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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/707 /2005-709 /2005 - CU[DB]C/732/2005 Date 27/07/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S CONVERGELABS SOFTWARE TECHNOLOGIES
PVT LTD
14TH FLOOR, SIGNATURE TOWER-B, SOUTH CITY-I,
GURGAON (HARYANA)

M/S CONVERGELABS SOFTWARE TECHNOLOGIES PVT LTD — Appellant

Vs

C.C.E GURGAON — Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/318-321 2009CU[DB]** dated 27.7.09

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
   C.C.E GURGAON
   DELHI-III, VANIJYA NIKUNJ, UDYOG VIHAR, PHASE-V, GURGAON
2. Adv. / Consult
   MR.V.LAKSHMI KUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029
3. S.D.R
4. J.C.D.R.
5. Bar association. CESTAT. New Delhi
6. Director Publications. Customs. Excise. I.P. Estate. New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(Customs Appeal Branch)

18 MR RAJESH SURI

C/O CONVERGE LABS SOFTWARE TEHNOLOGIES PVT LTD,
.14TH FLOOR, SINGNATURE TOWER-B, SOUTH CITY-I,

19. AMOL PATEL DIRECTOR
.M/S CONVERGELABS SOFTWARE TECHNOLOGIES PVT LTD, 14TH FLOOR, SIGNATURE TOWER-B,
SOUTH CITY-I,

20 M/s UT Starcom India , 805, Signature Towers – B, South City, Gurgaon ,Haryana.

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II
Customs Appeal Nos. 707-709 & 732 of 2005

[Arising out of the Order-in-Original No. 11-12/CE/2005 dated 28/04/2005 passed by The Commissioner of Central Excise, Delhi – III, Gurgaon.]

For Approval and signature :
Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Rakesh Kumar, Technical Member

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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

1. M/s Converge Labs Software Technologies Pvt. Ltd.]
2. Shri Amol Patel]
3. Shri Rajesh Suri] Appellant
4. M/s UT Starcom India Telecom Pvt. Ltd.]

Versus

CCE, Gurgaon Respondent

Appearance

Shri B.L. Narsimhan, Ashok Dhingra and Smita Singh, Advocates – for the appellant.

Shri Vijai Kumar, Authorized Representative (SDR) – for the Respondent.

CORAM:**Hon'ble Shri D.N. Panda, Judicial Member**
Hon'ble Sh. Rakesh Kumar, Technical Member

DATE OF HEARING : 04/06/2009.
DATE OF DECISION: 27/7/09

Final Order No. C/318-321/09 Dated : 27/7/09

Per. Rakesh Kumar :-

The facts giving rise to these four appeals are, in brief, as under.

1.1 M/s Converge Labs Software Technology Pvt. Ltd., Signature Tower B, South City – I, Gurgaon, Haryana (hereinafter referred to as M/s Converge) is a software 100% EOU under STPI Scheme to develop and export software, with Shri Amol Patel as its Director and Shri Rajesh Suri as its GM (Finance). M/s U.T. Star com INC, 805, Signature Tower, South City, Gurgaon (hereinafter referred to as M/s UTSC) is a U.S.A. based company engaged in manufacture of telecom equipment.

1.2 Exemption notification No. 140/91-CUS dated 22/10/91, as amended, exempts from whole of the basic customs duty leviable under 1st Schedule to the Customs Tariff Act,, 1975 and the

Additional Customs duty, if any, leviable under Section 3 (1) of the Customs Tariff Act, 1975, the goods listed in the table annexed to this notification, when either imported into India or procured from a private or public boarded warehouse, by a software 100% EOU under software Technology Part Scheme, for the purpose of –

(a) development of software, or

(b) data entry and conversion, or

(c) data processing, data analysis and control dates management, or

(d) call centre services,

for export out of India. This exemption is subject to the conditions specified in this notification. One of the main condition is that the goods brought duty free into the unit have to be used within the unit in connection with the above-mentioned activities for export, using data communication link or in form of physical export. As per condition No. 10, the imported duty free goods brought into the unit can be taken out temporarily outside the unit without payment of duty, with the prior approval of the Assistant/ Deputy Commissioner, for repairs or display, subject to such conditions as may be imposed.

1.3 During 2001 & 2002, M/s Converge imported several consignments of Telecom equipment – "Personal Access System Wireless local loop System (PAS) with about 5000 telephone hand sets" totally valued at Rs. 6,78,43,662/- without payment of duty from M/s UTSC. The duty foregone was Rs. 2,64,36,077/-. PAS is a part of telephone exchange. The PAS, thereafter, with the permission of the jurisdictional Assistant Commissioner and the STP authorities, was taken out of the unit and installed at Mahanagar Telephone Nigam Ltd., (MTNL) site at Okhla Phase – III, for "demonstration" and "testing". On 13/3/03, acting on an intelligence that the goods imported by M/s Converge free of duty are not being used for the intended purpose, the officers of Gurgaon Commissionerate visited the premises of M/s Converge and conducted inquiry with Shri Amol Patel and Shri Rakesh Suri. At that time only the 5000 telephone handsets were lying in the premises of M/s Converge and the PAS was in the premises of MTNL. Shri Amol Patel produced copies of two back to back agreements, each dated 10/7/01, between MTNL and M/s Converge and between M/s Converge and M/s UTSC. Both these agreements, initially for one year, were extended for a period of six months by two agreements each dated 9/7/02.

1.3.1 Under the terms of the agreement dated 10/7/01 between M/s Converge and M/s UTSC -

(i) since MTNL wishes to install and operate on a trial basis, UTSC's PAS™ wireless local loop system to be supplied and installed by M/s Converge in certain areas, UTSC is willing to provide the necessary equipment and license to operate it through M/s Converge for a limited period, at no charge to MTNL ;

(ii) M/s Converge is licensed by UTSC to offer PAS equipment for deployment in MTNL's network ;

(iii) M/s UTSC is loaning the PAS™ to M/s Converge for the duration of the trial period, on free of cost basis ;

(iv) M/s Converge shall install, commission and maintain the equipment at MTNL's premises during the trial period for which they will be paid U.S. $ 45000/- by M/s UTSC ;

(v) MTNL shall have right to realize any revenue from subscribers who are provided phone connections through the PAS™ given to MTNL through M/s Converge for trial and MTNL shall also have right to acquire the ownership of the PAS upon full payment at a negotiated price and also payment of customs duty; and

(vi) In the event of MTNL refusing to buy the equipment from M/s Converge, the equipment shall go back to M/s UTSC through the same route, the cost of which will be borne by M/s UTSC.

1.3.2 As per the agreement dated 10/7/01 between M/s Converge and MTNL -

(i) Since MTNL wishes to install and operate on trial basis, UTSC's PAS™ wireless local loop system to be supplied and installed by M/s Converge, M/s Converge is willing to provide the necessary equipment and services necessary to install and maintain the product during the period of trial at no charge to MTNL ;

(ii) M/s Converge shall make available all Technical information, as required by MTNL, to manage and evaluate the product, shall train the MTNL personnel to operate the product, shall provide all technical support for smooth operation of network during trial period and shall use its access to MTNL's facilities solely for the purpose of installation and maintenance of the PAS™ system ;

(iii) MTNL shall have right to realize revenue from subscribers that are provided phone connection through UTSC's PAS™ during the trial period; and

(iv) MTNL shall have right to purchase the product at a negotiated price and in that event MTNL would in addition to the price, shall be required to pay the import duty applicable.

1.3.3 From the above agreements it appeared that the purpose of import of the UTSC's PAS™ wireless loop system with 5000 handsets, was to provide it to MTNL on behalf of UTSC for field trial and M/s Converge was to install and maintain the system during the trial and in the event of MTNL opting to purchase the same, arrange its sale. In the event of MTNL refusing to buy the system, the same was to be returned by MTNL to UTSC through M/s Converge.

1.4 Inquiry was made with Shri Amol Patel, Director M/s Converge and Shri Rajesh Suri GM (Fin.) of M/s Converge. Shri Patel in his statement dated 13/3/03 stated that the capital goods required for software development are computers and peripherals, that he is aware of import of PAS™ wireless local loop system for MTNL's trial, that it is not a specific requirement of the company for software development, that if they had not entered into agreements with UTSC and MTNL, they would not have imported this equipment which is required by M/s UTSC's customer – MTNL for trial and that as far as he knows, no software was developed for product trial by MTNL. Shri Rajesh Suri in his statement dated 13/3/03, corroborating the statement of Shri Amol Patel, stated that M/s Converge export services of wireless network and conduct research and development work for their clients, that the PAS™ wireless loop system has been imported from M/s UTSC on loan basis for trial by MTNL and M/s Converge would be installing the equipment in MTNL's premises and maintain the same during the period of trial for which they will get U.S. $ 45000/- from M/s UTSC and that he is not aware as to whether any work was done on PAS System before sending it to MTNL's site for trial. Statement of Shri Shailendra Joshi, an engineer, working with M/s Converge, was recorded on 23/5/03 wherein he stated that he was involved, alongwith Shri M.C. Jain and Shri Rajeev Lal in installation, commissioning and maintenance of the PAS equipment in

MTNL's premises, that the work of installation/commissioning took nearly one and half years and that as regards maintenance, the fault in the system is detected by redlight in the cards installed in E-10B Switch room and after locating the fault, the same is rectified. Inquiry was made with Shri Yogesh Bijlani, Vice President M/s UTSC in India and he in his statement dated 3/4/03 stated that the PAS equipment imported by M/s Converge belongs to UTSC, that it was imported for being installed in MTNL's premises for trial, that import was made through M/s Converge as at the time of import, M/s UTSC, U.S.A. did not have any branch office in India and the liaison office of M/s UTSC in India was not competent to import, and that it is M/s Converge who were responsible for installation, commissioning and maintenance of the imported PAS™ wireless loop system in the MTNL's premises.

1.5 Since it appeared that the PAS™ wireless loop system imported by M/s Converge and found in the premises of MTNL for field trial, had been imported in contravention of the provisions of EOU Scheme and Notification No. 140/91-CUS, the same was placed under seizure. Thereafter show cause notices dated 29/9/03 and dated 25/3/04 were issued to M/s Converge, Shri Amol Patel, Shri Rajesh Suri, M/s UTSC and MTNL for confiscation of the goods v/a Rs. 5,65,96,376/- seized from MTNL's premises, denying the benefit of exemption under Notification No. 140/91-CUS to M/s Converge in respect of the imported PAS system and demanding duty amounting to Rs. 2,64,36,077/- in respect of the same and also for imposition of penalty under Section 112 (a) of Customs Act, 1962 on M/s Converge and under Section 112 (a)/112 (b) on Shri Amol Patel, Shri Rajesh Suri, M/s UTSC and MTNL.

1.6 The Commissioner vide impugned order in original No. 11 & 12/CE/05 dated 28/4/05 -

(a) ordered confiscation of the PAS™ wireless loop system v/a Rs. 5,76,13,647/- seized from MTNL's premises under Section 111 (j) & 111 (o) of Customs Act, 1962 with option to be redeemed under Section 125 of the Act on payment of redemption fine of Rs. 50,00,000/- and payment of duty of Rs. 2,24,73,309/- ;

(b) confirmed duty demand of Rs. 39,62,768/- on handsets etc. imported with the above-mentioned PAS system ;

(c) imposed penalty of Rs. 20 lakhs on M/s Converge under Section 112 (a) of Customs Act, 1962 ;

(d) imposed penalty of Rs. 5,00,000/- each under Section 112 (a) and 112 (b) on Shri Amol Patel and Shri Rajesh Suri ; and

(e) imposed penalty of Rs. 20 lakhs on M/s UTSC under Section 112 (b) of the Customs Act.

Penal proceedings against MTNL were dropped.

1.7 It is against the above order that appeals have been filed by M/s Converge, Shri Amol Patel, Shri Rajesh Suri and M/s UTSC.

2. Heard both the sides.

2.1 Shri B.L. Narsingham, Advocate, the learned Counsel for M/s Converge, Shri Amol Patel and Shri Rajesh Suri, made the following submissions -

(1) The goods imported – PAS™ wireless loop system with 5000 handsets, being capital goods are covered by S. No. 1 of the table annexed to exemption Notification No. 140/91-CUS. The goods had been imported under eight Bills of entry and each import

was backed by "Import Certificate" issued by the STPI, Noida certifying that the goods imported are relevant to the activity of M/s Converge and are to be installed and used by the unit. Once the clearance of the goods has been allowed by the concerned customs authorities and the import was backed by the certificate issued by the STP authorities, the eligibility of M/s Converge to imports these goods free of duty under Notification No. 140/91-CUS cannot be challenged. In this regard, reliance is placed on Tribunal's judgment in case of **DSL Software India Ltd. Vs. CCE, Bangalore** reported in **2005 (181) E.L.T. – 250.**

(2) The goods imported are part of telephone exchange which were to be installed and commissioned in the MTNL's premises by M/s Converge for trial and , thereafter ,were to be maintained during the period of trial. Maintenance involves testing of software. The software development includes software testing also. M/s Converge were providing the service of installation, commission and software testing to MTNL on behalf of their foreign customer UTSC.

The imported goods were, therefore, being used for the intended purpose.

(3) The imported goods had been taken to the premises of MTNL in accordance with the provisions of Condition No. 10 of the Notification and for removal of the goods the necessary permission of the jurisdictional Assistant Commissioner had been taken.

(4) Since the goods have been imported in accordance with the provisions of Notification No. 140/91-CUS and have been used for development of software for export, and since the same had been moved to MTNL's premises with Assistant Commissioner's approval for demonstration/ software testing, neither the same are liable for confiscation, nor any duty is recoverable nor M/s Converge on Shri Amol Patel and Shri Rajesh Suri are liable for penalty under Section 12 (a) and (b) of the Act.

2.2 Shri Ashok Dhingra, Advocate, the learned Counsel for M/s UTSC, pleaded that since UTSC are neither importers nor the person who have dealt with the imported goods in any manner, no penalty can be imposed on them under Section 112 (a) or 112 (b) of the Customs Act, 1962, that since the import was with the permission of STP authorities, Customs cannot take a different view and in this regard reliance is placed on Tribunal's judgment in case of **Amitex Silk Mills Pvt. Ltd. vs. CCE, Surat – I** reported in **2006 (194) E.L.T. – 344 (Tri. – Del.)**, which has been upheld by Hon'ble Supreme Court vide judgment reported in **2006 (199) E.L.T. A126 (S.C.)**; that M/s Converge had tested the software installed in the imported equipment, installed in MTNL's premises, that testing of software is part of software development, that since the import was with the prior permission of STP authorities and the imported goods had been used for the intended purpose, the legality of import and duty exemption under Notification 140/91-CUS cannot be questioned and that in any case, since M/s UTSC are willing to take back the goods, the same may be allowed to be re-exported to UTSC.

2.3 Shri Vijay Kumar, the learned Senior DR, defending the impugned order, made the following submissions -

(1) From the agreements each dated 10/7/01 of M/s Converge with M/s UTSC and of M/s Converge with MTNL and also from the statements of Shri Amol Patel, Shri Rajesh Suri and Shri S. Joshi, it is clear that the PAS™ wireless local loop system with 5000

telephone handsets had been supplied by M/s UTSC to MTNL through M/s Converge for trial by MTNL with purchase option. The role of M/s Converge was to import the equipment dispatched by M/s UTSC on loan basis, install and commission the same in MTNL's premises and carry out maintenance during the period of trial. Neither any software had been developed with the help of imported equipment nor its maintenance involved any software testing by M/s Converge. The goods imported were, therefore, not meant for software development for export.

(2) The condition of the Notification No. 140/91-CUS were not satisfied as –

(i) the use of the imported goods was not within the unit ; and

(ii) Under condition No. 10 of the Notification, the imported goods can be removed by a STP unit for display/repairs and while the AC had given permission for removal for test/ demonstration, in the MTNL's premises the goods were being used for trial, which is totally different from test/demonstration.

(3) As per agreements between M/s Converge and MTNL and M/s Converge and M/s UTSC, after trial of the imported PAS system by MTNL, the MTNL could purchase the same at a negotiated price. Thus the goods had been removed to MTNL's premises for possible purchase which is not permitted in condition No. 10 of the notification.

(4) From the statements of Amol Patel and Shri Rajesh Suri, it is clear that neither these goods were required by M/s Converge for software development, nor any software had been developed with the help of these goods. The only purpose of import was to supply the same to MTNL, install and commission the same in MTNL's premises for commercial trial and thereafter possible sale. The use of the goods for software development for export was non-intended.

(5) In view of above, not only the import of goods is not permitted, the same are not eligible for duty exemption.

(6) M/s UTSC being abettor, are also liable for penalty under Section 112 (a) of Customs Act, 1962.

(7) The goods were supplied by M/s UTSC to MTNL through M/s Converge only to take advantage of their STP unit status eligible for duty free import of capital goods and imports. Therefore M/s UTSC's request for re-export has been rightly rejected by the Commissioner.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 The first point of dispute to be decided in this case is as to whether the goods imported by M/s Converge – PAS™ local loop system, have been used for the intended purpose and whether the conditions of the exemption Notification No. 140/91-CUS have been satisfied in respect of the same.

3.2 The exemption Notification No. 140/91-CUS, as amended, exempts the goods listed in the table annexed to this Notification from whole of the basic Customs Duty chargeable under 1st Schedule to the Customs Tariff Act, 1975 and from the Additional Customs Duty chargeable under Section 3 (1) of the Customs Tariff Act, 1975, if imported by a Software Development Unit under Software Technology Park Scheme for the purpose of Development of Software, data entry and conversion, data processing, data analysis and controlled data management or call centre services, for export out of India – the export of software can be through data communication link or in form of physical export. The duty free import of the specified goods for the above purposes is subject to certain conditions specified in first para of the notification. Some of the important conditions are as under :-

(1) The importer has been granted the necessary licence for the import of the goods for the purposes mentioned in this notification and carries out his activity under customs bond subject to such other conditions as may be specified by the Assistant/Deputy Commissioner of Customs

(2) The STP unit exports out of India 100% or such other percentage, as may be fixed by the Standing Committee, of the software developed, data entry and conversion done, data processed, data analyzed and controlled data management shown or call centre services rendered, wholly or partly from the goods for the period stipulated by the Standing Committee.

(3) The importer brings the imported duty free goods into the unit and uses them within the unit in connection with the said activity for exports, using data communication link or in form of physical export and he cannot move the goods from the unit without the approval of the Assistant/Deputy Commissioner of Customs

(4) The unit produces a certificate to the Assistant/ Deputy Commissioner of Customs from the concerned Chief Executive of the Software Technology Park (STP) to the effect that the goods imported are to be installed and used in the unit and that the import of such goods has been authorized by the Standing Committee

(5) The unit executes a bond in the prescribed format binding himself to pay on demand an amount equal to the duty leviable on the goods alongwith interest if –

(a) in case of capital goods, such goods are not proved to the satisfaction of Assistant/Deputy Commissioner to have been installed or otherwise used within the bonded premises or re-exported within the period of one year from the date of importation or procurement thereof and

(b) in case of goods other than capital goods, such goods, which are not proved to the satisfaction of the Assistant/ Deputy Commissioner to have been used in connection with the production or packaging of goods for export out of India.

(6) The Assistant Commissioner may, subject to the conditions as prescribed by him, permit the goods imported into India free of duty by STP unit to be taken out temporarily without payment of duty for repairs or display, as the case may be, and importer shall be bound to comply with such conditions and limitations.

3.3 From the above, it is clear that a STP unit in software technology park is allowed to import the goods as specified in this notification free of duty for the purpose of development of software, data entry and data conversion, data processing, data analysis and controlled data management call centres services for export out of India and this exemption is subject to the conditions specified in the notification, some of the main conditions being mentioned, as above. The question to be answered as to whether in this case the PAS™ wireless loop system alongwith 5000 handsets has been imported by M/s Converge for the purposes as mentioned in the Notification No. 140/91-CUS and whether they have fulfilled the conditions subject to which the exemption is available.

3.4 From the two agreements first between M/s UTSC and M/s Converge and second between M/s Converge and MTNL, whose details are discussed in para 1.3.1 and 1.3.2, it is clear that the purpose of import of PAS™ wireless local loop system with 5000 telephone handsets was to provide the same to MTNL for free trial and subsequent purchase if the MTNL were satisfied with its performance and the role of M/s Converge was to facilitate this import, install and commission the same in the MTNL's premises and thereafter maintain the same during the trial period, arrange the sale in the event of MTNL choosing to buy the same and arrange its re-export to M/s UTSC if the MTNL were not interested in buying the same. In both the agreements, we do not find any mention, whatsoever, of software development by the use of the imported equipment. In this regard Shri Amol Patel, the Director of M/s Converge in his statement dated 13/3/03, recorded under Section 14 of the Central Excise Act, 1944, which has not been retracted, has stated that the capital goods required for software development in their unit are computers, laptops and peripherals, that the import of PAS™ wireless local loop system for MTNL's trial was not specific requirement of the company for software development and that the same had been imported only because of their agreement with M/s UTSC. He also stated as far as he knows no software has been developed by the use of this equipment. Subsequently Shri Rajesh Suri, G.M. (Finance) of M/s Converge in his statement dated 13/3/03 corroborated the statement of Shri Amol Patel and stated that while M/s Converge conduct research and development work for their clients, the PAS™ wireless local loop system had been imported from M/s UTSC on loan basis only for trial by MTNL and the job of M/s Converge was installing the equipment MTNL's premises and its maintenance during the period of trial and that he is not aware as to whether any work for software development was done on the PAS™ system before sending it to MTNL's site for trial. Shri Shailendra Joshi, Engineer working with M/s Converge in his statement dated 23/5/03 also confirms that the imported equipment after its import had been installed in the MTNL's premises for trial, that the installation had been completed in about one and half year and that as regards maintenance the fault, in the system ~~is~~ are detected automatically and after locating the same, Key are rectified and that, as such, no software testing work or software development work was done on the software system. Thus from the statements of Shri Amol Patel, Shri Rajesh Suri and Shri Shailendra Joshi, it is clear that on import of this equipment, the same had not been put to any use in the unit and

no software development work had been done and that the same was shifted to MTNL's premises, where it was installed, and commissioned for the trial purpose and M/s Converge was responsible for maintenance during the period of trial. Shri Yogesh Bijlani, Vice President of M/s UTSC in India in his statement dated 3/4/03 also confirms that this equipment was meant only for free trial for MTNL and since during the period of import M/s UTSC did not have any branch office in India, the import had to be routed through M/s Converge.

4. From the above evidence, it is absolutely clear that the purpose of import of this equipment by M/s Converge was to install the same in the MTNL's premises for trial and thereafter possible sale. It has been pleaded by the appellants that the maintenance of the equipment by M/s Converge during the period of trial at the MTNL's premises involved software testing and the software development includes software testing. This plea is

absolutely incorrect as neither the agreement of M/s Converge with M/s UTSC nor the agreement of M/s Converge with MTNL mentions any software testing or software development to be done by M/s Converge nor anything like this comes out from the statements of Shri Amol Patel, Shri Rajesh Suri and Shri Shailendra Joshi. We, therefore, hold that this equipment had not been imported for any software development whatsoever and the sole purpose of this import was marketing to install the same in the MTNL's premises for trial and, thereafter, possible purchase. This equipment could have been imported by M/;s UTSC or MTNL directly for trial purpose but in that event customs duty would have had to be paid at the time of import and in the event of MTNL refusing to buy after one and half year's trial and re-export of the equipment, in terms of the provision of Section 74 of the Customs Act, readwith Notification No. 19-CUS dated 6/2/05, as amended, only 30% of the duty paid at the time of import could have been refunded as duty drawback. Obviously it is to avoid this only that the import has been routed through M/s Converge, who, as discussed above, had no use whatsoever of this equipment for development of software for export.

5. It has been pleaded by the appellants that the equipment had been imported in eight consignments covered under eight bills of

entry and the time of each import the required certificate from the STP authorities certifying that the goods being imported are to be installed and used by the unit had been produced. Though, we find that such certificates had, indeed, been issued but it is clear that the same have been obtained by M/s Converge by misrepresentation without telling the STP authorities about actual purpose of the import of this equipment. M/s Converge have not produced their application to the STP authorities in spite of being asked to do so at the time of hearing. On perusal of the certificates, it is seen that each of these certificate certifies that the items for import are relevant to the activity and are to be installed and used by the unit and are covered by the exemption under Notification No. 140/91-CUS. But as discussed above, these items were never installed by M/s Converge in their unit and neither any software was developed with the help of imported goods, nor was there any intention to do so. The sole purpose of this import was to supply the same to MTNL was field trial and possible purchase and M/s Converge allowed their 100% EOU status to be used for duty free import of PAS local loop system for supply to MTNL for trial. Therefore, the certificates issued by the STP authority do not make this import valid.

6. It has been pleaded that once the goods have been allowed to be cleared free of duty under Notification No. 140/91-CUS by the concerned Customs Authority, the Jurisdictional Central Excise Officers incharge of the STP Unit cannot question the duty free clearance and deny the duty exemption under Notification No. 140/91-CUS. We do not agree with this plea, as from the facts discussed above, it is clear that duty free import under Notification No. 140/91-CUS has been made by misrepresentation and misdeclaration and therefore the Jurisdictional/Customs/ Central Excise Officers are well within their rights to reopen the assessment and deny the exemption. In any case, since the basic conditions of duty free import under Notification No. 140/91-CUS, that is used of the imported equipment for software development data entry, data processing etc. for export has not been fulfilled, M/s Converge are not eligible for duty exemption. Since the imported equipment was neither installed in the premises of M/s Converge in the software technology park nor used for software development for export, the condition No. 4 and 7 of para 1 of the notification have also been violated. It has been pleaded that removal of the imported equipment to MTNL's premises was with the permission of the Jurisdictional/Assistant/Deputy Commissioner. Though the Jurisdictional/Assistant/Deputy

Commissioner have given permission for removal of the imported equipment for testing/demonstration purposes, the permissions have been given under impression that the goods are being sent to MTNL's premises only for testing for display and the same would be returned. From the records it is seen that the concerned Customs officers were not aware that the imported equipment is being sent to MTNL's premises for commercial trial and possible purchase, which is not permitted.

7. From the above discussion, it is clear that the real purpose for the import of this equipment by M/s Converge was to supply the same to MTNL for trial and possible purchase and not any software development for export and to do this without payment of duty and for this purpose only, the supply had been routed by M/s UTSC through M/s Converge in order to take advantage of their EOU status and on that basis full exemption from Customs Duty. M/s Converge, for the purpose of duty free import of this equipment, which was to be supplied to MTNL for free trial and possible purchase and was not meant for any software development, hoodwinked the customs into at various stages into believing that the equipment is required for software development, while the facts were totally different. In view of this, we hold that M/s Converge were not eligible for import of this equipment and

were not eligible for duty exemption under Notification No. 140/91-CUS. Since, as discussed above, the conditions subject to which the duty free import of the goods was permitted have been violated, the goods have rightly confiscated under Section 111 (o) of the Customs and penalty has been rightly imposed on M/s Converge under Section 112 (a). Accordingly, the confiscation of the goods under Section 111 (o) and imposition of penalty on M/s Converge under Section 112 (a) of Customs Act is upheld. As regards imposition of penalty on Shri Amol Patel, Director of M/s Converge and Shri Rajesh Suri, GM (Finance) of M/s Converge under Section 112 of Customs Act, 1962 since both of them have dealt with the goods knowing very well that the conditions subject to which the import of these goods had been allowed, have been violated and hence the same are liable for confiscation, both of them have been rightly penalized under Section 112 (b) of Customs Act.

8. As regards, M/s UTSC, it is seen that at the time of import, they had a liaison office which subsequently was completed into branch office. The equipment was to be supplied by M/s UTSC to MTNL for trial and possible purchase but in order to take advantage of the EOU status of M/s Converge and make duty free imports, the import was routed through M/s Converge while they

had absolutely no use for these goods for any software development. Thus, M/s Converge have abetted this illicit import and hence penalty has been rightly imposed on them. It has been pleaded on behalf of M/s UTSC that since they are the owners of the goods, the re-export may be allowed to them. In view of the facts and circumstances in which these goods have been imported, as discussed in para 4 and 7 above and also in view of the fact that the goods have been used by MTNL after their import, we are not inclined to allow re-export without payment of duty. M/s Converge are free to redeem the goods on payment of duty chargeable alongwith interest and redemption fine and thereafter they can very well re-export the same.

9. In view of the above discussion, the impugned order is upheld. The appeals are dismissed.

(Pronounced in open court on 27/7/09

(Rakesh Kumar)
Technical Member

(D.N. Panda)
Judicial Member

PK