significant contributor to grid-connected power generation capacity. It aligns with India’s agenda of sustainable growth and plays a crucial role in meeting the nation's energy needs while enhancing energy security.

38. Solar energy holds a central place in India's National Action Plan on Climate Change, with the National Solar Mission being one of its key initiatives. Launched on 11 January 2010, NSM aims to establish India as a global leader in solar energy by creating favourable policy conditions for the diffusion of solar technology across the country. This mission is in line with India's Nationally Determined Contributions target, which aims to achieve about 50 per cent cumulative electric power installed capacity from non-fossil fuel-based energy resources and reduce the emission intensity of its GDP by 45 per cent from 2005 levels by 2030. India's goal to achieve 500 GW of non-fossil-based electricity generation capacity by 2030 aligns with its efforts to be Net Zero by 2070. In 2023-24, out of the total generation capacity of 9,943 MW added, 8,269 is from non-fossil fuel sources. According to the Renewable Energy Statistics 2023 released by the International Renewable Energy Agency (IRENA), India has the 4th largest installed capacity of renewable energy.

39. The International Solar Alliance was formed at the COP21 held in Paris in 2015, as a joint effort by India and France. It is an international platform with 94 member countries. It works with governments to improve energy access and security worldwide and promote solar power as a sustainable way to transition to a

carbon-neutral future. ISA's mission is to unlock USD 1 trillion of investments in solar energy by 2030 while reducing the cost of the technology and its financing. It is partnering with multilateral development banks, development financial institutions, private and public sector organisations, civil society, and other international institutions to deploy cost-effective and transformational energy solutions powered by the sun, especially in the least Developed Countries and the Small Island Developing States.

xxxx xxxx xxxx

42. It is imperative for India to not only find alternatives to coal-based fuels but also secure its energy demands in a sustainable manner. India urgently needs to shift to solar power due to three impending issues. Firstly, India is likely to account for 25% of global energy demand growth over the next two decades, necessitating a move towards solar for enhanced energy security and self-sufficiency while mitigating environmental impacts. Failure to do so may increase dependence on coal and oil, leading to economic and environmental costs. Secondly, rampant air pollution emphasizes the need for cleaner energy sources like solar to combat pollution caused by fossil fuels. Lastly, declining groundwater levels and decreasing annual rainfall underscore the importance of diversifying energy sources. Solar power, unlike coal, does not strain groundwater supplies. The extensive use of solar power plants is a crucial step towards cleaner, cheaper, and sustainable energy."

164. Undisputedly, the activities undertaken by the writ petitioners are in aid of the objective of the country transitioning towards renewable energy sources so to meet the targets of switching to a cleaner energy source. This is clearly an aspect which cannot possibly be doubted even by the respondents. What was however sought to be canvassed was the resultant distortion of the level playing field with the respondents alleging that the petitioners are deriving an undue advantage of the MOOWR Regulations having established a solar generation unit with the aid of duty free imports at a cost far lesser than that which a domestic producer may incur in the course of establishing a comparable generating facility. It was in the aforesaid backdrop that

the learned ASG had urged us to interpret Section 65 as well as the MOOWR Regulations in a manner which would coalesce with the larger policy measures adopted by the Union.

165. While we have no reason to doubt the salutary purpose and objective underlying the framing of those measures, as a Court, we cannot be unmindful of our primary function being confined to interpret the statutory provisions in accordance with well-defined precepts of interpretation. The construction of a statute cannot be guided or influenced by the subsequent experience of the executive or of discerned inequitable results. As we have found hereinabove, the statutory scheme underlying the MOOWR Regulations cannot be construed as seeking to exclude solar power generation in terms of permissions granted under Section 65. The contemporaneous literature also fails to lend credence to the submission of the respondents. In fact, it clearly tends to be indicative of a contrary position and the absence of an intent to exclude any particular activity of manufacture. It is this which leads us to doubt whether even the principles of purposive interpretation could be justifiably deployed.

N. APPLICABILITY OF PURPOSIVE INTERPRETATION PRINCIPLES

166. The principle of purposive interpretation is one which Courts resort to in order to overcome anomalies and to avoid resultant absurdities. GP Singh, in his seminal work on **Principles of Statutory Interpretation**[45] succinctly explained the rule of purposive construction as being liable to be resorted to in order to avoid absurdity,

[45] Justice GP Singh, Principles of Statutory Interpretation, 13th edition, 2012

repugnancy, or inconsistency. However, and as the learned author explained in the said treatise, the aforesaid principle is liable to be adopted in situations where the language of the statute itself is capable of bearing more than one construction or a plain grammatical construction leads to an apparent contradiction of the underlying object of the statute. We deem it apposite to extract the following passages from the aforesaid work:-

> "**4. REGARD TO CONSEQUENCES**
>
> If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. This rule has no application when the words are susceptible to only one meaning and no alternative construction is reasonably open.
>
> **(a) Hardship, inconvenience, injustice, absurdity and anomaly to be avoided**
>
> In selecting out of different interpretations "the court will adopt that which is just, reasonable and sensible rather than that which is none of those things" as it may be presumed "that the Legislature should have used the word in that interpretation which least offends our sense of justice". If the grammatical construction leads to some absurdity or some repugnance or inconsistency with the rest of the instrument, it may be de-parted from so as to avoid that absurdity, and inconsistency. Similarly, a construction giving rise to anomalies should be avoided. As approved by VENKATARAMA AIYAR, J., "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

167. **Craies on Legislation**[46], expounds the cardinal rule of construction to be words of the legislation, when precise and unambiguous, being acknowledged as embodying the true means of declaring legislative intent. The learned author elaborated upon the aforesaid precepts by stating that Courts are bound to give effect to clear legislative language, even if the consequences which follow were neither contemplated nor countenanced. It was further explained that a mere anomaly would not be sufficient for the test of literal meaning being jettisoned. This would be evident from the following passage:-

> **"Effect of rule (1): unintended consequences of clear language**
>
> The principal effect of the cardinal rule, subject to the restrictions and modifications explored below, is that a court is bound to give effect to clear legislative language even if the consequences in the instant case are such that the legislature did not contemplate and would not have countenanced. As Jervis C.J. said in *Abley v Dale* —
>
> > "If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."
>
> So, for example, the following dictum of Lord Herschell in *Cox v Hakes* remains valid today—
>
> > "It is not easy to exaggerate the magnitude of this change; nevertheless, it must be admitted that, if the language of the legislature, interpreted according to the recognised canons of construction, involves this result, your lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the legislature."

[46] Craies on Legislation, A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation, Daniel Greenburg, South Asian Edition, 2010

The only difference in the application of this dictum today and when it was said is that the "Recognised canons of construction" leave greater flexibility today, as will be seen below, for the use of matters outside the language of the text, where it is not clear, in order to discern the legislative intent.

This principal effect of the rule requires to be considered in the light of the principal qualification, mentioned in the quotation from Lord Wensleydale above and considered further below. The distinction requires to be drawn between a result which appears absurd merely in the sense that it hard to believe that the legislature would have wanted it and one which is absurd in the sense that it falsifies or produces inconsistency in the legislation, so that even looking at nothing but the literal meaning of the text as a whole a difficulty emerges.

A mere anomaly, however, is not in itself sufficient to prevent the application of the literal meaning of an Act. See, for example, the following passage of the judgment of Peter Gibson L.J. in *Slamon v Planchon*-

> "I share the judge's unease at a construction which gives rise to the two 'anomalies' which he has identified as arising, being circumstances in which a landlord is not a resident landlord for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993, viz. (1) freehold held by a bare trustee for a beneficiary for part of the period between the date of conversion and the relevant date and by the beneficiary for the remainder of the period, and (2) freehold held by the trustee for A for life, remainder to A's son, for part of that period and on A's death by the son. Those examples seem to me not so much anomalies as surprising consequences of the construction which, as the judge acknowledged, was what the clear words of s.10(1) and (4) suggested. One is entitled to wonder what was the intention of Parliament in so providing.
>
> However, the duty of the court is to give effect to the intention of the legislature as ascertained from the language used and I do not think it permissible to arrive at a construction other than what the clear statutory words dictate either by leaning in favour of the landlord or by mixing interests when it is plain that the interest relied on had to be continuous singe before the conversion. It was not open to the judge to write into s. 10(4) the words "at any time" (particularly when the words are found in s. 0(1)), nor to rewrite s.10(1)(b) in the way he suggests is its meaning when read with s.10(1)(a).

> To revert to the intention of Parliament, it can only be assumed from the statutory language that Parliament intended a simple test: at the relevant date either own the freehold from before the conversion or be a beneficiary under the same trust since before the conversion. It would surely have been obvious to Parliament that so unsophisticated a test would give rise to consequences such as those identified by the judge. Nevertheless, that is the test which was enacted and the courts must give effect to it."

168. The learned author then proceeded to enter the following words of caution and enunciated the principle of courts being forbidden from modifying express legislative language. This is evident from the following passages from that seminal work:-

> **"Qualification of rule: avoidance of absurdity, &c.**
>
> The principle that the literal meaning of legislation must be applied even if it appears unjust does not prevent a construction which does more justice or appears more desirable from being preferred to an unjust or undesirable construction, where both are equally supported by the words used. As Finnemore J. said in *Holmes v Bradfield R.D.C.*-
>
> > "The mere fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things."
>
> In *Stock v Frank Jones (Tipton) Ltd,* the House of Lords considered the extent to which the literal meaning might be qualified for the purposes of rectifying anomaly. Lord Simon of Glaisdale said-
>
> > " ...a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly. "

For early examples of the latitude available for the avoidance of manifest absurdity see *Simms v Registrar of Probates, R. v Tonbridge Overseers,Gover's Case, River Wear Commissioners v Adamson" and Ex p. St. Sepulchre's. For recent cases on the point see Omar Parks Ltd v Elkington," Baker v The Queen, In re Pantmaenog Timber Co Ltd, Cranfield v Bridgegrove Ltd* and *Lewis v Eliades*.

The latitude to have regard to justice and common sense in choosing in which of the various ways, each of which is possible as a matter of grammar and syntax, to read a particular legislative expression, does not, however, amount to permission for the courts to modify express legislative language for the same purpose. As Willes J. said in *Abel v Lee* –

> "No doubt the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy or injustice. ... But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act in order to bring it in accordance with his views of what is right or reasonable."

169. Dealing specifically with the issues of evasion of tax and the construction liable to be placed on statutes governing the imposition of taxes and duties, the author makes the following observations:-

> "As to whether an action can be within the letter of the law but not within the spirit of the law—
>
> It is clear from the discussion above that the courts will give effect only to the letter of the law, that is to say what the legislature has enacted rather than what it might have enacted had it thought about it.
>
> But it is equally clear that in determining what the letter of the law means, and what is intended to be encompassed by language capable of a breadth of construction, the courts will have regard to the spirit of the law, meaning the obvious intention with which the letter of the law was framed.
>
> In this context Sir Roundell Palmer said in 1872–
>
> > "Nothing is better settled than that a statute is to be expounded, not according to the letter, but according to the meaning and spirit of it. What is within the true meaning and spirit of the statute is as much law as what is within the very letter of it, and that which is not within the meaning

> and spirit, though it seems to be within the letter, is not the law, and is not the statute. That effect should be given to the object, spirit, and meaning of a statute is a rule of legal construction, but the object, spirit, and meaning must be collected from the words used in the statute. It must be such an intention as the legislature has used fit words to express."

On the question of whether the law has a spirit for practical purposes, the exception proves the rule: in the case of taxing enactments the determination of the courts not to permit themselves to prefer the apparent underlying intention of an enactment to its letter is often forcibly contrasted by the courts with the greater latitude that they might permit themselves in other contexts. As Lord Reid said —

> "It is sometimes said that we should apply the spirit and not the letter of the law so as to bring in cases which, though not within the letter of the law, are within the mischief at which the law is aimed. But it has long been recognised that our courts cannot so apply taxing Acts."

The fact that a statutory regime has a clear social purpose does not mean that the courts will always feel able to act so as to prevent a course of conduct which is clearly designed to circumvent the statute and undermine its intention. In *In re C. (A Minor) (Adoption: Illegality),* for example, the High Court found that although the statutory regime of adoption law, with its rigorous screening processes, was being consistently and deliberately circumvented by people obtaining foreign adoption orders and seeking to have them confirmed here, the courts were nevertheless powerless to refuse confirmation where it was in the best interests of the child post facto.

For a case where the court agreed "that the court should take care not to circumvent the policy of the Act". See *Pegram Shopfitters Ltd v Tally Weijl."*

170. **Cross**, in his celebrated work on **Statutory Interpretation**[47], while acknowledging the primary precept being that of words of a statute being understood in their plain grammatical and ordinary sense, explained the circumstances in which the principle of a secondary meaning may be resorted to.

[47] Cross, Statutory Interpretation, John Bell and George Engle, 3rd edition, 1995

We deem it appropriate to extract the following illuminating passages as they appear in that work:-

> "**CHOICE BETWEEN PRIMARY AND SECONDARY MEANING**
>
> The second of our basic rules set out on page 49 must now be illustrated: 'If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.' To repeat a quotation from one of Lord Reid's speeches:
>
> > 'In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other permissible meaning of the word or phrase.'
>
> Likewise, Lord Simon of Glaisdale in *Maunsell v Olins*said:
>
> > '... the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred…'
>
> The question whether words like 'absurdity', 'anomaly' and 'contradiction' are helpful in this context is best considered after the propositions embodied in the above quotations have been illustrated. Certainly, purposive construction most frequently requires giving effect to the ordinary and primary meaning of the words used, since the drafter has chosen them with care to give effect to the purpose for which the legislation is passed. It is only in exceptional cases that a purposive construction requires the judge to seek out a secondary meaning.
>
> There is much to be said for the view that there is no radical discontinuity between primary and secondary meanings. E A Driedger has suggested that:
>
> > 'the adoption of a secondary meaning is not a departure from the literal meaning; the secondary meaning is the literal meaning in the context in which the words are used: I have come to the conclusion that, except where a mistake is corrected or a meaning is given to senseless words, there is no such thing as a literal meaning as distinguished from some other meaning.'

He goes on to point out that the real distinction is between the 'first blush' or the ‘obvious ‘meaning of words and the less obvious. This has much in common with the views of Glanville Williams noted in the previous chapter. The appropriate reading of words depends on context, and in particular on the purpose of the statutory provision examined.

It must be emphasised at the outset that it is only when a secondary meaning is available that there can be any question of the courts' abandoning a primary meaning simply because it produces a result which they believe is contrary to the purpose of the Act. No judge can decline to apply a statutory provision because it seems to him to lead to absurd results nor can he, for this or any other reason, give words a meaning they will not bear. We have already seen this point, in connection with *Duport Steels Ltd v Sirs*. It will be recalled that the Court of Appeal considered that the words any act done by a person in contemplation or furtherance of a trade dispute' had to be interpreted as qualified by the requirement that the acts should not be too remote from the dispute, because of the undesirable consequences which would flow from admitting as lawful all secondary action. Although expressing sympathy with this concern, the House of Lords considered that it could not but give effect to the plain words of the statute which covered any act done in contemplation or furtherance of a trade dispute. Lord Scarman said:

> ‘In this field Parliament makes, and un-makes, the law; the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge must say so and invite Parliament to reconsider its position. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires.’”

171. In the Chapter titled "Presumption against Intending Injustice or Absurdity", **Maxwell on the Interpretation of Statutes**[48] explains the legal position as follows:-

> **"Injustice**
>
> A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words. "If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice." But the possibility of injustice which leads the court to adopt a particular construction must be a real one: if the injustices suggested in argument are purely hypothetical, and may never or only rarely occur in practice, the court will remain unmoved."

172. Dealing specifically with taxing statutes, *Maxwell* propounds the following:-

> **"Taxing Acts and "the substance"**
>
> Although statutes imposing pecuniary burdens are construed strictly in favour of those on whom the burden is sought to be imposed, and in revenue statutes in particular the subject is aided by presumptions such as that against double taxation, the question is primarily that of the "full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision." "So often, particularly in Tax Statutes, the spirit and intention of the Act... is subject to such uncertainty ... that it may provide a misleading rather than a reliable guide, and in any case affords a less certain guide than the construction of the words without a resort to conceptions of spirit and intention." The language used is not to be either stretched, in favour of the Crown or narrowed in favour of the taxpayer. So, where the court has to consider a provision

[48] Maxwell on the Interpretation of Statutes, P. St. J. Langan, 12th edition, 1976

> expressly designed to prevent tax evasion, which uses unnecessarily wide language to achieve its purpose, that language will be given effect to even though the section is thereby made to apply to cases which it was probably never intended to catch. And where a statute referred to the surveyor of taxes "discovering" an undercharge, the House of Lords could "see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged. "

173. The learned author proceeds to thereafter significantly observe as under:-

> "**Keeping outside the Act**
>
> It is, however, essential not to confound what is actually or virtually prohibited or enjoined by the statutory language with what is really beyond the enacting part, though it may be within the policy, of the Act: for it is only to the former case that the principle under consideration applies, and not to cases where, however manifest the object of the Act may be, the language is not fairly co-extensive with it. An Act of Parliament is always subject to evasion in this sense, for there is no obligation not to do what the legislature has not really prohibited nor to do what it has not really commanded. It is not evading an Act to keep outside it."

174. The principles noticed hereinabove find resonance in the judgment rendered by our Supreme Court in **Raghunath Rai Bareja & Anr. vs. Punjab National Bank & Ors.**[49]. In this case, the Supreme Court enunciated the general rules of interpretation which would apply and when purposive interpretation may be resorted to in the following terms:-

> "**34**. Similarly, in Nasiruddin v. Sita Ram Agarwal [(2003) 2 SCC 577 : AIR 2003 SC 1543] (vide SCC p. 588, para 35) this Court observed:
>
> > "35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a

[49] (2007) 2 SCC 230

different manner, only because of harsh consequences arising therefrom."

35. Similarly, in E. Palanisamy v. Palanisamy [(2003) 1 SCC 123] (vide SCC p. 127, para 5) this Court observed:
Equitable considerations have no place where the statute contained express provisions.

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37. In the present case, while equity is in favour of the respondent Bank, the law is in favour of the appellant, since we are of the opinion that the impugned order of the High Court is clearly in violation of Section 31 of the RDB Act, and moreover the claim is time-barred in view of Article 136 of the Limitation Act read with Section 24 of the RDB Act. We cannot but comment that it is the Bank itself which is to blame because after its first execution petition was dismissed on 23-8-1990 it should have immediately thereafter filed a second execution petition, but instead it filed the second execution petition only in 1994 which was dismissed on 18-8-1994. Thereafter, again the Bank waited for 5 years and it was only on 1-4-1999 (sic 11-1-1999) that it filed its third execution petition. We fail to understand why the Bank waited from 1990 to 1994 and again from 1994 to 1999 in filing its execution petitions. Hence, it is the Bank which is responsible for not getting the decree executed well in time.

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39. In Hiralal Ratanlal v. STO [(1973) 1 SCC 216 : 1973 SCC (Tax) 307 : AIR 1973 SC 1034] this Court observed: (AIR p. 1035)

"In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that the court has to see at the very outset is what does that provision say. If the provision is unambiguous and if from that provision the legislative intent is clear, the court need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear." (SCC p. 224, para 22)

40. It may be mentioned in this connection that the first and the foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc.

can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match Abv. Securities and Exchange Board of India [(2004) 11 SCC 641 : AIR 2004 SC 4219] . As held in Prakash Nath Khanna v. CIT [(2004) 9 SCC 686] the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide Delhi Financial Corpn. V. Rajiv Anand [(2004) 11 SCC 625]. Where the legislative intent is clear from the language, the court should give effect to it, vide Govt. of A.P. v. Road Rollers Owners Welfare Assn. [(2004) 6 SCC 210] and the court should not seek to amend the law in the garb of interpretation.

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43. In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn., pp. 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.

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48. No doubt in some exceptional cases departure can be made from the literal rule of the interpretation e.g. by adopting a purposive construction, Heydon's mischief rule, etc. but that should only be done in very exceptional cases. Ordinarily, it is not proper for the court to depart from the literal rule as that would really be amending the law in the garb of interpretation, which is not permissible vide J.P. Bansal v. State of Rajasthan [(2003) 5 SCC 134 : 2003 SCC (L&S) 605 : AIR 2003 SC 1405] , State of Jharkhand v. Govind Singh [(2005) 10 SCC 437 : 2005 SCC (Cri) 1570 : JT (2004) 10 SC 349] . It is for the legislature to amend the law and not the court vide State of Jharkhand v. Govind Singh [(2005) 10 SCC 437 : 2005 SCC (Cri) 1570 : JT (2004) 10 SC 349] . In Jinia Keotin v. Kumar Sitaram Manjhi [(2003) 1

> SCC 730] this Court observed (SCC p. 733, para 5) that the court cannot legislate under the garb of interpretation. Hence there should be judicial restraint in this connection, and the temptation to do judicial legislation should be eschewed by the courts. In fact, judicial legislation is an oxymoron."

175. As was noticed by us hereinabove, the language in which Sections 61 and 65 are couched does not give rise to any ambiguities. This is also not a case where a plain grammatical construction leads to an apparent contradiction or a position of irreconcilability between two provisions present in the same enactment. Our conclusions are based on a harmonious construction of Sections 61 and 65 along with the contemporaneous material which accompanied the promulgation of the MOOWR scheme.

176. While we have dilated on the aspect of purposive interpretation, one cannot possibly lose sight of the fact that the arguments addressed by the respondents with respect to the illegality of the activities undertaken by the petitioners were not based on an asserted statutory anomaly, absurdity or irreconcilability, principles which are often spoken of in the context of statutory interpretation. The learned ASG also did not argue that the statutory provisions suffered from ambiguity. The entire plank of the argument against solar power generation being permissible under Section 65 was based on the inequitable impact that such activity was likely to have on domestic industry and local generators. That, however, and as was observed by us in the preceding parts of this decision, is an aspect pertaining to policy and which cannot constitute a legitimate basis for the Court to reconstruct a statutory provision. The respondents essentially bid us to introduce a condition of ineligibility in the garb of statutory interpretation. It would be wholly incorrect for us to recreate or reassemble Section 65 so as to exclude a

particular category of activity based upon the experience of its working or its perceived negative impact on domestic industry.

177. While and hypothetically, it may be open for the respondents to adopt appropriate remedial measures if they be of the opinion that solar power generation by virtue of permissions granted under Section 65 is negatively impacting local generators or distorts the *"level playing field"*, this Court would clearly not be justified in deploying principles of purposive interpretation to correct that projected and asserted anomaly.

O. ANCILLARY ISSUES

178. Before closing the matter, we take note of an additional issue pertaining to the demand of a provisional bond for release of goods which had been raised by the respondents and stood raised in W.P. (C) 12386/2022. We had while dealing with the aforesaid issue and while considering C.M. 36603/2023 (Application for Directions) passed detailed orders on 04 August 2023. We do not deem it necessary to observe any further in this respect. The respective parties would proceed further in accordance with the directions which had been issued on this batch. Consequently, W.P.(C) 12386/2022 shall stand disposed of finally in terms of that order.

179. In W.P. (C) 10838/2022, the respondents have in terms of an order dated 19 July 2022 proceeded to cancel the license held by the petitioner. Quite apart from the said order being devoid of reasons, it would not sustain in light of the conclusions recorded hereinabove.

P. FINAL DETERMINATION

180. Accordingly, and for all the aforesaid reasons, we allow the present writ petitions. The impugned Instruction of the Board dated 09

July 2022 insofar as it mandates review of existing licences and taking of "*follow-up*" action is hereby quashed. For reasons aforenoted, we also quash the SCNs' dated 13 July 2022 [W.P.(C) 10537/2022, W.P.(C) 10835/2022, W.P.(C) 10836/2022, W.P.(C) 10840/2022, W.P.(C) 10844/2022, W.P.(C) 10853/2022, W.P.(C) 10837/2022] and 12 December 2022 [W.P.(C) 1507/2023]. As noted above, we allow W.P.(C) 10838/2022 and quash the impugned order dated 19 July 2022 for reasons aforenoted. W.P.(C) 12386/2022 shall stand disposed of in accordance with the directions laid down in para 178 of this judgment. We leave it open to the respondents to proceed further in accordance with law.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

MAY 06, 2024/neha/kk/RW