CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>BANGALORE</u>

REGIONAL BENCH - COURT NO. 1

<u>Appeal(s) Involved:</u>

C/21301/2018-DB, C/21297/2018-DB, C/21300/2018-DB, C/21298/2018-DB, C/21299/2018-DB, C/21304/2018-DB, C/21555/2018-DB, C/21306/2018-DB, C/21556/2018-DB, C/21581/2018-DB, C/21588/2018-DB

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-85-2017-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-84-17-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-86-17-18 dated 26/03/2018 passed by Commissioner of Central Tax , COCHIN]

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-88-17-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

[Arising out of Order-in-Original No. COC-CUSTMS-000-COM-89-17-18 dated 26/03/2018 passed by Commissioner of Central Tax , COCHIN(Appeal)]

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-90-2017-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

[Arising out of Order-in-Original No. COC-CUSTMS-000-CCM-10-18-19 dated 18/06/2018 passed by Commissioner of Central Tax , COCHIN]

[Arising out of Order-in-Original No. coc-customs-000-ccm-87-17-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

[Arising out of Order-in-Original No. COC-CUSTMS-000-CCM-10-18-19 dated 18/06/2018 passed by Commissioner of Central Tax , COCHIN]

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-85-2017-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

[Arising out of Order-in-Original No. coc-customs-000-ccm-87-17-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

Srivenkateswara Repro Graphics
24/a,west Canal Bank Road,kottur,chennai
CHENNAI - 600085
TAMILNADU
Appellant(s)

Best Mega International
Gl6,ansal Bhavan,k.g.marg,new Delhi
NEW DELHI - 110001
NEW DELHI
Appellant(s)

Supreme Enterprises
No 3/19 Nallathanni Thottam Sivanandha Mill Road Vilankurichi
COIMBATORE - 00
TAMIL NADU
Appellant(s)

Bedy Associates
F-255,flatted Factory Complex,okhala,new Delhi
NEW DELHI - 110020
NEW DELHI
Appellant(s)

Data Enterprises
F 246 Flatted Factory Complex Okhala
NEW DELHI - 682009
NEW DELHI
Appellant(s)

Skylark Office Machines
Shop No 4,ground Floor,10,aziz Mulk 4 Th Street,thousand Lights,chennai
CHENNAI - 600006
TAMILNADU
Appellant(s)

Lakshmi Narayanan Rao
Director Moksha Business Machines Room No 19 3rd Floor Unity House Abids
HYDERABAD - 500001
TELANGANA
Appellant(s)

Suresh Kumar Khettarpal
Unistar Enterprises 88 Ranapratap Nagar Karol Bagh
new delhi - 110005
new delhi
Appellant(s)

Moksha Business Machines
Room No 19 3rd Floor Unity House Abids
HYDERABAD - 500001
TELANGANA
Appellant(s)

Mr Rajesh N Kumar Khatterpal
Gl6,ansal Bhavan,k.g.marg,new Delhi
NEW DELHI - 110001
NEW DELHI
Appellant(s)

Unistar Enterprises
88 Ranapratap Nagar Karol Bagh
new delhi - 110005
new delhi
Appellant(s)

VERSUS

Commissioner of Customs Cochin-cus
CUSTOM HOUSE
COCHIN - 682009
KERALA
Respondent(s)

Commissioner Of Central Tax & Central Excise, Cochin
C.R. Buildings, I.S Press Road
Cochin - 682018
Kerala
Respondent(s)

Commissioner of Customs Cochin-cus
CUSTOM HOUSE
COCHIN - 682009
KERALA
Respondent(s)

Commissioner Of Central Tax & Central Excise, Cochin
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Kerala
Respondent(s)

Commissioner of Customs Cochin-cus
CUSTOM HOUSE
COCHIN - 682009
KERALA
Respondent(s)

Appearance:

Shri N. VISWANATHAN Advocate
FLAT 8A, 'RAMS', NO.26, SOUTH MADA
STREET, SRI NAGAR, COLONY SAIDAPET,
CHENNAI.600015
For the Appellant

CHENNAI - TN

Shri Gopakumar, Jt. Commissioner(AR) For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. V. PADMANABHAN, TECHNICAL MEMBER

Final Order No. 20330-20340 / 2019

Date of Hearing: 03/04/2019
Date of Decision: 03/04/2019

Per : V. PADMANABHAN

This common order is being passed in respect of appeals against eight Orders-in-Original as per the details given below:-

Sl. No.	Appeal No.	Assessee name	Penalty imposed	Order-in-Original No.
1	C/21297/2018	Sri Venkateswara Repro Graphics	Rs.1.5 lakhs	No.84/2017-18 dt. 26/03/2018
2	C/21298/2018	Bedi Associates	Rs.1.6 lakhs	No.88/2017-18 dt. 26/03/2018
3.	C/21299/2018	Data Enterprises	Rs.1.6 lakhs	No.89/2017-18 dt. 26/03/2018
4.	C/21300/2018	Supreme Enterprises	Rs.1.5 lakhs	No.86/2017-18 dt. 26/03/2018
5.	C/21301/2018	Best Mega International	Rs.20 lakhs	No.85/2017-18 dt. 26/03/2018
6.	C/21581/2018	Rajesh N Kumar Khatterpal	Rs.10 lakhs	-do-
7	C/21304/2018	Skylark Office Machines	Rs.2 lakhs	No.90/2017-18 dt. 26/03/2018
8.	C/21556/2018	Moksha Business Machines	Rs.3 lakhs	No.10/2018-19 dt. 18/06/2018
9.	C/21555/2018	Lakshmi	Rs.1 lakh	-do-

		Narayanan Rao		
10.	C/21588/2018	Unistar Enterprises	Rs.2 lakhs	No.87/2017-18 dt. 26/03/2018
11	C/21306/2018	Suresh Kumar Khettarpal	Rs.50,000/-	-do-

2.1. The issue involved in all the cases relates to importation of used Multi-function Digital Photocopiers and Printers (MFD for short). The imports made by these eight importers at Cochin Customs were ordered for absolute confiscation by the adjudicating authority considering these imported goods as "prohibited" goods. After absolute confiscation, no option for redemption was extended to the importers. The adjudicating authority further imposed penalties on the importers under Section 112(a) of the Customs Act, 1962 for imports made in violation of various provisions. In certain cases, penalties have also been imposed on the proprietors of the importing firms under Section 114AA read with Section 112(a) of the Customs Act, 1962.

2.2. The MFDs imported were old and used. The Customs authorities took the view that these imports were in violation of Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act, for short), Foreign Trade Policy 2015-2020 and Pollution Control Regulations applicable to e-waste. These orders are in challenge in the present set of appeals.

3.1. The learned counsel appearing for all the appellants submitted as follows:-

i. The consignments which are imported are used MFDs but they are functional and can be put to use for the intended purpose. The original authority held them to be e-waste which is actually incorrect.

ii. The nature and condition of the imported goods have been subjected to examination in all cases except in the case of M/s. Supreme Enterprises as well as M/s. Skylark Office Machines. In respect of M/s. Moksha Business Machines, a part of the consignment has been examined. In case where examination has not been done, it is on account of the fact that the Customs authorities did not permit opening and examination of the consignments. In cases where the goods were examined, the relevant certificates categorically state that the items have a self-life of at least 7 years.

iii. The import of MFDs (used) is subjected to conditions of Import policy as well as Hazarduous Waste Rules, 2016. As per the Import Policy, the importation of used machinery is restricted and can be made only with the authorization / licence issued by DGFT. He admitted that none of the importers were in possession of such licence / authorization.

iv. As per the Hazarduous Waste Rules, 2016, the import of MFD is subject to the conditions of production of documents as per Schedule VIII. This prescribed 5 documents with reference to import of impugned goods. The appellants fulfilled all the conditions and as such, there is no violation of Hazarduous Waste Rules in the present imports.

v. Even though, the imports have been made in violation of the Import Policy, it is submitted that such violation should not result in absolute confiscation of goods. He submitted that the importers were entitled to release of the imported goods even on payment of redemption fine and penalty.

vi. Regarding enhancement of value carried out by the Customs Authorities, the appellant would not contest the issue.

vii. In respect of penalties imposed on the proprietors as per Section 114AA of the Act, he submitted that once the importing firms are penalized, there is no justification for imposition of separate penalties on the proprietor.

3.2. Learned counsel further submitted that the imports of similar MFDs made in the same port were being permitted by the Customs authorities in the earlier period. In respect of similar imports made at the material time, certain appeals were considered by the Bangalore Bench of the Tribunal in the case of *Parag Domestic Appliances & others* decided vide Final Order No.21592-21594/2017 dt. 09/08/2017, the Tribunal took the view that the goods cannot be considered as prohibited goods and permitted release of the goods on payment of redemption fine and penalty @ 10% and 5% respectively. He further submitted that this decision of the Tribunal was challenged by the Revenue before the Kerala High Court at Kochi ; the same was upheld and release of the goods was ordered. The Revenue further carried the issue before the Hon'ble Supreme Court who decided the issue in Civil Appeal No.1057-1059 of 2019 dt. 24/01/2019. The Apex Court finally upheld the order of the Tribunal with the observation "We therefore find no error with the conclusion of the Tribunal affirmed by the High Court that the respondents were entitled to redemption of the consignment on payment of the market price at the reassessed value by the customs authority with fine under Section 112(a) of the Customs Act, 1962".

3.3. Learned counsel further submitted that the adjudicating authority has also observed that the imports have been made in violation of the Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012 (CRO for short) issued by the Ministry of Communication and Information Technology (MCIT). The Commissioner has also referred to the letter received by Jt. Secretary (Customs), CBEC from Joint Secretary, MCIT, to the effect that, CRO applies universally to all notified products after the date of coming into effect of the order and that repaired/ refurbished / second hand items, if notified, also requires registration under the provisions of the order.

3.4. In this connection, he submitted that the imported goods i.e. MFDs are not one of the goods notified under the above goods by the Ministry of Communication and Information Technology. In this regard he relied on the decision of the Hon'ble High Court of Andhra Pradesh & Telangana in Writ Petition No.2728 of 2018 in which the High Court has taken the view that such Regulations will be applicable only to those goods which were notified under the Rules and further that MFD has not been notified under the said Rules. The decision was also accepted by the Department of Revenue.

3.6. He also submitted that the goods may be allowed to be released. In addition, he also cited the decision of the Chennai Bench of the Tribunal in the case of Value Marks Traders Pvt. Ltd. Vs. CC(Sea), Chennai-II [Final Order No.41864/2018 dt. 11/05/2018]. The Chennai Bench has also taken the view that MFD is not one of the items notified in the ITC (HS) Schedule-I notified under the Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order, 2012.

3.7. Learned advocate also requested that the demurrage charges payable on the imported goods which now stands confiscated by the lower authorities, should also be waived in terms of Rule 6(l) of the Handling of Cargo in Customs Area Rules, 2009.

4. Learned AR supported the findings of the original authority. He emphasized that the enhancement of value as well as the violation of Import Trade control Regulations stands admitted by the appellants. He also submitted that the imported MFDs are clearly objectionable e-

waste as they are used items. The appellants have not satisfied all the conditions of Hazarduous Waste Rules, 2016. In any case, he added that the documents submitted in terms of the Rules are not complete.

5. We have heard both sides extensively and perused the appeal records.

6.1. The imports in the present cases are of second hand MFDs. Admittedly, the importers are not in possession of any authorization / licence issued by the DGFT for import of such goods. As such, the goods are liable for confiscation in terms of Section 111(d) as has been held by the lower authorities. But it is seen that the original authority has ordered for absolute confiscation of these goods without extending option to the importers to redeem the goods on payment of redemption fine and penalties. We have carefully considered the decision cited by the appellants by the same Bench in the case of Parag Domestic Appliances and other (supra). We note that the imports considered by the Tribunal in the said case were of similar products and imported under identical circumstances. The Tribunal took the view that the goods imported are not to be considered as prohibited goods but to be considered as restricted goods and as such, allowed the redemption of the impugned goods on payment of redemption fine and penalties. It is further on record that the appeals against the said orders by Revenue ultimately came to be decided by the Hon'ble Supreme Court which upheld the original findings of the Tribunal in regard to the release of the goods. On the issue regarding the imports being in violation of the provisions of Hazarduous Waste Regulations 2016, we note that this issue has been examined in detail by the Tribunal in the earlier decision in the case of Parag Domestic Appliances where it was held that imports were in violation of Import Policy and some of the conditions of Hazardous Waste Rules, 2016. The observations are reproduced below:-

"8. On the first point regarding importation being in violation of Import Policy, the same being an admitted fact, does not require further elaboration. On the second point regarding violation of provisions of Hazardous Waste Rules, 2016, we have carefully examined the submissions of the appellants. First of all, we note that the original authority held against the appellants substantially on the ground that the product is waste. In this connection, we have perused the definition "waste". Rule 3(1)38 of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 defines waste as under:-

"waste" means materials that are not products or by-products, for which the generator has no further use for the purposes of production, transformation or consumption.

9. We note that the products under import are MFDs having use as digital multifunctional devices as intended. It is not clear as to how when the product imported in the form of whole machine and having certified functional life of 5/7 years, the same can be considered as waste. Even if the items imported require certain reconditioning, repair, it will not make the product as waste. We have perused the certificates issued by the authorised Chartered Engineers, M/s. Best Mulyankan Consultants Ltd. and M/s. ELBI Consultancy (India) Pvt. Ltd., Chennai with reference to present impugned consignments. A perusal of these certificates will clearly show that the imported items cannot be considered as waste. It is specifically mentioned that the items imported are in full form and fit for use for printing A3 size papers and they are capable of being put to productive use and the machines were not in a damaged condition to such an extent which will compromise their functionaility. The residual life of these machines has been certified. In the face of these technical opinions and facts as recorded, we find that the imported items cannot be considered as waste.

10. Examining the conditionalities as mentioned in Hazardous Waste Rules 2016, we note the Schedule VIII (entry 4(j)) stipulates 5 documents to be produced by the importer. The first one is regarding country of origin which in the present case, *the importer produced the certificate from Canadian authorities. We find force in the objection raised by the Revenue regarding the non-applicability of such certificate to the present consignments. The consignments have originated from China / Korea / Japan as admitted by the importer and were initially being supplied by Canadian authorities cannot be correlated and now with the Bills of Lading are from various ports of USA etc. As such, the country of origin certificate to be issued by competent authority of that country is not satisfactorily produced in the present consignments. To that extent, there is a violation of the said rules.*

11. The next condition is regarding certificate issued by inspection agency approved by DGFT regarding functionaility and residual life of the goods. We note that the original authority held against the appellants regarding violations of these provisions. The present consignments which are imported for which Bills of Entry were filed in October to November 2016 are governed by the 2016 Rules which superseded the 2008 Rules. The learned counsel for the appellant drew our attention to the decision of Technical Review Committee under the 2016 Rules. The decision of the meeting held on 18th and 19th October 2016 recorded that the Extended Producer's Responsibility (EPR) authorisation requirement under 2016 Rules are to be produced on application to the Pollution Control Board and a time line is prescribed for the same. After considering these time lines, the Committee decided that the implementation of EPR can start from 01/05/2017 and advised the Customs authorities to permit clearance of the imported goods without EPR authorisation till 30/04/2017.

12. Regarding Schedule III Part D of the Hazardous Waste Rules, 2016, we note that the said part deal with list of other waste for import and export without permission of Ministry of Environment. Entry No.B1110 deals with electrical and electronic assemblies destined for direct reuse and not for recycling or disposal. The condition for import of used MFDs was mentioned therein. The said condition was later amended vide Notification dt, 06/07/2016. The effect of amendment is that the trader also can import the said MFDs which are not domestically manufactured.

> *13. Regarding production of EPR authorisation under 2011 Rules, we note that the appellant has produced an authorisation dt. 21/04/2017 issued by the Central Pollution Control Board. Another condition is the MFDs shall be for printing A3 size or above. As per the technical certificate issued by the Chartered Engineer, same stands fulfilled. In any case, there is no dispute on this fact in the impugned proceedings. The final condition is regarding acknowledgement copy of the annual return to be filed with State Pollution Control Board. We note that the appellant has to file the annual return at the end of the year and the same will be effected after the importation of goods.*
>
> *14. Regarding applicability of Rule 13 of 2016 Rules, we note that the same deals with hazardous and other waste. In terms of definition of 'waste' in the rules, we find that used machines with residual life of 5 or 7 years cannot, per se, be considered as 'waste'.*
>
> *15. In view of the above detailed analysis, we find that the importation of the impugned goods is in violation of Import Policy of the relevant time and also of some of the conditions of Hazardous Waste Rules 2016. The violation of Hazardous Waste Rules is with reference to country of origin certificate. Other conditions mentioned therein have substantially been fulfilled as discussed above."*

6.2. In view of the above, we hold that the imported goods are liable for confiscation under Section 111 (d) of the customs Act, 1962. Next, we turn to the observations of the adjudicating authority that the import has been made in violation of the Electronics and Information Technology (Requirement for Compulsory Registration) Order, 2012 (CRO). We have perused the said order ; the goods notified under the said Order ; as well as the letter issued by the Jt. Secretary in the Ministry of Electronics and Information Technology to Jt. Secretary (Customs), CBEC. The schedule attached to the CRO order specifies various goods which are required to take compulsory registration. While we find that printers and photocopiers find place in the schedule, the MFD does not find place in the said order. In this connection, the Hon'ble High Court of Andhra Pradesh and Telangana in the order cited by the appellant has examined the same issue and has concluded that the item MFD was not notified under the CRO and as such, it is not open to the Customs authorities to blindly apply the directives of Department of Electronics and Information Technology through the letter dt. 16/12/2016 to the appellant's goods. In view of the above, we are of the view that the appellants cannot be held to have violated the provisions of the Compulsory Registration Order.

6.3. Having concluded that the imported goods are liable for confiscation but ordering absolute confiscation is not justified, we are left with the task of deciding what would be the appropriate redemption fine and penalty to be imposed on the importers. In the earlier decision of this Bench, the issue has been considered and it has been held that 10% and 5% of the enhanced value would be appropriate for redemption fine and penalty respectively. We adopt the same yardstick in arriving at the redemption fine and penalty and order that imported goods may be allowed for clearance on payment of redemption at 10% and penalty 5% of the re-assessed value, besides payment of applicable Customs duty.

6.4. We also note that some of the consignments are yet to be examined by the DGFT approved Chartered Engineers. While the findings in this order shall apply to these consignments also, we make it clear that the applicability will be only when they are of similar nature and on the same footing as claimed by the appellants. In case, the contrary is established on such examination by the approved Chartered Engineer, such consignments shall be dealt with separately by the Customs authorities.

6.5. The only point left to be considered is imposition of penalty under Section 114AA on proprietors of the importers in certain cases. In this regard, we note that the proprietor is not different from the proprietory firm. Since the importing firm already stands penalized under Section 112(a) of the Act, we find no requirement to impose separate penalty on the proprietor under Section 114AA. Hence, penalties imposed on the proprietors are set aside.

7. The learned advocate has also requested for waiver of demurrage on the imported goods. The goods were ordered for confiscation by the lower authorities and such goods are now being allowed for clearance on payment of redemption fine and penalty. Hence, the jurisdictional Commissioner of Customs may consider the request of the appellants for waiver of demurrage in terms of Rule 6(l) of the Handling of Cargo in Customs Area Rules, 2009.

8. Appeals are disposed of in above terms.

(Order was pronounced and dictated
in Open Court on **03/04/2019**)

S.S GARG
JUDICIAL MEMBER

V. PADMANABHAN
TECHNICAL MEMBER

Raja...