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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2512/2014 and CM No.5213/2014 (directions)

OM SHIVAY ENTERPRISES ..... Petitioner

Through: Mr. Bhagabati Prasad Padhy, Advocate

versus

THE CHIEF COMMISSIONER OF CUSTOMS & ORS ...... Respondents

Through: Ms. Sonia Sharma, Sr. Standing Counsel for R-1 & 2
Mr. Sanjeev Narula, CGSC with Mr. Ajay Kalra, Advocate for R-3

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% **02.02.2015**

1. The limited grievance of the petitioner is that, its goods are not being cleared, based on an erroneous view of the respondents that they are in the nature of E-waste and thus qualify as hazardous waste. The grievance is set forth in the background of the following brief facts.

2. The petitioner has imported into the country second hand multifunctional copier machines (Plus A-3 size) (in short collectively referred to as the machines).

2.1 The import of the said machines was made by the petitioner on 05.12.2013. The petitioner avers that it has obtained a Chartered Engineer's Certificate, dated 12.12.2013, which is indicative of the fact that, the said machines, have a residual value equivalent to approximately 5-6 years.

2.2 Furthermore, the said certificate also indicates that the machines in issue cannot be classified as E-waste.

2.3 Apart from the above, it is also averred by the petitioner that the appraising officer of respondent no.1, has certified in the order dated 20.12.2013 that the machines imported are that "E-goods". In other words, according to the petitioner, these goods are not "***restricted***" goods in terms of paragraph 2.17 of the Foreign Trade Policy, formulated, for the period 2009-2014 (in short FTP).

3. The petitioner, is aggrieved by the fact that respondent no.1 is insisting on obtaining a permission from respondent no.3 i.e., Ministry of Environment and Forest (in short MOEF) for clearance of the subject machines.

4. It is on account of this logjam, that the said machines have been kept in a warehouse, resulting in the petitioner incurring expenses by way of rent, etc. It appears that the petitioner has filed an application dated 31.01.2014, with respondent no.3, to take its permission for import of the aforementioned machines.

5. The petitioner in this behalf claims that the machines which are being imported are not hazardous waste, as defined under the provisions of Hazardous Waste (Management, Handling and Trans-boundary Movement) Rules, 2008 (hereafter referred to as 2008 Rules).

5.1 It is the petitioner's case that the machines are not hazardous waste, since, they are not cannibalized, and instead, are complete machines, which are required for re-use. In support of his contention, the learned counsel for the petitioner relies upon the following judgment of the Madras High Court, dated 05.06.2013, passed in a batch of writ petitions, the lead petition being:

WP (C) 1439/2013, titled : ***Shrishti Digital Solution Vs. Additional Commissioner of Customs***.

6. The captioned petition was moved in this court on 23.04.2014. On that date, the matter was adjourned to 01.05.2014. On the returnable date, i.e., 01.05.2014, respondent no.3 was represented by Mr. Sumit Pushkarna, who was then on the panel of Central Government. Since then, the respondents have filed their returns in the matter.

7. The learned counsel for respondent no.1 and 2 say that the Madras High Court judgment in ***Shrishti Digital Solution*** dealt with an earlier policy, which stands amended vide notification no.35(RE-2012)/2009-2014, dated 28.02.2013. It is therefore contended by the counsel for the respondents that not only the import of the said machines is, restricted, but that, import can be made only with due authorisation.

7.1 According to the learned counsel for the respondents, the authority which is vested with the power to grant authorisation is the Director General of Foreign Trade (in short DGFT). It is the contention of the learned counsel for the respondents, that the, authorisation by DGFT, will perhaps, only be given if, respondent no.3 were to certify that the subject machines do not fall in the category of a hazardous waste under 2008 Rules.

8. Both counsels, however, do not dispute the fact that the petitioner's application for seeking approval of respondent no.3, is pending consideration.

9. Apart from the above, the learned counsel for respondent no.1 and 2 says that a show cause notice dated 24.04.2014, has been issued under Section 124 of the Customs Act, 1962. There is no dispute that the petitioner has filed its reply to the said show cause notice.

10. The learned counsel for the petitioner has contended that there is, in substance, no change in the policy. According to him, the machines i.e., the goods in issue, fell as per the earlier import policy in the restricted category, and that, even after the amendment made to the policy have continued to fall in the restricted category. Therefore, according to the learned counsel for the petitioner, the judgment, in the case of ***Shrishti Digital Solution***, would be applicable to the facts of this case.

10.1 The learned counsel for the petitioner also submits that what is lost sight of by the respondents, a fact which was noticed by the Madras High Court in the aforementioned judgment, is that, if the good in issue, like the subject machines, are complete machines and not imported, in cannibalized form, they cannot be classified as E-waste. Therefore, the said judgment applies in all force to the petitioner's case.

11. In these circumstances, in my view, the most appropriate course would be to direct respondent no.3 to determine as to whether or not the goods in issue i.e., the aforementioned machines are hazardous waste, as per the 2008 Rules. In arriving at its conclusion, respondent no.3 will take into account the judgment of the Madras High Court in the case of ***Shrishti Digital Solution*** as also the following judgment of the Madras High Court, dated 08.10.2014, passed in WP (C) 16288/2014, titled: ***City Office Equipments Vs. The Commissioner of Customs (Seaport-Import)***.

11.1 The needful will be done by the respondent no.3 within two weeks from today. For this purpose, a notice will be issued to the petitioner setting out the date, time and venue to enable its authorised representative to remain present before the concerned authority, for placing its case for approval.

11.2 In case respondent no.3 were to grant approval, it will send the necessary intimation both to DGFT as well as to the concerned officer in Customs.

11.3 However, in the event, the decision of respondent no.3, was to go against the petitioner then, it will have the liberty to take recourse to an appropriate remedy in accordance with law.

11.4 The writ petition and the pending application are disposed of, with the aforesaid directions.

12. Needless to say, adjudication proceedings will continue in the meanwhile.

13. Dasti.

RAJIV SHAKDHER, J

FEBRUARY 02, 2015
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