# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# SOUTH ZONAL BENCH
# BANGALORE

Appeal(s) Involved:

**C/20/2008-DB**

[Arising out of No. 29/2007 dated 16/10/2007 passed by CC, Bangalore]

**ARICENT TECHNOLOGIES (HOLDINGS) LIMITED**
(FORMERLY KNOWN AS FLEXTRONICS SOFTWARE SYSTEMS LTD) BANGALORE

Appellant(s)

**Versus**

**C.C-BANGALORE-CUS**
C.R. BUILDING,QUEENS ROAD,
P.B.NO. 5400,
BANGALORE
KARNATAKA
560001

Respondent(s)

Shri G. Shivadass, Advocate — For the appellant
Smt. Kavitha Podwal, Superintendent(AR) — For the Respondent

Date of Hearing: 17/04/2018
Date of Decision:___________

**CORAM:**
**HON'BLE SHRI S.S GARG, JUDICIAL MEMBER**
**HON'BLE SHRI DEVENDER SINGH, TECHNICAL MEMBER**

## Final Order No. ______________

**Per : S.S GARG**

The present appeal is directed against the impugned order dt.28.9.2007 / 16-10-2007 passed by the Commissioner of Customs, Bangalore whereby the Commissioner has confirmed the demand of duty amounting to Rs.34,55,753/- under Section 28(1) of Customs Act, 1962 and also confirmed the demand of interest amounting to Rs.9,58,982/- and also appropriated the amount of Rs.44,14,735/- paid by the appellant. The Commissioner also confiscated the goods and gave the option to the appellant to redeem the same on payment of redemption fine of Rs.30 lakhs and also imposed a penalty of Rs.4 lakhs under Section 112(a)(ii) of the Customs Act, 1962.

2. Briefly the facts of the present case are that the appellant is a 100% EOU working under the STP Scheme. They were granted a Private Bonded Warehousing License No.83/2000-Cus dt. 25/03/2000 under Section 58 of the Customs Act, 1962. The said license was renewed on 23/07/2005 and the same was valid till 21/03/2010. They were also granted In-Bond Manufacturing Sanction Order bearing No.83/2000-Cus dt. 25/03/2000 under Section 65 of the Customs Act, 1962 for carrying out operations related to development of software. The appellant carried out STP operations from 2000 and earned Foreign Exchange. In order to carry out the activity of software development, the appellant require various items of capital goods for use in the STP premises and they applied to the Director, STPI vide their letter dt. 20/03/2000 enclosing list of capital goods required at the time of setting up of the STP unit for approval and to procure the same duty free under the provisions of the Notification No.63/97-Cus dt. 16/03/1997. The Director, STPI vide letter dt. 24/03/2000 informed the appellant that the Inter-Ministerial Standing Committee of the STPI had examined the list of the capital goods submitted by the appellant approved duty-free procurement of the same and thereafter the appellant imported the goods without payment of duty and brought the said capital

goods into their bonded premises which was later duly warehoused by the STP authorities. The appellant also submitted an application dt. 06/04/2004 to STPI along with Proforma Invoice of their supplier requesting for necessary approval to procure the Modular Work Station (Lato Panel) from M/s. Anagram Systems, Noida, SEZ, Noida for a value of Euro 1,43,290.46. The proforma invoice of the supplier described the goods as Modular Workstation and accessories and the same was also proposed to be used along with the existing workstation. Thereafter vide letter 08/04/2004, the Director, STPI issued the necessary approval for procurement of Modular Workstation which was duly authorized by Standing Committee of the Department of Electronics. Further the Director, STPI also attested the Proforma Invoice and thereafter the appellant vide letter dt. 08/04/2004 submitted a request to Deputy Commissioner of Customs, Bangalore for issue of procurement certificate to enable the appellant to effect purchase of the workstation and accessories without payment of duty and the Deputy Commissioner issued the necessary procurement certificate on 13/04/2004 authorising the appellant to obtain duty free goods against proforma invoice and thereafter the appellant sent the procurement certificate to M/s. Anagram Systems and the supplier dispatched the consignment in completely knocked down form duly sealed with Customs seal and also verified and countersigned by the Customs Officer in charge of M/s. Anagram Systems. On receipt of the goods, the appellant filed Bill of Entry No.187/2004 dt. 26/04/2004 for warhousing which was duly verified and bonded and it was verified by the Bonding Officer and thereafter it was installed in the bonded premises. Appellant has also submitted another application dt. 15/03/2004 to STPI authorities along with proforma invoice for procuring duty free import of modular workstation as accessories (Glazed Frames and Glass Doors). The Director, STPI permitted the appellant to procure the modular workstation on the ground that the same has been authorized by the Standing Committee of the Department of Electronics and thereafter the appellant filed Bill of Entry No.586569 dt. 18/03/2004 by availing the benefit of exemption under Notification No.52/03-Cus dt. 31/03/2003 and received the goods into their bonded premises. Thereafter on 22/02/2006, Customs officers visited the appellant's premises and conducted physical verification of the goods procured by the appellant and the utilization and after the verification, the Department directed the appellant to pay the Customs duty foregone on the glazed frames and glass doors imported under the Bill of Entry No.586569 dt. 18/03/2004 and on the Modular workstation procured from SEZ Noida under Bill of Entry No.187/04 dt. 26/04/2004. Thereafter the appellant requested the Department to pass an order but in the meantime the appellant deposited Rs.44,14,735/- under the provisions of Customs Act, 1962 read with Notification No.52/2003 dt. 31/03/2003 under protest. After following the due process, the Commissioner vide the impugned order confirmed the proposals in the show-cause notice and hence the present appeal.

3. Heard both the sides and perused records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and documentary evidence and the law on the point. He further submitted that the appellants have procured the modular furnitures which is evident from the proforma invoice, the sale invoices and the bills of Entry filed with the Customs and after importation, the said goods have been installed at the appellant's premises. He further submitted that the notification, inter alia, exempt a number of items like uninterrupted power supply system, pollution control equipment, quality assurance equipment, storage systems, special racks for storage, modular furniture and parts thereof, computer furniture, anti-static carpet, teleconference equipment, servo control system, panels for electrical, air conditioners and security systems and the spares and consumables for the above items. He also submitted that the exemption in the notification is by description and not by chapter heading, hence it is eligible to the benefit of notification irrespective of its classification in the Customs Tariff Act. He also submitted that once the modular furniture and parts thereof are covered by description for exemption under the notification, the same should be allowed without any further interpretation. It is his further submission that there is no statutory definition for the expression modular furniture and the modular furniture in commercial sense certainly covers the items procured by the appellant as the modular workstation which can be easily assembled and reassembled in different configurations to respond to the changing needs and the frames are fixed to each other with the help of nuts and bolts. He further submitted that the goods procured by the appellant are in the nature of connecting parts between two workstations and consequently, the items procured by the appellant should be considered as parts of modular furniture only and the benefit of Notification No.52/2003-Cus should be available to the appellant. He further submitted that while interpreting the notification, the intention of Legislature is also to be taken into consideration and the intention of the Notification No.52/2003-Cus is to be give benefit to the modular furniture, its parts and spares. He further submitted that STPI permitted the import of the goods under Customs Notification No.52/2003 after being satisfied that the goods were eligible for duty free import, only after examining the proforma invoice submitted by the appellant and issued a certificate that the goods are required for use at the STP and that the goods were authorized by the Standing Committee of the Department of Electronics. Further the certificate specifically stated that the items imported by the appellant were covered by the Customs Notification No.52/3003 and as per the EXIM Policy for 2002-07, necessary approval was granted. He also submitted that if the Customs Department had a doubt regarding the certificate granted to the appellant, then they should have referred to the DGFT for clarification. He also submitted that once a Committee which also consists of a member from CBEC had authorized the appellant to import under a particular notification after examining all the necessary documents, then it is not open to the Customs Department to later on turn out and state that the goods are not eligible to the benefit of the Notification. In support of this submission, he relied upon the following decisions:-

i. GE India Technology Centre Vs. CC, Bangalore [2009(247) ELT 402 (Tri. Bang.)]
ii. DSL Software Ltd. Vs. CC [2005(181) ELT 250]
iii. Transparent Technologies Pvt. Ltd. [2006(200) ELT 118 (Tri. Bang.)]

4.2. The learned counsel alternatively submitted that the items in question should be considered as capital goods and therefore eligible for the benefit of Notification No.52/2003. He also referred to the definition of capital goods in the Foreign Trade Policy, 2004 which covers, inter alia, a plant required for manufacture or production of goods or for rendering services. He further submitted that the Tribunal in the case of Wipro Ltd. Vs. CC [2004(173) ELT 207 (Tri. Bang.)] and Novell Software Development (I) Ltd. Vs. CC [2006(194) ELT 444 (Tri. Bang.)], has interpreted the expression ‘capital goods’ used in the Notification in a very wide sense. The learned counsel also placed reliance on the decisions of the Tribunal in the case of ***Cognizant Techno Solutions India P. Ltd. Vs. CC(AP & Admn.), Kolkata-I [2012(286) ELT 77 (Tri. Kol.)]*** wherein the Tribunal has held that the mineral fibre sound absorbing sheet, cut to sizes and used as false ceiling is a modular furniture and entitled to benefit of exemption under the Notification No.140/1993-Cus.

4.3. Another submission of the learned counsel is that there cannot be a demand of duty as the goods are still lying in the bonded warehouse of the appellant and until and unless these capital goods are either cleared for home consumption or removed in contravention of Section 71 of the Customs Act, no duty can be demanded from the appellant. For this submission, he relied upon the following decisions:-

i. CC, Bangalore Vs. Infosys Technologies Ltd. [2003(159) ELT 863]
ii. DSL Software Vs. CC [2005(181) ELT 250]
iii. Arjun Industries Ltd. Vs. CCE, Jaipur [2005(70) RLT 7]
iv. Delta World Tele Systems Vs. CCE [2008(226) ELT 83 (Tri. Mum.)]

4.4. The last submission of the learned counsel for the appellant is that the entire demand is barred by limitation and extended period cannot be invoked because import has been made after obtaining necessary permissions from the STPI as well as Customs. He further submitted that the appellant procured the items in April 2004 under a bona fide belief that the goods imported are modular furniture and the same has been indicated in the Bill of Entry and the packing list and the commercial invoice were also enclosed with the Bill of Entry and all other documents such as certificate issued by STPI were also submitted to the Department. Further the goods were cleared without any objection as the authorities were aware of what was imported and has accepted that it was modular furniture and eligible for the benefit of Notification No.52/2003. He further submitted that it is a settled law that longer period of limitation cannot be invoked unless there is an element of fraud, collusion or any willfull mis-statement or suppression of facts.

5. On the other hand, the learned AR defended the impugned order and submitted that the imported goods do not fall in the definition of modular furniture and the said items are not exempted under the Notification No.52/2003. He further submitted that in spite of the approval from STPI, it is the duty of the Customs officer to find out as to whether the goods imported conform to the description of the goods. If the goods imported do not correspond to those mentioned in the notification, exemption cannot be given notwithstanding approval of the STPI or the Development Commissioner. She further submitted that the notification granting benefit of exemption should be strictly interpreted. As the item imported are not modular furniture, the benefit of notification cannot be given.

6.1. After considering the submissions of both the parties and perusal of material on record and the various decisions relied upon by the appellant cited supra, we find that the appellants have imported the goods considering the same as modular furniture and have availed the benefit of

Notification No.52/2003. Further we find that in the proforma invoice and sale invoice and Bill of Entry, they have described the goods as parts of modular furniture. Further we find that the STPI authorities have also permitted the import of goods under Customs Notification No.52/2003 after satisfying themselves that the goods were eligible for duty free import and necessary certificate was also issued. Further we find that for availing exemption under Notification No.52/2003-Cus dt. 31/03/2003, two conditions need to be satisfied (a) STPI unit is set up as per the authorization granted by the Development Commissioner / STPI authorities and a certificate is issued by STPI stating that the goods are required to be installed or used in the unit and (b) the import is authorized by the Standing Committee. In the present case, both the conditions have been fulfilled by the appellant and once the Committee has authorized the import, then, in our opinion, the Customs Department later on cannot question the benefit under the Notification. An identical issue arose in the case of DSL Software Ltd. and this Tribunal in para 8 has held as under:-

> ***8.*** *We have gone through the various submissions made by the learned Advocates and learned Departmental Representatives. As already pointed out, the Notification No. 140/91 enables the E.O.U. to import various goods necessary for setting up of units under Software Technology Park of India (STPI). In fact, the application indicating the requirement of goods is scrutinised by a very High Level Committee appointed by Ministry of Industry in its Notification, dated 22-2-1993. This Committee is chaired by Secretary, Department of Electronic or his nominee and consists of Members from*

*various Ministries including the Chairman of the Central Board of Excise and Customs or his nominee. This Committee in its wisdom has authorised the import of Modular Furniture required by the appellants. Once they have authorized to import of Modular Furniture on the basis of the information furnished by the appellants, it is not for the customs authorities to hold that they are not Modular Furniture after the import and installation of the items in the units under customs provisions. It is also a fact that the authorization issued by STPI has not been cancelled. If at all, the Department had any doubt about the entitlement of goods imported for the benefit of Notification, they should have immediately addressed the CBEC for clarification. From the records, it is seen that the Department has not taken any such steps. All the appellants have followed the proper procedure in importing the goods. It is not the case of the Department that the goods were imported without knowledge of the Department. In fact, the goods were exempted and allowed to be bonded. Under these circumstances, the Commissioner's decision to hold that the goods are not entitled for the benefit of exemption Notification No. 140/91-Cus. cannot be sustained. In other words, the authorization of STPI cannot be questioned without taking steps for the cancellation of the authorization. If the Department holds that the goods are not covered by the exemption Notification, they should have issued the show cause notice within the time limit under Section 28 or Section 11A of the Acts. There are absolutely no ground in any of the four cases to invoke the longer period as all the goods were imported and installed only with the knowledge of the Department. The adjudicating authority has blindly invoked the longer period without any reason. We also find that the goods are held liable for confiscation under Section 111(o) of the Act. This is not correct. Section 111(o) of the Customs Act will come into effect only when the post importation conditions of exemption Notification are not fulfilled. In other words, Section 111(o) is only for exempted goods. When the Department feels that the exemption is not applicable to*

> *the impugned goods, Section 111(o) cannot be invoked at all. The demand can be made only under Section 28. It is clearly seen that no ground exists for invoking the longer period. Hence all the demands are clearly time barred.*

6.2. Further we find that in the case of Cognizant Techno. Solutions India Pvt. Ltd. cited supra, the Kolkata Tribunal held that mineral fibre sound absorbing sheet, cut to sizes and used as false ceiling, is a modular furniture and is entitled to the benefit under Notification No.52/2003 and in the present case, the goods procured are in the nature of connecting parts between the two workstations. Therefore it can be considered as parts of modular furniture only and the benefit of notification can be extended to the appellant.

6.3. Besides this, we also find that the Department has invoked the extended period of limitation in the present case and issued the show-cause notice on 01/05/2006 for the goods which were imported on 18/03/2004 and 26/04/2004. The Department has not brought any evidence on record to show that there was an element of fraud, collusion or any willful mis-statement or suppression of facts on the part of the appellant justifying the invocation of extended period of limitation. Since all the goods have been procured by obtaining necessary permission from STPI as well as Customs authorities and the Customs was fully aware of the import and therefore it does not lie in the mouth of the Department now to contend that the appellants, hence suppressed the material facts and are not eligible for the benefit of the Notification and the goods imported by the appellants are not the modular furniture. Consequently, we hold that the entire demand is barred by limitation. The issue of limitation has also been decided by the Tribunal in the case of DSL Software India Ltd cited supra n para 8 which has been reproduced supra and the entire demand was held to be clearly time barred.

7. Keeping in view of our discussion above, we are of the considered view that the impugned order is not sustainable in law on merits as well as on limitation. Therefore we set aside the impugned order by allowing the appeal of the appellant with consequential reliefs, if any.

(Order was pronounced
in Open Court on **..................**)

**DEVENDER SINGH**
**TECHNICAL MEMBER**

**S.S GARG**
**JUDICIAL MEMBER**

Raja...