

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench

Court – I

Customs Appeal No. 2659 of 2010

(Arising out of Order-in-Appeal No.27/2010 V CH dt.12.07.2010 passed by CCCE & ST
(Appeals), Visakhapatnam)

Mass the toner shop

Village Kharbara (Kurkuthiya), 5,
Aziz Mulk 1st Street, Thousand Lights,
Chennai, Tamil Nadu – 600 006

.....Appellant*VERSUS***Commissioner of Customs & Service Tax,
Visakhapatnam - CUS**

4th Floor, Customs House, Port Area,
Visakhapatnam, AP – 530 035

.....Respondent**Appearance**

Shri V. Sreenivasan, Advocate for the appellant.

Shri Mir Anwar Mohiuddin, Authorized Representative for the respondent.

Coram:**HON'BLE Dr. D.M. MISRA, MEMBER (JUDICIAL)****HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)****FINAL ORDER No. A/30328/2020****Date of Hearing: 20.01.2020****Date of Decision: 20.01.2020****[Order per: P. VENKATA SUBBA RAO.]**

1. This appeal is filed against Order-in-Appeal No. 27/2010 (V) CH dated 12.07.2010.

2. Heard both sides and perused the records. The appellant is a proprietary firm based in Chennai and had imported 102 old and used digital multi functional (Print and Copying) machines with standard accessories from Singapore and declared total C & F value of US \$23,855/-. These machines had country of origin as Japan, Germany, China and Korea. They filed bill of entry No. 556117 dated 30.09.2009 to clear the goods. The importer had not produced any import license for the goods which were imported. They also had not produced any Chartered Engineer's inspection

certificate at the load port certifying the value of the machines so imported. The goods were examined and as per the dock's appraising report dated 28.10.2009 the goods were referred by the Customs to a Chartered Engineer who assessed the value of consignment at US \$30,030/- (C & F). The importer/appellant accepted the enhanced value of the goods and agreed to pay the duty accordingly.

3. The Additional Commissioner of Customs, Visakhapatnam in his Order-in-Original No. 31/2009 dated 08.12.2009 has observed that in terms of Para 2.17 of the Foreign Trade Policy (2009-2014), used and second hand multi functional digital copying machines can be imported only under a valid import license. The appellant had not produced, at any stage, an import license for the import of the same. He also observed that the appellant had failed to produce the Chartered Engineer's Certificate certifying the value of the goods which were imported. On assessment by the Chartered Engineer appointed by the Customs, the value of the goods was found to be US \$30,030/- as opposed to a declared value of US \$23,855/-. He, therefore, held that the goods imported by the appellant were liable to confiscation under section 111(d) for having been imported without a valid import license. He also held that the goods were liable for confiscation under section 111(m) of the Customs Act for misdeclaration of the value in the Bill of Entry. As the goods are liable for confiscation, he held that the importer is liable for penalty under section 112(a) of the Customs Act, 1962.

4. The Ld. Additional Commissioner enhanced the value of the goods as per the Chartered Engineer's Certificate and held them liable for confiscation under section 111(d) & 111(m) of the Customs Act read with Rule 3(2) and Rule 3(3) of Foreign Trade (Development & Regulation) Act, 1992. However, he gave them an option to redeem the goods on payment of redemption fine of Rs.4,50,000/-. He also imposed a penalty of Rs.75,000/- upon the appellant in terms of section 112(a) of the Customs Act, 1962.

5. Aggrieved, the appellant appealed to the first appellate authority who upheld the order of the lower authority but only reduced the redemption fine from Rs.4,50,000/- to Rs.1,50,000/-. Aggrieved by this order, the present appeal has been filed.

6. Ld. Consultant for the appellant submits that they are not challenging the enhancement of the value by the Customs and had indeed paid the Customs duty accordingly. However, they are aggrieved by the confiscation of the goods on both the grounds i.e., import of the goods without a license/authorisation and misdeclaration of the goods. They are also aggrieved by the imposition of penalty consequent upon the confiscation of the goods. He would submit that what they had imported were multi functional digital copiers which can be used as copiers and also as printers. In terms of section 5 of the Foreign Trade (Development & Regulation) Act, 1992 the DGFT is authorized to frame a Foreign Trade Policy and amend it from time to time. On 19th October, 2005 the DGFT has issued Notification No.31 (RE-2005)/2004-2009 dt.19.10.2005 amending Para 2.17 of the Foreign Trade Policy (2004-2009) to be read as follows:

"Import of second hand capital goods, including refurbished/reconditioned spares shall be allowed freely. However, second hand personal computers/laptops, photo copier machines, Air Conditioners, diesel generator sets will only be allowed against a license issued in this behalf."

7. Subsequently, on 28.02.2013 by Notification No.35 (RE-2012)/2009-2014, Para 2017 of the Foreign Trade Policy was further amended making the following goods importable only against an authorisation.

- (i) Personal computers/Laptops including their refurbished/reconditioned spares.
- (ii) Photo copier machines/Digital multi functional Print/copying machines.
- (iii) Air Conditioners &
- (iv) Diesel generator sets.

8. He would submit that with effect from 28.02.2013 in addition to photo copier machines, import of second hand digital multi functional print/copying machines has also been restricted. Therefore, after 28.02.2013 import of such machines is permissible only against a license. He would submit that it is on record that they had imported the goods on 30.09.2009 well before the Notification No.35 (RE-2012)/2009-2014 dt.28.02.2013 was issued. During that relevant period the only notification, which restricted import of second hand goods was Notification No.31 (RE-2005)/2004-2009 dt.19.10.2005 which specifically restricted import of used photo copier machines but had not restricted used multi functional digital copiers. Therefore, during the

period 19.10.2005 to 28.02.2013 import of second hand multi functional digital copiers was not restricted at all.

9. He would submit that the department's argument is that multi functional digital copiers are also a form of photo copier machines and therefore, the import restrictions under notification No.31 (RE-2012)/2009-14 apply during the relevant period. Such an interpretation is not correct since multi functional digital copiers were specially restricted w.e.f. 28.02.2013. He relies on the case law of City Office Equipment [2014 (302) ELT 212 (Mad.)] in which the Hon'ble High Court of Madras specifically dealt with this issue. Para 24 of which reads as follows:

"24. The Foreign Trade Policy and the procedure relevant to us is the one laid down in the policy covering the period 2009-2014. The amended Para 2.17 of the Policy and Handbook of Procedures (Vol. I) are relevant only for the period post 28-2-2013. Hence, by no stretch of imagination, the amendment under Notification No. 35 (RE-2012)/2009-2014, dated 28-2-2013 could be taken as having any relevance for the import made prior to 28-2-2013. Even though learned Assistant Solicitor General placed strong reliance on Notification No. 35 (RE-2012)/2009-2014, dated 28-2-2013 that it is a clarificatory amendment and hence will have relevance to the case on hand and that it is given under the hand of the Director General of Foreign Trade who has effected this notification, we fail to gather any such indication to read it so, particularly in the context of the powers conferred under Section 5 of the Foreign Trade (Development and Regulation) Act on the Government to make amendment to the policy. A comparative study of Notification No. 35 (RE-2012)/2009-2014, dated 28-2-2013 amending Para 2.17 of the Foreign Trade Policy and the provision that existed prior to 28-2-2013, show that the amended notification made the import policy regime as subject to an authorisation for import as against the original requirements viz., allowed to be imported only as per provisions of FTP, ITC (HS), HBP v1, Public Notice or an Authorisation issued for import of the specified second-hand item. In the light of the amendment and the clear provision, we do not find any justifiable ground to accept the case of the appellants to interfere with the order of the learned single Judge. We have already held that there is no conflict between the policy and the procedure laid down. Read in the context of the choice laid down for compliance by an importer as spoken to in Para 2.17 of the policy, we have no hesitation in dismissing the appeal filed by the Director General of Foreign Trade."

10. He would submit that the binding ratio of the judgment of the Hon'ble High Court of Madras applies to this case and has been followed in several decisions including by this bench. Therefore, the goods were correctly imported by them without a license during the relevant period. For this reason, the confiscation of the goods under section 111(d) does not stand.

11. As far as the confiscation of the goods under section 111(m) is concerned, he would submit that this provision is meant for those cases where the goods, which have been imported do not correspond any value or

in any other particular way with the entry made under the Act. In their case, there is nothing on record to show that the value which is declared by them is incorrect or does not reflect the actual transaction value. However, the customs department decided to get the goods assessed by their Chartered Engineer who enhanced the value of the goods imported from US \$23,855/- to US \$30,030/-. As the enhancement was small, they did not challenge it and have paid the duty on the enhanced value. The mere acceptance of the enhanced value by the appellant does not make their goods liable for confiscation for misdeclaration of value. Therefore, the confiscation under section 111(m) also fails. Consequently, the imposition of penalty under section 112(a) also needs to be set aside.

12. Learned departmental representative supports the impugned order.

13. We have considered the arguments on both sides and perused the records. The following questions have to be decided.

- (1) Whether the second hand multi functional digital copiers could be imported without license or authorisation from the DGFT during the relevant period?
- (2) Whether the restriction on import of used photo copier machines by DGFT's Notification No. 31 (RE-2005)/2004-2009 dated 19.10.2005 also automatically extends to multi functional digital copiers as asserted by the department?
- (3) Consequently, whether the imported goods are liable for confiscation under section 111(d) of the Customs Act, 1962?
- (4) Whether the goods were liable for confiscation for misdeclaration of value under section 111(m) only because the importer did not challenge the enhanced value by the Customs department, in the absence of any evidence that the value was indeed misdeclared by the importer?
- (5) Whether the imposition of fine is correct?
- (6) Whether the imposition of penalty is correct?

14. As far as the first two questions are concerned, evidently, only photo copier machines and not multi functional digital copiers were restricted for import during the relevant period. Restriction on multi functional digital copiers came into force much later only w.e.f. 28.02.2013. The department's

case is that the term "photo copier machines" also includes multi functional digital copiers and therefore, the import was restricted. This issue has been decided by the Hon'ble High Court of Madras in the case of City Office Equipment (supra) clearly holding that the restriction on import of second hand multi functional digital copiers come into force only from 28.02.2013 and not before. Therefore, the import of the goods in question was therefore not restricted and confiscation under section 111(d) needs to be set aside.

15. As far as the enhancement of the value is concerned, in the first place, we find that the enhancement was marginal from US \$23,855/- to US \$30,030/-. The importer could have challenged this enhancement arguing that there is no evidence that they have misdeclared the value and hence the declared value must be accepted. However, they have chosen not to do so and paid the customs duty on the enhanced value. Mere acquiescence by the importer in order to expedite their clearances through customs does not form the evidence that the value has been misdeclared, more so when the enhancement was marginal. For these reasons, we find that the confiscation of goods under section 111(m) also needs to be set aside. Consequently, the imposition of fine and penalty also need to be set aside.

16. In conclusion, we find that the impugned order is liable to be set aside and we do so.

17. The appeal is allowed and the impugned order is set aside with consequential relief, if any.

(Operative part of the order was pronounced in the open court
on conclusion of hearing)

(Dr. D.M. MISRA)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)