CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 04/03/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70107-70108/2016 SM dated 26/10/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	C/60767-60768/2013	COMMISSIONER OF CUSTOM, LUCKNOW HALL NO 3, 5TH FLOOR KENDRIYA BHAWAN, SECTOR-H ALIGANJ, LUCKNOW
	Name and Address of Respondent	NAEEM AHMAD S/O SH JALLUDDIN,DIRECTOR OF NAEEM AND SONS ELECTRONICS PVT LTD 116, SURYA VIHAR COLONY GORAKHPUR(UP) SH ARSHAD NAEEM S/O SH NAEEM AHMAD LTD 116, SURYA VIHAR COLONY GORAKHPUR(UP)

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s SH K.K.ANAND,ADV
A-103, DEFENCE COLONY
NEW DELHI-110024

4 Bar Association, CESTAT, ALLAHABAD

5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhisham Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

13 The ICFAI society, 52, Nagarjuna Hill, Penjagutta Hyderabad.-500082

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Cus. Appeal Nos.60767,60768/13

Arising out of OIA No.10-11/CUS/ALLD/2013 dated 30.08.2013 passed by Commissioner of Customs (Preventive), Lucknow.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether His Lordship wishes to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental Authorities? :

AC

Commr.of Customs (Preventive), Lucknow

...APPELLANT(S)

VERSUS

Shri Naeem Ahmad, Director of Naeem & Sons Electronics Pvt. Ltd.
Shri Arshad, Director of Naeem & Sons Electronics Pvt. Ltd.

RESPONDENT (S)

APPEARANCE

Shri Vikram Kaushik, A.C. (A.R.) for the Department
Ms.Surabhi Sinha, Adv. for the Respondent (s)

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

DATE OF HEARING & PRONOUNCEMENT : 26.10.2015

Final ORDER NO. 70107-70108/2016

CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL

Per Mr. Anil Choudhary :

The revenue is in appeal against order in appeal Nos. 10-11/CUS/ALLD/2013 dated 30.08.2013 passed by Commissioner of Customs (Preventive), Lucknow, against the directors of M/s Naeem & Sons Electronics Pvt. Ltd. and tender of the electronic goods imported mobile phones, wherein by the impugned order, the confiscation as well as penalty imposed on the firm and its Directors.

3. The facts in brief are that the preventive officer on 23.07.11 intercepted a vehicle and found that mobile phones of different brands, both Indian and Chinese with accessories valued at about Rs.5,42,725/- were being transported. On questioning the persons in occupation of the goods & vehicle they could not produce valid documents regarding the licit purchase or import of the Chinese and Indian origin goods in question. In the course of investigation the premises of the respondent assessee M/s Naeem & Sons Electronics Pvt. Ltd. and Vodafone was searched by the revenue on 25.7.11. In the course of search, mobile phones of different models of G-FIVE and Tintel Brand-Chinese Mobile Phone were found and the same were detained for further investigation. Statement of Mr. Naeem Ahmed, Director, was recorded wherein he had stated that the aforesaid G-Five phones were purchased from M/s Praneet Electronics, New Delhi and that Tintel brand were purchased from M/s. R. V. Solutions, Lucknow. The laptop detained and from the main shop of the Respondent was also opened by the expert and the records therein were downloaded in

presence of the directors. In further investigation, Mr Sanjiv Singh of M/s. R. V. Solutions in his statement recorded under section 108 certified the documents that is the invoice dated 16/7/11, copy of bill of entry number 3710200 and 3920477 filed and assessed in the Customs House at Gorakhpur, along with the letter in support of the said transaction. Further the bill of entry so submitted, was sent to Additional Commissioner (Import) new Custom House, IGI Airport, New Delhi for verification. As per report of the concerned Asstt. Commissioner, the bill of entry was found genuine in respect to purchase of G-5 Phones from Parneet Electronics, New Delhi. They also supported their invoice issued in favour of the respondent and the company. The statement was recorded of Mr Amarjit Singh, Director of M/s Parneet Electronics Private Ltd., it was stated that they had imported the mobile phones in respect of the sale invoice number R-I 240 dated 30/7/2010 imported vide bill of entry number 875864 dated 5/6/10 and sale invoice number R-I 785 dated 22/01/2011 relating to bill of entry number 2557041 dated 10/1/11. In the subsequent investigation of the bills of entry as stated, it is admitted by Revenue that the same was found in order. However, it appeared to revenue that the mobile phones detained from the shop premises of Naeem & Sons Electronics Pvt. Ltd. are smuggled and not legally imported and accordingly the respondents were required to show cause vide SCN dated 18.1.2012 as to why the goods found and detained valued at Rs.14,31,830/- be not confiscated and why not penalty be imposed under Section 112 of the Act.

4 The appellants contested the show cause notice and the same was adjudicated vide OIO dated 13.09.2012 and the goods found and detaied valued at Rs. 14,31,830/- from the premises of main shop, M/s Naeem & Sons Electronics Private Ltd. were held liable to confiscation and as the same were already released against security during the course of investigation, redemption fine of Rs. 3,57,958/- was imposed, further was no penalty of Rs.2,50,000/- each under section 112 of the act was imposed on the Directors namely, Shri Naeem Ahmad & Shri Arshad. Further penalty of Rs.5.00 lakhs was imposed under section 112 on the company, M/s Naeem & Sons Electronics Pvt. Ltd. and Rs.2,50,000/- each on Naeem Ahmed and Arshad Naeem, Respondents herein.

5. Being aggrieved the Respondents preferred an appeal before the ld. Commissioner, who vide the impugned order, has held that the appellants have sufficiently explained the source of purchase/acquisition of the goods in question. Further the appellant have also explained the search of source wherein bills of entry was produced by the sellers namely, M/s Parneet Electronics Pvt. Ltd. and M/s R. V. Solutions which were also found to be genuine on verification. In this view of the matter, M/s Naeem & Sons Electronics and the Directors, have discharged their onus. Further with reference to section 123 of the Customs Act it was also held that burden of proof in the facts and circumstances, that the goods are smuggled, lies is on the revenue and further that the revenue have failed to discharge the onus in the facts and circumstances. Accordingly, the order-in-original for confiscation and penalty was set aside and the appeal is allowed in

favour of the present respondents and their company, that is, M/s Naeem & Sons Electronics Pvt. Ltd.

6. Being aggrieved the revenue is in appeal before this Tribunal on the ground that the Commissioner (Appeals) has not properly appreciated that search had taken place at two premises of M/s Naeem & Sons Electronics Pvt. Ltd.. Firstly, mobile phones of Chinese origin were found when the vehicle was seized along with the goods on 23.7.11 and the persons in-charge could not produce proper documents in support and had indicated that some of the goods were also purchased from respondents. They produced some improper documents, namely, kachha bills. Etc. In view of the seizure on 23.7.11 (from vehicle) the ld. Commissioner (Appeals) erred in accepting the goods in search on 25.7.11 at shop premises of M/s Naeem & Sons Electronics Pvt. Ltd., on the ground that the imported Chinese mobile phone sets which were detained had been affixed with stickers as required under notification number 44(RE-2000) 1997-2002 dated 24/11/2000 issued under Section 5 of Foreign Trade (Development and Regulation) Act, 1992, wherein the labels indicated imported in March 2011 along with bill of entry number and date. As the documents in support submitted in support showed licit import with bills of entry, were imported in June, 2011 and as mobile phones found and detained, appear to be not properly supported by import documents.

7. Having considered the rival contentions I find that this is a new case being made out by the revenue at this stage, which is obvious from the show was notice. I find from the show cause notice that the

revenue had verified the documents, like bill of entry produced by the sellers of the respondents, wherein the Import documents verified by the revenue and found to be correct. In absence of any adverse observation in the show cause notice that the goods in question do not relate to the import documents produced in the course of investigation, no new case can be made out before the Tribunal in the second appeal. Further, I find from the impugned order that the ld. Commissioner (Appeals) has dealt with the issue in detail and recorded the following findings :

> "I observed that while passing the order of confiscation, adjudicating authority has held that the models of G-5 Mobiles shown in the invoice of M/s Pranneet Electronics Pvt. Ltd. were different, as they do not match with the G-5 mobiles which have been detained and when the physical verification was done then it was found. There were no names of importer company address, year and month of import printed on the cover/packet Made in China words only were found to be printed on the packets, therefore, it appears that the mobiles were illegally imported.
>
> All the model of detained lintel Chinese Mobiles sets were perused then it was found that the name of importer company of these mobile sets, was printed as M/s R. V. Solution Pvt. Ltd., Karolbag, New Delhi and the year and month was printed as March, 2011. M/s Naeem and Sons Pvt. Ltd. presented the Invoice Issued by M/s R.V.Solutions Pvt. Ltd. that belongs to June, 2011. It appears from this that the bill of entry

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and invoice which were of 2011, are not pertaining to detained tintel mobiles.

I observed that during search of both the shop a total of 1358 pieces of mobile phone (749 piece of tintel named company and 609 pieces of G-5 named company) were found. The appellants have produced the bills pertaining to all the recovered mobiles during the search/investigation which were issued by M/s Praneet Electronics Pvt. Ltd., New Delhi and M/s R. V.Solution Pvt. Ltd., Lucknow, on verification the said bills were found to be correct. Officers of both the Company appeared before the Customs Officers and have admitted that Chinese Mobile are purchased by M/s Naeem & Sons Electronics Pvt. Ltd. from their firm and the bills which were produced are correct. Both Companies have admitted that their companies import mobile from China. Export-import work/business is not carried out by the appellant's firm. Appellant's firm purchase goods from importers located at Delhi and Lucknow and sell the same from his company.

I further observed that during the search 749 pieces of different models of tintel mobile were recovered. The appellant has purchased the tintel mobile phone from M/s R.V.Solutions, Lucknow & Delhi Branch of M/s R. V. Solution had imported the above mobiles from China. Sticker has been affixed on each mobile of manufacturer company, on which the name of importer is R. V. Solutation Pvt. Ltd., Delhi and months and year of manufacture of mobile set is March, 2011. This lebel appears to be affixed by the factory in China. The above mobiles have been manufactured in March,2011 and the same have been imported in India in June, 2011. Whereas according to the seizure list, Tintel TI-295 pieces, tingtel T2-296 pieces, tintel T-5-81 pieces, tintel T06-77 pieces were recovered. As per the bills produced by the appellant 1500 pieces of tintel,T1, 1000 pieces of tintal T2, 200 pieces of tintel T3, 200 pieces of tintel T5 and 200 pieces of tintel T6 were purchased. All these goods were purchased on 16.07.2011 from M/s R.V.Solutations. As per the panchanama, itself stickers are fixed on each mobile. On which name of importer is printed as R.V.Solution and the bill issued by M/s R.V.Solutation has been found correct.

In these circumstances, I am of the opinion that appellant has successfully defended their case on the basis of documentary evidences, on the contrary, department has failed to bring any tangible evidences. Thus, mere on assumption that date of manufacture, bill of entry and invoice issued to the appellant are of different months, therefore, confiscated mobiles do not pertain with the said invoice is not sustainable in the eyes of law, accordingly, its confiscation is against law and the same is liable to be set aside. I find force in the submission of appellant as this is a prevalent practice in every trade, further if there was any problems regarding the models then the investigation officers should have asked clarifications from the owner of M/s Praneet Electronics Pvt. Ltd. who appeared on 02.12.2011 to tender his statement. They too, would have clarified,but despite presence of their representative, no query/investigation was done. The legal representative of M/s Parannet Electronics Pvt. Ltd. had appeared and his statement under section 108 was taken by Superintendent of Customs.

The representative had admitted in his statement that they import the mobile from China and he has also verified the bill of entry produced by the applicant. If they recovered mobiles when not validly imported, or the rules prescribed by law were not followed, in these circumstances, the total responsibility is on the importer but despite this allegation, no show-cause notice was given to importer company. This means that the import done by the importer company was deemed to be correct.

I observed that there is no evidence against the appellants from which it is proved that aforesaid recovered all the mobile sets were smuggled, mobile phones are the articles of "Non-notified goods" category therefore under the provision of Section 123 of Customs Act, the seizing officer has to prove that the seized goods, have been brought illegally by smuggling. He has to assert with proof that as to how, from where by what means, the aforesaid seized mobiles, have been brought illegally by smuggling and along with that he has given evidence also in support. It will be proved that the aforesaid mobile were smuggled. But in adjudication order, it has not been followed.."

In this case, the mobile phones and parts thereof of foreign origin are recovered from the appellant. It is not disputed by the Revenue that the goods are not notified under Section 123 of the Customs Act. In this situation, the onus is on Revenue to prove that the goods in question are smuggled goods in nature. Revenue has not produced any evidence to show that goods in question are smuggled into India. Even in the statement recorded by the revenue at the time of seizure, the appellant never admitted the fact that the goods in question are smuggled into India. Merely on the ground that goods were of foreign origin, in absence of notification under Section 123 of the Customs Act, there is no presumption that foreign marked goods are smuggled in nature. The mobile phones and parts thereof are freely traded in the local market. Further, I find that the Tribunal in the decisions relied upon by the appellant held that in absence of any notification under section 123 of Customs Act, the burden to prove that goods in question are smuggled in nature and mere non-production of the bills by the person concerned does not lead to the inference that goods in question are smuggled in nature. In these circumstances as revenue failed to prove that goods in question are smuggled in nature, the confiscation of the goods is not sustainable and set aside. In view of above, I see no basis for award of penalty upon the above appellants and firm. Likewise there is no basis for confiscation of 1358 pieces of mobiles phone or imposition of redemption fine and accordingly, appeals are allowed and order passed by Joint Commissioner, Customs, Lucknow, related to appellants, are set aside."

In the facts and circumstances and on the facts, I find that there is no error in the findings of the ld. Commissioner (Appeals). Accordingly, I uphold the impugned order and dismiss the appeals of the revenue.

The Respondent will be entitled to consequential benefits in accordance with law.

(Dictated and pronounced in the open Court)

(Anil Choudhary)
Member (Judicial)

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प्रमाणित प्रति / Certified True Copy
17.3.16
सहायक रजिस्ट्रार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001