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

Appeal(s) Involved:

**C/176/2009-DB**

[Arising out of Order-in-Appeal No. 170-08 dated 22/12/2008 passed by , ]

**MISTRAL SOLUTIONS LTD**
NO.629, I MAIN, DOMLUR LAYOUT,
BANGALORE

Appellant(s)

**Versus**

**Commissioner of Service Tax**
**BANGALORE SERVICE TAX- I**
NULL 1ST TO 5TH FLOOR,
TTMC BUILDING,above BMTC BUS STAND,DOMLUR
BANGALORE, - 560071
KARNATAKA

Respondent(s)

**Appearance:**

Shri PRADYUMNA G.H. ADVOCATE
NO.371, 8TH MAIN
SADASHIV NAGAR
banglaore - 560080
Karnataka

For the Appellant

Smt. Kavita Podwal, Superintendent(AR)

For the Respondent

Date of Hearing: 18/02/2019
Date of Decision: 18/02/2019

**CORAM:**
**HON'BLE MR. S.S GARG, JUDICIAL MEMBER**
**HON'BLE MR. SANJIV SRIVASTAVA, TECHNICAL MEMBER**

## Final Order No. 20175 / 2019

**Per : S.S GARG**

The present appeal is directed against the impugned order dt. 22/12/2008 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants imported 12 nos. of goods described as 'TX4000/2014-LINGS / FULL Stack (HW only)' from M/s. HCOM Ltd., Singapore vide Bill of Entry No.376051 dt. 27/02/2007. Thereafter proceedings were initiated by the Customs Department vide show-cause notice dt. 08/06/2007 issued by Assistant Commissioner of Customs alleging that the value of similar goods imported by other parties such as Motorola India Pvt. Ltd. and Siemens Public Communications was much higher and hence the transaction value declared by the appellant was liable to be rejected and its value was liable to be re-determined under Rule 6 of Customs Valuation Rules, 1988. Further it was alleged that the appellant has resorted to mis-declaration of the value of goods imported by them and hence the imported goods were liable to confiscation as per Section 111(m) of the Customs Act, 1962 (the Act) and penalty under Section 112(a) of the Act was liable to be imposed on them. after following the due process, the Additional Commissioner vide order-in-Original dt. 25/06/2008 confirmed the differential customs duty of Rs.3,33,292/- along with interest as per Section 28 of the Act and further held that imported goods were liable to confiscation with an option to the appellant to redeem the same on payment of redemption fine of Rs.2,25,000/- under Section 125 of the Act and also imposed penalty of Rs.1,12,000/- under Section 112(a) of the Act. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who rejected the same.

3. Heard both 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 the law. He further submitted that the impugned order has travelled beyond the show-cause notice because in the show-cause notice differential customs duty was not demanded and for this submission, he relied upon the decision of the Delhi High Court in the case of CC Vs. R.K. International [2018-TIOL-1762-HC-DEL-CUS] wherein it has been held that without specific demand in the show-cause notice under Section 124 of the Customs Act, 1962, the Revenue is not entitled to demand customs duty under Section 28 of the Act. Learned counsel further submitted that as far as mis-declaration of the value of the imported goods is concerned, the show-cause notice only referred to the contemporaneous imports of similar goods by Motorola India Pvt. Ltd. and Siemens Public Communication, Bangalore but the assessment was not challenged. He further submitted that demand of duty without challenging the assessment is bad in law as held by the Supreme Court in the case of CCE Vs. Flock (India) Pvt. Ltd. [2000(120) ELT 285 (SC)].

4.2. As far as merit is concerned, the learned counsel submitted that the goods imported by the appellant were not similar and much less identical to the goods imported by Motorola India Pvt. Ltd. and Siemens Public Communications as alleged in the show-cause notice. He also submitted that the goods imported by the appellant were HW only means ‘hardware only’ and was not enable with SS& protocol software on the

Board and this is clearly shown in the purchase order also whereas the goods imported by other parties, it was loaded with SS& protocol software embedded on the Board itself. He further submitted that the rejection of transaction value in the absence of any allegation or evidence that the supplier and the appellant were related or that the value was influence of some other factor or that there was flow back from the supplier of the item is totally untenable and liable to be set aside. For this submission, he relied upon the following decisions:-

i. Divine International Vs. CC [2016(338) ELT 142 (Tri. Del.)]
ii. CC, Delhi Vs. Maruti Fabric Implex [2016(343) ELT 963 (Tri. Del.)]
iii. S.K. Dhawan Vs. CC(Import) [2016(344) ELT 436 (Tri. Mumbai)]

4.3. Further the learned counsel also submitted that the redemption fine is not imposable as there was no seizure of the goods in the first place and it is settled law that confiscation can be ordered only when the goods are seized. For this submission, he relied upon the following decisions:-

i. Chinku Exports Vs. CC [1999(112) ELT 400 (Tri.)]
ii. CC Vs. Raja Impex (P) Ltd. [2008(229) ELT 185 (P&H)]
iii. Shiva Kripa Ispat Pvt. Ltd. Vs. CCE [2009(235) ELT 623 (Tri. LB)]
iv. Bhagyanagar Metals Ltd. Vs. CCE, Hyderabad [2016(333) ELT 395 (Tri. LB)]
v. Thyseenkrupp Industries India P. Ltd. Vs. CC [2016(343) ELT 533 (Tri. Mumbai)]

4.4. Further learned counsel also challenged the penalty imposed under Section 112(a) on the ground that the conditions mentioned in Section 112(a) are not fulfilled.

5. Learned AR for the Department defended the impugned order.

6. After considering the submissions of both parties and perusal of the material on record, we find that in the first place, the demand of differential duty under Section 28 of the Act is not sustainable as the same has not been invoked in the show-cause notice and therefore the demand is beyond the show-cause notice. Further we find that the Revenue has not challenged the assessment which is complete and without challenging the assessment, the demand cannot be made. Further we find that the products which were imported by the appellant were only hardware whereas the products compared with other importers were loaded with software also. Further we find that Revenue has not been able to bring on record that the appellant and the supplier were related parties and there was any flow back from the appellant to the supplier. In the absence of all these materials, we are of the considered view that the impugned order is not sustainable and therefore the same is set aside by allowing the appeal of the appellant with consequential benefits, if any.

(Operative portion of the Order was pronounced
in Open Court on **18/02/2019**)

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| **SANJIV SRIVASTAVA**<br>**TECHNICAL MEMBER** | **S.S GARG**<br>**JUDICIAL MEMBER** |

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