CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE
COURT NO.1

Appeal(s) Involved:

C/21309/2018-DB

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-80-17-18 dated 26/03/2018 passed by Commissioner of CUSTOMS , COCHIN]

Pypye Techserve Pvt Ltd
42 Subhash Park Nehrunagar Circle
Ambawadi
AHMEDABAD
AHMEDABAD
00

Appellant(s)

Versus

Commissioner Of Customs
Customs House, Willingdon Island, Cochin.

Respondent(s)

Appearance:

Shri RAVISH BHATT, Advocate
37 SAMANPAN BUNGLOGS BODAKDEV
AHMADABAD 15

For the Appellant

Shri K. Murali, Superintendent(AR)

For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Date of Hearing: 22/07/2019
Date of Decision:19/11/2019

Final Order No. 21020 / 2019

Per : S.S. GARG

The present appeal is directed against the impugned order dt. 26/03/2018 passed by the Commissioner of Customs whereby the Commissioner has passed the following orders:-

i. I order confiscation of the old and used Digital Multifunction Printers/Devices imported vide 34 Bills of Entry valued at Rs.5,05,13,140/- (Rupees five crores five lakhs thirteen thousand one hundred and forty only) by M/s.Pypye Techserv Pvt. Ltd., Ahmedabad, Gujarat as listed under Section 111(d) and (m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 and Schedule III of Rule 13(4) of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and Electronic and Information Technology Rules (Requirement of Compulsory Registration) Order, 2012, being "prohibited goods" under Section 2(33) of the Customs Act, 1962. The goods cannot b e allowed for home consumption without clearance from the competent authorities and there is no specific request from the importer for re-export of the impugned goods, I refrain from granting the option of redemption under Section 125 at this stage.

ii. The re-fixation of value would be premature at this stage as the procedures prescribed valuation rules has not been complied with in the proceedings. For the purpose of considering the penal liabilities the transaction value declared in the Bills Entry is accepted.

iii. I impose penalty of Rs.55,00,000/- (Rupees fifty five lakhs only) on M/s. Pypye Techserve Private Ltd., Ahmedabad, Gujarat under Section 112(a) of the Customs Act, 1962 and I refrain from imposing penalty on the importer under Section 114AA of the Customs Act, 1962.

iv. I impose penalty of Rs.5,00,000/- (Rupees five lakhs only) on Shri Pratik Babaria, Managing Director, M/s. Pypye Techserve

Private Ltd., Ahmedabad, Gujarat under Section 112(a) of the Customs Act, 1962 and I refrain from imposing penalty on him under Section 114AA of the Customs Act, 1962.

2. Briefly the facts of the present case are that pursuant to intelligence received by Special Intelligence and Investigation Branch, Kochi, there was an investigation into the aspect as to whether the old and used multi-function devices (MFDs) being imported through Cochin Port by various importers including the present appellant were without following mandatory requirements prescribed in Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and in violation of Foreign Trade Policy 2015-2020. After the investigation, the Department came to the conclusion that the goods imported by the appellant vide 34 Bills of Entry appeared to be illegal import and a show-cause notice under Section 124 of the Customs Act, 1962 was issued to the appellant on the allegation that old and used Digital Multifunction printers/Devices imported vide 34 Bills of Entry should not be considered as illegal import under Rule 15(1) of Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and why these printers and devices should not be considered as prohibited goods under Section 3 of Electronic and Information Technology Rules (Requirement of Compulsory Registration) Order, 2012 and why these Digital Multifunction Printers/Devices should not be confiscated under Section 111(d), (m) and (o) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 and Section 3 and Section 6 of Environment Protection Act, 1986. Further the invoice value declared by the appellant in respect of 6 Bills of Entry should not be rejected under Rule 12 of the Customs Valuation Rules, 2007 and re-determined as per Rule 9 of Customs Valuations Rules, 2007. Appellant filed detailed reply to the show-cause notice, inter-alia, explaining as to why there was no violation of statutory provisions and the rules as alleged in the show-cause notice. After following the due

process, the Commissioner passed the impugned order thereby confiscating the impugned goods and refrained from granting the option of redemption under Section 125 and also imposed penalty on the appellant and its Managing Director. Hence the present appeal.

3. Heard both sides and perused the records.

4. Learned counsel appearing 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 and the precedent decisions by the Tribunal and the High Court. He further submitted that the impugned order has been passed without considering the relevant documentary evidences and the statutory provisions/rules. He further submitted that used MFDs in working condition did not fall in the ambit of waste as defined under Rule 3(38) of Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and it could not have been included in the scope of 'Other Wastes'. He further submitted that all the documents which were required to be produced for import of the impugned goods were produced by the appellant but they were not properly appreciated by the Commissioner. He also submitted that the decision of the Apex Court relied upon by the respondent was altogether in a different context of facts and is not applicable to the facts and circumstancs of the present case. He also submitted that the Commissioner failed to appreciate that the appellant had already produced certificate issued by ELBI Consultancy (P) Ltd, which is an agency approved by DGFT for inspection and certification of imported MFDs, which also certified that imported MFDs were for printing A3 size and about printing papers of A3 size and above. He also submitted that the Commissioner failed to appreciate that MFDs in any case was not a prohibited item but a restricted one and requirement of BIS for import of these devices is not required. he also submitted that this issue is no more res integra and has been settled by this Tribunal

in the case of Parag Domestic Appliances and Atul Automation pvt. Ltd. vide its Final Order No.21592-21594/2017 dt. 09/08/2017 and allowed the appeal of the appellant and directed the Customs authorities to release the confiscated goods on payment of redemption fine and penalty. He further submitted that the decision of the Tribunal was challenged by the Department before Hon'ble High Court of Kerala and the Hon'ble High Court vide its order dt. 14/03/2018 in Customs Appeal No.18 of 2017 dismissed the appeal of the Revenue. The Department challenged the decision of Kerala High Court before the Hon'ble High Court of Supreme Court and the Hon'ble Apex Court vide its order dt. 24/01/2019 in Civil Appeal No.1057 to 1060 of 2019 dismissed the appeals of the Revenue. He further submitted that the only difference between the present appeal and the appeals decided by the Tribunal in the case of Parag Domestic Appliances and Atul Automation Pvt. Ltd. is that in those cases, the Commissioner released the goods on payment of redemption fine and penalties but in the present case, the goods were confiscated and were not ordered to be released on payment of redemption fine. Except this difference, the earlier order decided by the Tribunal and upheld by Hon'ble Supreme Court was on identical facts and the impugned goods were also the same and the impugned order was also on the same grounds. The learned counsel prayed that in view of the settled position of the law with regards to the impugned goods, the present appeal should also be decided by following the ratio of the said decisions which has been settled by the Supreme Court.

5. On the other hand, the learned AR defended the impugned order and submitted that the imported MFDs are clearly a potential e-waste as they are used items. He justified the confiscation of the goods on the ground that these goods have been specifically restricted by the Import Policy which required a licence from DGFT and importation of goods in the present case is clearly a breach of such condition which will result in confiscation. He further submitted that

such goods ought to have been considered as prohibited items as their import is not free of restriction. He also justified the imposition of penalty on its Managing Director.

6. After considering the submissions of both the parties and perusal of the material on record, we find that this issue is no more res integra and has been settled by this Tribunal in the case of Parag Domestic Appliances and Atul Automation Pvt. Ltd. wherein the Tribunal after considering the submissions of both the parties have observed in para 7 to 19.1, as under:-

> *7. We have heard both sides extensively and perused the appeal records. We note that the dispute in the present case relates to the eligibility of the importer to clear the goods for home consumption as a trader. They are not contesting the confiscability of the imported items and penal consequences thereof. It is admitted that the import is in violation of Import Policy applicable during the material time. The goods are used items and require an import licence for importation. The point which is strongly pleaded before us is that they have not violated the Hazardous Waste Rules, 2016 and they are entitled for redemption of the goods as absolute confiscation or option to re-export only, is not legally sustainable. Penalties under Section 114AA are also contested. We also note that enhanced valuation of used items now imported, is also not contested.*
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> *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:-*
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> > *"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.*
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> *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.

16. With the above background, we examine now the proceedings on penal action against the importer. Admittedly, the goods are restricted and there are violations of Policy. The question is whether such violations will result in refusal to release the goods on redemption in terms of Section 125 of Customs Act, 1962. We note that the importer himself have imported a large number of consignments through Calcutta Port and also other ports including Cochin, and these were in fact adjudicated and allowed for clearance on payment of appropriate redemption fines and penalties. We note that even through the Cochin Port such consignments have been allowed for clearances including for the present appellants. No substantial change in the law subsequently has been discussed in the impugned order to change the earlier decision. We also note that the Hon'ble Madras High Court in City Office Equipments [2016(336) ELT 19 (Mad.)] examined the scope of such infringement and their implication for the application of Section 125. The High Court observed that even if the goods are liable for confiscation, the same can be released on payment of redemption. The High Court was examining the provisions of FTDR Act read with Section 125(1) of Customs Act, 1962. The Hon'ble Punjab & Haryana High Court in Horizon Ferro Alloys Pvt. Ltd. Vs. UOI [2016(340) ELT 27 (P&H)] examined the scope of Section 125 and observed as below:-

> *5. ....Section 125 of the Act leaves option to the officer to grant the benefit or not so far as goods whose import is 'prohibited' but no such option is available in respect of goods which can be imported, but because of the method of importation adopted, become liable for confiscation. Hon'ble Madras High Court in T. Elavarasan, 2011 (266) E.L.T. 167 (Mad.), was pleased to rely on the said judgment of Hon'ble Andhra Pradesh High Court and held that an option has to be given to the petitioner to pay the applicable*

> *customs duty and the redemption fine and to get the gold jewellery released, as per Section 125 of the Customs Act, 1962. In the context of Section 125 if the word "prohibited" is construed as to apply in respect of every violation of any regulation or restriction or statutory procedural requirement, the word 'shall' in said Section would be rendered redundant and meaningless. If the definition of 'prohibited goods' is applied in the context of Section 125, it would result in absurdity rendering the word 'shall' redundant and otiose, because there cannot be any situation where the goods would be liable to confiscation under Sections 111 and 113 as the case may be without there being any violation of the provisions under the Customs Act, 1962 or under any other law or rules, regulations made thereunder. Therefore, in the context of statutory provisions of Section 125, so as to give a meaningful application to both words 'may' and 'shall' used in the said Section, the definition of 'prohibited goods' is inapplicable by application of settled principles of statutory interpretation. The Tribunal was therefore correct in observing that under Section 125 of the Customs Act, unless the importation or exportation of goods is expressly "prohibited" the adjudication authority would be obliged to offer to the owner the goods an option to pay fine in lieu of confiscation.*

The High Court was dealing with cigarettes and R22 gases which were imported in concealment. Observing that these two items were not expressly prohibited for importation, Court ordered for redemption of the same. In the present case, we are dealing with a restricted item which was imported by the appellants for further usage of the said used machines. Admittedly, these items are not expressly prohibited for importation. The Tribunal observed in Yakub Ibrahim Yusuf Vs. CC, Mumbai [2011(263) ELT 685 (Tri. Mumbai)] that redemption of goods on fine has to be allowed in terms of Section 125 if the goods were not expressly prohibited for import. The Tribunal was dealing with import of gold in violation of the provisions of Policy.

17. In view of the above discussions and analysis, we find that while confiscation of the imported items cannot be faulted with, we note that the appellants are entitled for release of the goods on payment of appropriate redemption fine. The original authority allowed the redemption of goods, though only for re-export, on payment of fine of Rs.1 crore in respect of M/s. Atul Automation P. Ltd., and on payment of Rs.30 lakhs in case of M/s. Parag Domestic Appliances Ltd.

18. The total assessable values for the consignments imported by M/s. Atul Automation Ltd. and M/s. Parag Domestic Appliances are about Rs.5.2 crores and Rs.1.37 crores respectively. These are enhanced values as per impugned order. The learned counsel for appellants pleaded that the redemption fines of 20% / 22% are harsh. Considering the detention / demurrage charges for one year, as the goods were lying in Port, and also based on past *practice in such cases, he pleaded for reduction of fines.*

19.1. We note that Hon'ble Kerala High Court in Office Devices [2009(240) ELT 336 (Ker.)] and in Navpad Enterprises [2012(278) ELT 172 (Ker.)] held that the discretion vested under Section 125 of Customs Act should be exercised in an objective manner. In the present case, no detailed reasoning has been recorded in the impugned order for fines which are apparently on the higher side when compared to consistent practice of imposing 10% of value as fine. We also have to bear in mind the detention charges to be incurred on goods. The guiding principle for fixing the quantum of redemption fine when the goods were allowed to be cleared for home consumption is generally that the importer should not gain out of imported goods which were in violation of the applicable law. Keeping that principle in mind, the margin profit likely to be earned by the appellant through such act which is in contravention of law is sought to be diminished or removed. Having noted the above principle and also keeping in mind the enhanced value of the impugned goods, we find that a redemption fine of ***Rs.52 lakhs (Rupees fifty two lakhs only)*** *and* ***Rs.14 lakhs (Rupees fourteen lakhs only)*** *for consignments imported by M/s. Atul Automation Pvt. Ltd. and M/s. Parag Domestic Appliances, respectively can be imposed. On payment of such fine, the impugned goods are to be considered for duty assessment and clearances.*

7. Further we find that the decision of the Tribunal has been upheld by the Hon'ble High Court of Kerala as cited supra and the appeal by the Revenue before the Apex Court was also dismissed. Therefore by following the ratio of the decision cited supra, we are of the considered view that the impugned order confiscating the MFDs is not sustainable in law and therefore, we set aside the same and the impugned goods are allowed to be redeemed on payment of redemption fine. Further we note that in the case of Parag Domestic Appliances and Atul Automation Pvt. Ltd., the Tribunal imposed redemption fine of 10% of the value of the goods. By considering the precedent decisions and by following the same, we also hold that the appellant is liable to pay redemption fine of **Rs.50 lakhs (Rupees fifty lakhs only)** for the consignments imported by them. As far as imposition of penalties on the appellant as well as the Managing Director is concerned, this Tribunal in the ea rlier case have imposed the penalty of 5% of the assessable value under Section 112(a) of the Customs Act, 1962. Keeping in view the consistent practice followed as held in various cases as discussed by the Tribunal in the case of

Parag Domestic Appliances and Atul Automation pvt. Ltd.. Therefore applying the ratio of those decisions, we find that the ends of justice shall be met if the penalty imposed under Section 112(a) is reduced to **Rs.25 lakhs (Rupees twenty five lakhs only)** for the appellant M/s. Pypye Techserve Private Ltd.. As far as penalty on the Managing Director Shri Pratik Babaria is concerned, we uphold the penalty of **Rs.5 lakhs (Rupees five lakhs only)** imposed under Section 112(a) of the Customs Act, 1962.

8. The appeal is disposed of in above terms.

(Order pronounced on 19/11/2019)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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