

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 85855 of 2022

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-1562/2021-22 dated 27.01.2022 passed by Commissioner of Customs (Appeals), Mumbai-III, Mumbai.)

IBM India Private Limited

No.12, Subramanya Arcade,
Bannerghatta Road,
Bangalore – 560 029.

.....Appellants

VERSUS

Commissioner of Customs (Import)

Air Cargo Complex (ACC), Sahar
Andheri (East), Mumbai – 400 099.

.....Respondent

Appearance:

Shri B.V. Kumar, Advocate for the Appellants

Shri Deepak Sharma, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85426/2024

Date of Hearing: 21.12.2023

Date of Decision: 22.04.2024

PER : M.M. PARTHIBAN

This appeal has been filed by M/s IBM India Limited, Bangalore (herein after, referred to as 'the appellants'), assailing Order-in-Appeal No. MUM-CUSTM-AMP-APP-1562/2021-22 dated 27.01.2022 (herein after, referred to as 'the impugned order') passed by Commissioner of Customs (Appeals), Mumbai-III, Mumbai.

2.1 The issue involved in this appeal is relating to the eligibility of goods imported by appellants, under various Bills of Entry (B/E) filed by declaring these as 'Small Form-factor Pluggable (SFP)-25G-SR Optical Transceiver, SFP-10G-SRL Optical Transceiver, QSFP-10G-UNIV Optical Transceiver, etc.' classifiable under Customs Tariff Item (CTI) 8517 6290, for exemption/duty concession under Notification No.57/2017-Customs dated 30.06.2017 (Sl. No.20), as amended.

2.2 The brief facts of the case are that during Post Clearance Audit of import transactions of the appellants for the period November, 2018 to October, 2019 through Air Cargo Complex (ACC) Customs Commissionerate, Sahar, Mumbai, the Department alleged that the appellants had incorrectly claimed concessional rate of duty under Sl. No.20 of Notification No.57/2017-Customs dated 30.06.2017. Accordingly, the Department had conducted Pre-Notice Consultation on 19.02.2020 and 13.08.2020 with the appellants for advising them to voluntarily pay the differential duty in denial of the exemption claimed by the appellants and after their disagreement, the Department had issued show cause proceedings by issue of Show Cause Notice (SCN) dated 06.10.2020. Out of the total 22 Bills of Entry (B/E) covering the entire import transactions during the disputed period, 2 B/Es relating to imports by STPI were excluded being imports under free of duty, and differential customs duty of Rs.36,16,445/- was demanded under Section 28(1) of the Customs Act, 1962 along with applicable interest, besides the proposal for confiscation of the impugned goods under Section 111(m) *ibid* and imposition of penalties under Section 112(a) and 117 *ibid*. The Order-in-Original dated 08.03.2021 in confirmation of the adjudged demands was appealed against by the appellants before the learned Commissioner of Customs (Appeals), which were disposed of vide impugned order dated 27.01.2022 passed by him in upholding the order passed by the original authority and rejecting the appeal filed by the appellants. Feeling aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal.

3.1 Learned Advocate appearing for the Appellants, stated that the impugned goods viz. 'Transceiver for Ethernet switch/ Transceiver modules of different models' all essentially sub-assemblies/components/parts of Optical Transport Equipment. The function of these transceiver module is to link or connect the switch/router devices to the network, and these goods do not work or function on their own. On the basis of the opinion given by their technical team, the appellants in classifying the goods under CTI 8517 6290, claiming duty concession under Notification No. 57/2017-Customs dated 30.06.2017 (Sl. No.20), as amended. However, during the period of appeal and upon understanding that the classification of transceivers/SFP has been decided by the Tribunal the case of Reliance Jio Infocomm Ltd. and Others, the appellants had submitted an additional submission claiming that in terms of the above decision on classification of the goods, which have also been

upheld by the Hon'ble Supreme Court, the imported transceivers/SFP can also be classified under CTI 8517 7090 extending the benefit of exemption under Sl. No.5(a) of Notification No.57/2017-Customs dated 30.06.2017. He further submitted that the exemption available to a 'Part' will also be available to 'sub assembly' as held by the Tribunal and as clarified by the CBEC in its Circular No.666/57/2002-CX dated 25.09.2022. The appellants have also produced necessary technical opinion from the authorised Chartered Engineers M/s Souparnika Associates, on SFP transceiver and that there used as parts/sub-assembly in data communication centres. As regards the confiscation of goods and consequent imposition of redemption fine and penalty, learned Advocate inasmuch as there was no fraud or deliberate suppression on the part of the appellants, and that the impugned goods have been declared properly, the issue of incorrect claim of exemption does not attract the provisions of section 111 *ibid* for confiscation and imposition of penalty on the appellants. Further, learned Advocate for the appellants also submitted a written statement mentioning that they are withdrawing the submissions made in para 52 of the appeal memorandum claiming that the SCN dated 07.10.2020 was issued by Additional Commissioner of Customs (Audit) who is not notified as 'proper officer' of Customs under Section 6 *ibid*, as the Government had issued necessary Notification No. 39/ 2018-Customs (N.T.) dated 11.05.2018.

3.2 In support of their stand, learned Advocate had relied upon following decisions of the Tribunal and judgement of Hon'ble Supreme Court, in the respective cases mentioned below:

- (i) *Commissioner of Customs-Mumbai Vs. Reliance Jio Infocomm Ltd.*, – Final Order No.A-85669-85671/2022 of CESTAT, Mumbai upheld in Civil Appeal No.1475-1477/2023.
- (ii) *Seagull Fabricators Pvt. Ltd. Vs. Commissioner of C. Ex., Mumbai-III* – 2001 (127) E.L.T. 186 (Tri.- Mum.)
- (iii) *Wipro GE Medical Systems Ltd. Vs. CC*,– 2006 (206) E.L.T. 400 (Tri.- Bang.)
- (iv) *Lewek Altair Shipping Pvt. Ltd. Vs. Commissioner of Customs, Vijayawada* – 2019 (366) E.L.T. 318 (Tri. - Hyd.)
- (v) *Commissioner Vs. Lewek Altair Shipping Pvt. Ltd.* – 2019 (367) E.L.T. A328 (S.C.)

4. Learned Authroised Representative appearing for the Revenue reiterated the findings recorded by the learned Commissioner (Appeals) in the impugned order and stated that exemption under Notification No.57/2017-Customs dated 30.06.2017 (Sl. No.20) is not applicable to the impugned goods, as the appellants themselves contradicted their declaration of imported goods as complete equipment in B/E and in the appeal as these are only parts. Hence, he claimed that the appeal is liable to be set aside.

5.1 Heard both sides and perused the records of the case. We have also considered the additional written submissions given in the form of paper book by learned Advocate for the appellants as well as Authorised Representatives for the Revenue, and the arguments advanced during the hearings of this case.

5.2 Brief issue for consideration before us is the eligibility of imported goods of description 'Small Form-factor Pluggable (SFP) - Optical Transceiver' of various models under Notification No.57/2017-Customs dated 30.06.2017 as amended, for deciding on the appropriate levy of customs duty, in respect of various Bills of Entries filed during the disputed period.

6.1 From the factual matrix of the case, we find that imported goods under dispute have been declared with complete description as 'Small Form-factor Pluggable (SFP) - Optical Transceiver' of various models and notification benefit under Sl. No.20 of Notification No.57/2017-Customs dated 30.06.2017 was claimed for concessional Basic Customs Duty (BCD) of 10%. However, as the proper officer was not convinced with the justification given by the appellants, the impugned goods were re-assessed at merit rate of 20% BCD by denying the notification benefit and the same were appealed against before the Commissioner of Customs (Appeals).

6.2 The learned Commissioner of Customs (Appeals) in the impugned order dated 27.01.2022, in denying the Customs duty exemption claimed by the appellants, had given the following findings. The relevant portion of the above Order is extracted and given below:

"5.....I find that it is the appellants only who have declared impugned goods at the time of clearance as Optical Transceiver under CTH 85176290 and now they stating that impugned goods i.e., Optical Transceiver is not Optical transport equipment and rather sub-system/sub-assembly/part of later. I, after going through all the submissions of but the parties, find the appellants' claim to be an afterthought and liable to be rejected mainly on following grounds:

(a) The declared description i.e., Thanks itself in the case that item incorporates Transmitter [Optical Sub-Assembly] (TOSA) and Receiver [Optical Sub-Assembly] (ROSA), both in itself and thus in my view, it is more than sufficient to conclude that impugned goods were complete unit in an order to justify that impugned goods were Optical transport equipment.

(b) It is the appellant who declared impugned goods as optical transceiver, it is on record that they have nowhere mentioned them to be sub-system/sub-assembly/part of 'Optical Transport Equipment'

(c) Further they classified impugned goods at 85176290 which is meant for Optical transport equipment. If the goods were be sub-system/sub-assembly/part of 'Optical Transport Equipment' then appellant should have classified them at CTH 8517 70 90 men for parts of heading 8517...

It cannot be a choice of the applicant that at the time of clearance, they were declared goods in accordance to the CTH 85176290 and classifying them at the same heading (85176290) and when demand under section 28(1) is raised, after the clearance of the goods, they would state that the impugned goods were sub-system/sub-assembly/part of that good and not exactly that good.

6. in view of the above, I hold that the impugned goods imported by the appellants which falls under the category of Optical transport equipment are not eligible for exemption under serial No.20 of the notification No.57/2017, dated 30.06.2017 by virtue of notification No.75/2018-Customs dated 11.10.2018 and notification No.02/2019- Customs dated 29th January 2019"

7. On careful reading of the impugned order passed by the learned Commissioner of Customs (Appeals), it transpires that he has given a specific finding that the impugned goods fall under the category of 'Optical transport equipment'. In coming to such conclusion, he had referred to the description of the imported item 'Transceiver' incorporates transmitter and receiver and thus it is an equipment for optical transportation. Accordingly, he has concluded that since these are optical transport equipment, the benefit of customs duty exemption in the exemption entry at Sr. No.20 of the Notification No. 57/2017-Customs dated 30.06.2017 is not applicable to the impugned goods.

8.1 In order to properly appreciate the conclusion arrived at in the impugned order in denying the Customs duty exemption claimed by the appellants, we would like to firstly refer to the relevant exemption Notification No. 57/2017-Customs dated 30.06.2017 as amended, during the disputed period, and the relevant portions of which are extracted below:

[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Notification No. 57/2017 – Customs

New Delhi, the 30th June, 2017

G.S.R. (E). – In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description as specified in column (3) of the Table below, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate as specified in the corresponding entry in column (4) of the said Table subject to any of the conditions, as specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (5) of the said Table.

TABLE

S.No.	Chapter or Heading or Sub-heading or tariff item	Description of goods	Standard rate	Condition No.
(1)	(2)	(3)	(4)	(5)
1.	4016 99 90	The following goods for use in manufacture of cellular mobile phones, namely :- (i) Microphone Rubber Case (ii) Sensor Rubber Case / Sealing Gasket including sealing gaskets / cases from Rubbers like SBR, EPDM, CR, CS, Silicone and all other individual rubbers or combination / combination of rubbers	10%	1
2.	7318 15 00	Screw for use in manufacture of cellular mobile phone	10%	1
3.	7326 90 99	SIM socket / Other Mechanical items (Metal) for use in manufacture of cellular mobile phones	10%	1
4.	8517 12	Telephones for other wireless networks, other than cellular networks	Nil	-
5.	8517 70 90	(a) All goods other than the parts of cellular mobile phones (b) Inputs or sub-parts for use in manufacture of parts mentioned at (a) above	Nil	-
6.	Any Chapter	(a) The following goods for use in manufacture of cellular mobile phones, namely :-	Nil	1

By issue of amending Notification No.22/2018-Customs dated 02.02.2018 various entries were added to the above Notification which included Sl. No. 20 as below:

20.	8517 62 90	All goods other than wrist wearable devices (commonly known as smart watches)	10%	-";
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The above entry at Sl. No. 20 was further amended vide Notification No.75/2018-Customs dated 11.10.2018, w.e.f. 12.10.2018 as below:

(1)	(2)	(3)	(4)	(5)
"20	8517 62 90	All goods other than following goods, namely: - (a) Wrist wearable devices (commonly known as smart watches) (b) Optical transport equipment (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS) (d) Optical Transport Network (OTN) products (e) IP Radios	10%	-
21	8517 69 90	All goods other than following goods, namely: - (a) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers (b) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products (c) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products	10%	-".

The above entry at Sl. No. 20 and 21 was further amended vide Notification No.02/2019-Customs dated 29.01.2019, w.e.f. 31.01.2019 as follows:

(1)	(2)	(3)	(4)	(5)
"20	8517 62 90 or 8517 69 90	All goods other than the following goods, namely: - (a) Wrist wearable devices (commonly known as smart watches); (b) Optical transport equipment; (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS); (d) Optical Transport Network (OTN) products; (e) IP Radios; (f) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers; (g) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching Transport Profile (MPLS-TP) products; (h) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products	10%	-";

8.2 Plain reading of the above Notification provides that the imported goods classifiable by specific Chapter or heading or sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) in Column (2) of the Table and covered under the description are exempt from the payment of Basic Customs duty to the extent stated therein. The description of the goods mentioned in various serial number of the above notification are of different types viz., **"all goods other than..."**, **"specific goods** like Telephones for at Sl. No. 4", **"The following goods for use in manufacture ..."** and **"Goods** covered by **specific description"**. It is, therefore, clear that in order to decide whether the exemption is applicable to the imported goods, it is necessary to classify the goods under specific Customs Tariff Item (CTI) and to examine, whether such CTI is covered under the above exemption. In respect of 'All goods other than the following as specified therein', as in Serial No. 20, it would not suffice to see that the imported goods are covered under a particular description, as is done in this case by the impugned order. There is a requirement to properly classify the imported goods and see whether these are covered by the inclusion or exclusion provided therein.

8.3 In careful examination of the impugned order passed by learned Commissioner of Customs (Appeals), we find that such an examination has not been carried out. This is for the reason that firstly, the description of the goods specified in the exemption entry at Sl. No. 20 viz., 'All goods of CTI 8517 6290' have not been explained to state whether the imported goods is firstly classifiable therein in terms of the First Schedule to the Customs Tariff and then whether the imported goods are covered under the inclusion or exclusion. Even the original authority did not examine these aspects despite the claim made by the appellants that imported goods 'Soft Form-factor Pluggable' (SFP) transceivers are only part of 'Optical Transport Equipment'; each of such Optical Transport equipment require various units such as Transmitter Optical Sub-Assembly (TOSA), Receiver Optical Sub-Assembly (ROSA), drive circuits, power electronics etc.

8.4 It could be seen that by careful examination of the goods covered under heading 8517 of the First Schedule to the Customs Tariff and the relevant entries thereto, the position is made clear about the classification of the impugned goods in this case. We find that heading 8517 covers within its scope and ambit, mainly of three broad categories of goods for ascertaining proper classification. These are:

(i) first one i.e., *"Telephone sets, including telephones for cellular networks or for other wireless networks"*;

(ii) the other, second one i.e., *"other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)"*, which are other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528, which include the following:

(a) Base stations;

(b) Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus;

(c) Other machines, other than specified in CTI 8517 6210 to 8517 6210;

and

(iii) Parts of apparatus of the goods covered under (i) and (ii).

Since the impugned goods are neither telephone sets under (i) above, nor an apparatus/independent machine for transmission or reception of voice, images or other data, under second group of items mentioned in (ii) above, and are also not covered as specified part under CTI 8517 7010 viz., 'Populated, loaded or stuffed printed circuit boards', these are specifically covered under the CTI 8517 7090 as 'other parts'.

9.1 We also find that the issue of classification of Soft Form-factor Pluggable (SFP) is no more open to dispute as the Tribunal in the case of *Reliance Jio Infocomm Ltd.* (supra) had decided the issue, by holding that the classification adopted under CTI 8517 7090 by the Commissioner (Appeals), Hyderabad which have been followed by the Commissioner (Appeals), Mumbai. The relevant paragraphs of the above order of the Tribunal is extracted and given below:

"A bunch of appeals (No. C/88479, 88483, 88485, 88487, 88492/2018, C/87032, 87033, 87034, 87035, 87036, 87037, 87038, 87039/2019) filed by the Revenue against various Order-in-Originals passed by the Commissioner of Customs, Mumbai (Air Cargo Import) were decided by this Bench vide Final Order No. A/85571-85583/2022 dated 22.06.2022. The respondents filed a miscellaneous application seeking the rectification of the order in respect of three appeals i.e. No. C/88483, 88487 & 88492/2018 stating that though the common issue of classification of Populated Printed Circuit Boards (PPCB) for DWDM Equipment – Photonic Service Switch, common to all the appeals was decided by the above cited order, another issue of classification of Small Factor Pluggable (SFP) and alternative claim of exemption under Notification No. 24/2005-Cus dated 1.3.2005 remained to be decided in respect of the three appeals mentioned above. This Bench

vide Miscellaneous Order No. M/85546/2022 dated 12.07.2022 has ordered that these three appeals be delinked and placed before the Bench for a fresh hearing on 13.07.2022. Accordingly, the hearing was held on 13.07.2022.

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2.1 Learned Counsel further submits that vide order dated 25.01.2017, the Commissioner (Appeals), Hyderabad has held that SFPs are classifiable as parts under CTH 8517 70 and not as complete machine or apparatus under CTH 8517 6290; the said order of the Commissioner (Appeals), Hyderabad has been accepted by the Department and no appeal has been preferred; learned Commissioner (Appeals) in the impugned order followed the order of the Commissioner (Appeals), Hyderabad; further vide Order-in-Appeal dated 30.08.2019, Commissioner (Appeals), Mumbai has also held that SFPs are classifiable as parts under CTH 8517 70. Learned Counsel submits that without prejudice to above, SFPs are exempt from duty under Sr. No. 13 of Notification No. 24/2005-Cus dated 1.3.2005; irrespective of the subheading the items are exempted under the Notification cited above, which exempts all goods of heading 8517 except those mentioned in clause (i) to (iv) of the notification, the impugned SFP do not fall under the said clauses.

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5. The classification of Populated Printed Circuit Boards for DWDM Equipment – Photonic Service Switch has been decided by us vide Final Order dated 22.06.2022. We adopt the arguments put-forth by us to the impugned goods i.e. SFP in this case also as may be applicable.

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'5. I have considered the submissions made by the appellant in writing as well as those made during the personal hearing. I have also perused the documents submitted in defence. The issue to be decided is the correct classification of the goods imported. To decide correct classification of goods it is necessary to decide whether the SFP modules imported are equipment by themselves which are capable of providing the essential function of transmission and reception of optical data they are merely parts of the ethernet switch/parts of telecom equipment. The chapter sub-heading 8517 of CTA is given as below.

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6. The original authority has held that the impugned goods cannot be treated as parts but instead are themselves machines. The appellant has explained that the product SFP is a standalone pluggable module which can be plugged into any computer or networking such as Ethernet switch, IP Routers etc and could act as connector providing interface between two domains i.e. electrical and optical; that it gives information about optical power levels and electrical supply parameters, but only when SFP is plugged into Ethernet switch which has the requisite software to report these values.....It is noted that the OTN products provide for functionality of transport, multiplexing, switching, management, supervision and survivability of optical channels carrying client signals, whereas as explained by the appellant and the original manufacturer, the impugned goods do not perform such functions. Therefore, I hold that the impugned goods i.e. SFPs are classifiable as being parts of telecom equipment i.e. Ethernet switch falling under CTH 8517 7090 and thereby are entitled to the benefit of Notification 24/2005- Cus dated 01.03.2005 as claimed by the

appellant. Accordingly the order passed by original authority denying the benefit of exemption is also not correct and is liable to be set aside.'

7.....We find that the findings given by the Id. Commissioner (Appeals) vide the order cited above are quite elaborate and reasoned which were followed by the learned Commissioner (Appeals), Mumbai in the impugned order. Therefore, we find that no case has been made out by the Department against the impugned orders and accordingly, we find that the impugned orders do not require any interference by this Bench.

8. Accordingly, appeals filed by the Department are rejected."

9.2 Further, we find that above order of the Tribunal was appealed before the Hon'ble Supreme Court in Civil Appeals No. 1475-1477 of 2023, and upon considering that the classification of SFP under CTI 8517 7090, as per the order of the Commissioner (Appeals) dated 25.01.2017 and the Tribunal, having been accepted by the department, had dismissed the appeals filed by the department. The extract of the said Order of the Hon'ble Supreme Court is given below:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 1475-1477 OF 2023
COMMISSIONER OF CUSTOMS Appellant(s)
VERSUS
M/S RELIANCE JIO INFOCOMM LTD. Respondent(s)

O R D E R

Delay condoned.

Mr. Balbir Singh, learned Additional Solicitor General, would submit, after getting instructions, that the classification as has been done in the impugned order, has been accepted by the Department-Revenue (See order dated 25.01.2017 passed by Commissioner of Customs and Central Excise (Appeals), Hyderabad).

In view of the aforesaid fact, the civil appeals are dismissed.

Pending applications stand disposed of.

....., J.
[K.M. JOSEPH]

....., J.
[B.V. NAGARATHNA]



New Delhi;
February 27, 2023.

10. In view of the foregoing discussions and analysis, as well as on the basis of the judgement of the Hon'ble Supreme Court, we conclude that the product under consideration i.e., 'Small Form-factor Pluggable Optical Transceiver' of various models are classifiable under Customs Tariff Item (CTI) 8517 7090, and not under CTH 8517 62 90, as claimed by Revenue. Accordingly, the impugned goods are eligible for exemption/duty concession under Serial No. 5(a) of Notification No. 57/2017-Customs dated 30.06.2017, as amended. Therefore, we are of the considered view that the impugned order passed by the learned Commissioner (Appeals) in confirmation of the adjudged demands in the original order cannot be sustained on merits.

11. In the result, the appeal is allowed in favour of the appellants, by setting aside the impugned order dated 27.01.2022.

(Order pronounced in open court on 22.04.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha