IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2019

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

WP. Nos. 26049, 26054, 32154, 32155, 32156, 32157, 32159, 32642, 32646, 32649 & 33982 of 2018
and
WMP. Nos.30262, 30270, 37407, 37409, 37410, 37413, 37415, 37853, 37857 & 37859 of 2018

1 M/S.SKYLARK OFFICE MACHINES,
SHOP NO.4, GROUND FLOOR,
DOOR NO.10, AZIZ MULK 4TH STREET
THOUSAND LIGHTS, CHENNAI - 600 006
REP. BY ITS PROPRIETOR
SHRI ROHIT JHUNJHUNWALA

... PETITIONER IN WP.NO.26049 OF 2018

1 M/S.CITY OFFICE EQUIPMENT
DOOR NO.10 AZIZ MULK 4TH STREET THOUSAND
LIGHTS CHENNAI 600006 REP BY ITS PROPRIETOR
MR.PAWAN KUMAR JHUNJHUNWALA

... PETITIONER in WP No.26054 of 2018

1 M/S.ATUL AUTOMATION PVT LTD
NO.8 BENTINCK STREET TAHER MANSION KOLKATA-
700001 WEST BENGAL REP BY ITS DIRECTOR ATUL
KAMDAR

... PETITIONER in WP No.32154, 32155, 32156, 32157 & 32159 of 2018

1 M/S.DELHI PHOTOCOPIERS
B-30/ 2 3RD FLOOR JHIMIL INDUSTRIAL AREA
DELHI - 110095 REP. BY ITS PARTNER MR.
JITENDER MOHAN

... PETITIONER in WP No.32642 of 2018

1 M/S. EXCEL COPIERS
UB-14D ARUNACHAL BHAWAN BARAKHAMBA ROAD
NEW DELHI - 110001 REP. BY ITS PROPRIETOR
MR. ANKIT KHETTERPAL

... PETITIONER in WP No.32646 of 2018

1 M/S. CITY OFFICE EQUIPMENT
DOOR NO. 10 AZIZ MULK 4TH STREET THOUSAND
LIGHTS CHENNAI - 600006 REP. BY ITS
PROPRIETOR MR.PAWAN KUMAR JHUNJHUNWALA
... PETITIONER in WP No.32649 of 2018

1 M/S.SP ASSOCIATES
REP. BY ITS PROPRIETOR MR.YOGENDER PRATAP
NO.1/11959 ULDHANPUR NAVEEN SHAHDARA
DELHI 110 032
... PETITIONER in WP No.33982 of 2018

/Vs/

1. THE COMMISSIONER OF CUSTOMS,
CHENNAI II COMMISSIONERATE,
NO.60, RAJAJI SALAI, CUSTOMS HOUSE,
CHENNAI - 600 001.

2. THE JOINT/ADDL COMMISSIONER OF CUSTOMS(GR.5),
NO.60, RAJAI SALAI, CUSTOMS HOUSE,
CHENNAI - 600 001.

3. THE ASSISTANT/DEPUTY COMMISSIONER OF CUSTOMS (GR.5),
NO.60, RAJAI SALAI, CUSTOMS HOUSE,
CHENNAI - 600 001.

... RESPONDENTS IN WP.NOS.26049 & 26054 OF 2018

1 THE COMMISSIONER OF CUSTOMS
CHENNAI II COMMISSIONERATE NO.60 RAJAJI
SALAI CUSTOMS HOUSE CHENNAI 600 001

2 THE JOINT/ ADDL. COMMISSIONE
R OF CUSTOMS (GR.5) NO. 60 RAJAJI SALAI
CUSTOM HOUSE CHENNAI - 600001

... RESPONDENTS IN WP.NO.32157, 32159, 32642, 32646, 32649, 33982, 32154, 32155 & 32156 OF 2018

Writ Petitions filed under Article 226 of the Constitution of India praying for the issuance of writ of Mandamus

Directing the respondents herein to assess and clear the goods under import, viz., 466 units of Old and Used Digital

Multifunction Print and copying Machines, covered under Bill of Entry No.7009656 dated 29.6.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 10.7.2018 and in terms of the judgment rendered by the Honourable Division Bench of the High court of Andhra Pradesh and Teleangana at Hyderabad vide order dated 6.4.2018 in W.P.No.2728/2018 which order came to be accepted by the Central Board of Indirect Tax and Customs, New Delhi, vide their communication letter dated 14.6.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's rep. Dated 20/07/2018

(WP.NO.26049/2018)

Directing the respondents herein to assess and clear the goods under import, viz., 202 units of Old and Used Digital Multifunction Print and copying Machines, covered under Bill of Entry No.6818580 dated 15.6.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 29.6.2018 and in terms of the judgment rendered by the Honourable division bench of the High court of Andhra Pradesh and Teleangana at Hyderabad vide order dated 6.4.2018 in W.P.No.2728/2018 which order came to be accepted by the Central Board of Indirect Tax and Customs, New Delhi, vide their communication letter dated 14.6.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's rep dated 06/07/2018.

(WP.NO.26054/2018)

Directing the respondents herein to assess and clear the goods under import, viz,107 units of Old and Used Digital Multifunction Print and copying Machines, covered under Bill of Entry No.7186237 dated 12.7.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 30.7.2018 and in terms of the judgement rendered by the Honourable Division bench of the Highcourt of Andhra Pradesh and Telungana at Hyderabad vide order dated 6.4.2018 in W.P.No.2728/2018 which order came to be accepted by the Central Board of Indirect Tax and Customs, New Delhi, vide their communication letter dated 14.6.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's rep dated 18/09/2018.

(WP.NO.32154/2018)

Directing the respondents herein to assess and clear the goods under import, viz., 119 units Of Old and Used Digital Multifunction Print and Copying Machines, covered under Bill of Entry No. 7658190 dated 16.08.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 01.09.2018 and in terms of the judgement rendered by the Honorable Division Bench of the High Court of Andhra Pradesh and Telangana at Hyderabad vide order dated 06.04.2018 in W.P.No. 2728/ 2018, which order came to be accepted by the Central Board of indirect Tax and Customs, New Delhi, vide their communication letter dated 14.06.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's representation dated 18/09/2018. (WP No.32155 of 2018)

Directing the respondents herein to assess and clear the goods under import, viz,544 units of Old and Used Digital Multifunction Print and copying Machines, covered under Bill of Entry No.7658481 dated 16.8.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 5.9.2018 and in terms of the judgement rendered by the Honourable Division bench of the Highcourt of Andhra Pradesh and Telangana at Hyderabad vide order dated 6.4.2018 in WP.NO.2728/2018 which order came to be accepted by the Central Board of indirect Tax and Customs, New Delhi, vide their communication letter dated 14.06.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's representation dated 18/09/2018 (WP.NO.32156/2018)

Directing the respondents herein to assess and clear the goods under import, viz., 272 units Of Old and Used Digital Multifunction Print and Copying Machines, covered under Bill of Entry No. 7745849 dated 23.08.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 03.09.2018 and in terms of the judgement rendered by the Honorable Division Bench of the High Court of Andhra Pradesh and Telangana at Hyderabad vide order dated 06.04.2018 in W.P.No. 2728/ 2018, which order came to be accepted by the Central Board of indirect Tax and Customs, New Delhi, vide their communication letter dated 14.06.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's representation dated 18/09/2018 (WP.NO.32157/2018)

Directing the respondents herein to assess and clear the goods under import, viz., 136 units of old and Used Digital Multifunction Print and Copying Machines, covered under Bill of Entry No. 7658186 dated 16.08.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 01.09.2018 and in terms of the judgement rendered by the Honourable Division Bench of the High

Court of Andhra Pradesh and Telangana at Hyderabad vide order dated 06.04.2018 in W.P.No. 2728/ 2018, which order came to be accepted by the Central Board of indirect Tax and Customs, New Delhi, vide their communication letter dated 14.06.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's representation dated (WP No.32159 of 2018)

Directing the respondents herein to assess and clear the goods under import viz., 135 units of Old and Used Digital Multinfunction Print and Copying Machines, covered under Bill of Entry No. 7288405 dated 20.07.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 30.07.2018 and it terms of the Judgement rendered by the Honourable Division Bench of the High Court of Andhra Pradesh and Telangana at Hyderabad vide order dated 06.04.2018 in W.P.No. 2728/ 2018, which order came to be accepted by the Central Board of Indirect Tax and Customs, New Delhi, vide their communication letter dated 14.06.2018, deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's representation dated 17/09/2018.(WP No.32642 of 2018)

Directing the respondents herein to assess and clear the goods under import viz., 476 units of Old and Used Digital Multinfunction Print and Copying Machines, covered under Bill of Entry No. 7893233 dated 03.09.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 14.09.2018 and it terms of the Judgement rendered by the Honourable Division Bench of the High Court of Andhra Pradesh and Telangana at Hyderabad vide order dated 06.04.2018 in W.P.No. 2728/ 2018, which order came to be accepted by the Central Board of Indirect Tax and Customs, New Delhi, vide their communication letter dated 14.06.2018, deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's representation dated 17/09/2018 (WP No.32646 of 2018)

Directing the respondents herein to assess and clear the goods under import viz., 527 units of Old and Used Digital Multinfunction Print and Copying Machines, covered under Bill of Entry No. 7374355 dated 26.07.2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 17.08.2018 and it terms of the Judgement rendered by the Honorable Division Bench of the High Court of Andhra Pradesh and Telungana at Hyderabad vide order dated 06.04.2018 in W.P.No. 2728/ 2018, which order came to be accepted by the Central Board of Indirect Tax and Customs, New

Delhi, vide their communication letter dated 14.06.2018, deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's representation dated 17/09/2018 (WP No.32649 of 2018)

Directing the respondents to given a hearing and pass order in respect of the Bill of Entry No.8285902 dated 02/10/2018 by taking into account the judgment of the Honourable High court of Hyderabad in WP.No.2728 of 2018 dated 06/04/2018 and also the decision of the Tribunal in Final Order No.41864/2018 dated 11/05/2018.(WP No.33982 of 2018)

For Petitioner : Mr.N.Viswanathan and S.Baskaran in all Wps, except WP.No.33982/18

For Petitioner in WP.NO.33982/2018 : Mr. Sankar Narayanan

For Respondents : Mr.K.S.Ramasamy, CGSC in WP. No.26054 of 2018
Mr.T.L.Thirumalaisamy, CGSC in WP. No.26049/2018
Mrs.R.Hemalatha, Senior Standing Counsel in WP. Nos.32154,32155, 32156, 32157, 32159, 32642, 32646 & 32649 of 2018.

Mr.G.M.Syed Noorullah Sheriff, SGC, in W.P. No: 33982 of 2018.

.. .. ..

COMMON ORDER

The petitioners in all eleven (11) Writ Petitions seek the issuance of Writs of Mandamus directing the assessment and release of the consignments all of which comprises several units of old, used Digital Multifunction Print & Copying Machines (in short “DMPCM”).

2. The facts in regard to all Writ Petitions are common, except in relation to the details of consignment in each individual Writ Petition viz., 202 Units in WP. No.26054 of 2018, 466 Units in WP. No.26049 of 2018, 107 Units in WP. No.32154 of 2018, 119 Units in WP. No.32155 of 2018, 544 Units in WP. No.32156 of 2018, 272 Units in WP. No.32157 of 2018, 136 Units in WP. No.32159 of 2018, 135 Units in WP. No.32642 of

2018, 476 Units in WP. No.32646 of 2018, 527 Units in WP. No.32649 of 2018 and 259 Pieces of varying models of Multifunction Machines in WP. No.33982 of 2018.

3. The specific facts in regard to Writ Petition No.26049 of 2018, being the first matter in the batch, are adverted to for the sake of clarity.

4. The petitioner is engaged in the business of Import and Trading of second hand Digital Multifunction Printing and Copying and photocopier Machines and in trading in accessories, parts and consumables of the same. Several consignments of the aforesaid machines had been imported and examined under the prevailing appraisement system. Declarations had been filed to the effect that the Consignments were in conformity with the contents of the bills of entry and annexes thereto. Functional tests were also carried out. The authorities proceeded to re-fix the value of the consignments on the basis of the valuation of a Chartered Engineer as against the transaction C & F value adopted by the petitioner.

5. Further, since the Consignments were not accompanied by the documents stipulated by the Foreign Trade Policy (FTP), as amended with effect from para 2.31 of FTP (2015-20), the consignments were detained and not permitted to be cleared. As per the amendment, the consignments in question were 'restricted' in nature and as such, could be cleared only against satisfaction of several conditions imposed, including an authorization issued by the Directorate General of Foreign Trade (DGFT). The DGFT has been approached for the necessary authorisation for clearance of the consignment and the petitioners' application is yet pending.

6. While this is so, a representation was made on 07.07.2018 by the petitioner, requesting the release of the goods. The petitioner pointed out the serious hardship caused by way of the detention of the consignments, also undertaking to remit the enhanced value of the consignment as appraised by the Chartered Engineer without prejudice to their right to contest the enhancement in appeal.

7. Despite the request, the Consignment still awaits clearance and release.

8. The writ petitioners have set out the detailed background in which the imports of the second hand DMPCM have been detained by the authorities. According to them, the position, as obtained, was that the imports of the said products were permitted till December 2006 without any restriction

whatsoever. In December 2006, a sub-heading bearing No.8441 3110 was introduced in respect of the products in question and photo-copier machines were placed under CTH No.8443 3930 of the Customs Tariff Act from the Tariff Heading of 90091200. The Tariff Act thus recognised the two categories of the products as distinct and different and this distinction was also accepted by the Foreign Trade Policy, which adopted different classifications for photocopier machines on the one hand and DMPCM on the other.

9. The issue was carried to the Supreme Court and was decided in favour of the importers, in the case of Atul Commodities Private Limited v. Commissioner of Customs, Cochin, 2009 (235 ELT 385 (SC)). This conclusion was accepted by the authorities, however imposing a restriction on the import of second hand photocopiers alone by amending paragraph 2.17 of the Foreign Trade Policy. Reliance is thus placed by the petitioners on the distinction recognised under the statute with respect to photocopiers and DMPCM.

10. Based on this distinction, various importers contested the stand of the authorities to the effect that the DMPCM would not attract the restriction set out in paragraph 2.17 of the policy. The authorities, in the meanwhile, while assessing used DMPCM under sub-heading No.8441 3100 of the Customs Tariff Act, insisted on the production of an authorisation issued by the Director General of Foreign Trade for the clearance of the aforesaid goods.

11. Be that as it may, the petitioners state that the uniform practice followed was that, despite failure by the importer to comply with the provisions of the Foreign Trade Policy, clearance of the consignment of the goods was permitted on payment of fine and penalty. A stand was also taken by the authorities that the goods in question would constitute hazardous waste in terms of Rule 3 (1) (iii) of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 which require special permission from the Ministry of Environment and Forests for their import. A stand was also taken by the authorities to the effect that the goods constitute electrical and electronic assemblies that would be categorized as offending or prohibited goods.

12. The aforesaid stands were challenged by the importers and a learned Single Judge of this Court, in a batch of writ petitions, vide order dated 27.02.2012, negated both stands of the revenue, remanding the matter to the original authority for

denovo adjudication. This order was confirmed in Appeal, in the case of Commissioner of Customs, Tuticorin vs. City Office Equipment (2014 (302) ELT 212) and was also accepted by the authorities including the DGFT.

13. In the meanwhile, the assessments were completed denovo pursuant to the remand order passed by the learned Single Judge and that was challenged by way of a writ petition. This Court set-aside the order of the original authority again negating both stands of the Revenue to the effect that the goods would not constitute hazardous waste and would not be covered by the restriction imposed by the Foreign Trade Policy. The appeal filed by the authorities was dismissed by the First Bench of this Court, by order, dated 14.09.2015, in the case of Commissioner of Customs, Chennai v. Anand Impex, (2015 (325) ELT 103).

14. Thus, according to the petitioner, a quietus had been given to the issue by virtue of the long trajectory of the litigation, as noticed aforesaid. However, the authorities now appeared to be raking up the issue again, insisting upon the furnishing of a certification from the DGFT for clearance of the goods. It is, in these circumstances that the present writ petitions have been filed.

15. Counters have been filed in WP. Nos.26049, 26054 & 33982 of 2018. The stand of the revenue is that the clearance of the consignment would be contingent upon the fulfilment of all conditions as laid down in the amended Foreign Trade Policy (FTP) that are:

> i. Production of authorization/import license issued by the DGFT authorities since the subject goods are restricted under para 2.31 of FTP 2015-20.
>
> ii. Registration under the provisions of “Requirements for Compulsory Registration” with BIS as per the Electronics and Information Technology goods (Requirements for compulsory Registration) Order 2012 dated 07.09.2012 and subsequent orders dated 25.06.2013 and 07.11.2014 issued by MeitY.
>
> iii. Compliance of procedures as per the provisions of Hazardous and other Wastes (Management & Transboundary Movement) Rules 2016, E-Waste Management Rules, 2016.

16. Thus, according to the authorities, the consignments are liable to be cleared only upon production of

authorization/import license issued by the DGFT. Since admittedly, this condition has not been complied with by the petitioners, the revenue argues that the release, as sought for by the petitioners, may not be granted.

17. They also point out that the issue is not a localised one but applies pan India. In some jurisdictions, assessments have been made in respect of similar/identical consignments as in the present case and the matter has travelled by way of statutory appeal and special leave to the Supreme Court. The question is at large before the Supreme Court.

18. Learned counsel for the Revenue also point out that the Mandamus sought for by the petitioners is on the strength of the order passed by the High Court at Hyderabad dated 06.04.2018 in WP.No.2728 of 2018, which is in favour of the importer. However, the aforesaid order has not been accepted by the Revenue and is in the process of being challenged in appeal.

19. Heard Mr.N.Viswanathan, learned counsel for the petitioner in all WPs. and Mr.K.S.Ramasamy, learned CGSC appearing for the respondents in WP. No.26054 of 2018, Mr.T.L.Thirumalaisamy, CGSC appearing for the respondents in WP. No.26049 of 2018, Mrs.R.Hemalatha, Senior Standing Counsel appearing for the respondents in WP. Nos.32154, 32155, 32156, 32157, 32159, 32642, 32646 & 32649 of 2018.

20. The limited scope of the matter before me is for a direction to the respondents to release the consignments in question. Some importers have challenged the amendments to the Foreign Trade Policy itself by way of Writ Petitions that are pending in a batch before the Division Bench.

21. Notwithstanding the detailed submissions on merits made in the writ petitions in regard to the policy itself, the scope of the prayer before me is limited to the mandamus sought for release of the consignments in question. I thus restrict myself to the said prayer alone. The provisions of section 110A of the Act provides for Provisional release of the goods upon the importer furnishing sufficient security to the authorities. The provision states as follows:

> 110A. Provisional release of goods, documents and things seized pending adjudication.
> Any goods, documents or things seized under section 110, may pending the order of [adjudicating authority], be released to the owner on taking a bond from him in the proper from with such security and conditions as the

[adjudicating authority] may require.

22. My attention is drawn to a judgement of the Supreme Court in the matter of Commissioner of Customs Vs. Athul Automations Private Limited in Civil Appeal Nos.1057, 1058, 1060 & 1059 of 2019 dated January 24 of 2019. The Full Bench of the Supreme Court was concerned with a challenge to an order of the Customs Excise and Service Tax Appellate Tribunal that had been in favour of the importer, such importer not having challenged the Foreign Trade Policy itself. In such circumstances, the Bench, at Paragraph 13, permits the release of the goods stipulating the conditions of release as under:

> '13. We therefore find no reason to interfere with the impugned orders. In the statutory scheme of the Foreign Trade Act as discussed, we further find no error in the penultimate direction to the respondents for deposit of bond without sureties for 90% of the enhanced valuation of the goods leaving it to the DGFT to decide whether confiscation needs to be ordered or release be granted on redemption at the market value, in which event the respondents shall be entitled to set off.'

23. The aforesaid judgement would govern those situations of imports of consignments of DMPCM in cases where the Policy has not been challenged before the Courts. In line therewith, I direct the respondents to release the consignments of DMPCM in those cases, where there is no challenge to the policy, upon the petitioner furnishing a bond for 90% of the enhanced valuation of the goods, and security for the remaining 10%, within one (1) week from the date of furnishing of the aforesaid security.

24. Reference is also made to the order of the Division Bench of this Court in WP. Nos.15621 to 15623 of 2018 that states as follows:

> "Heard Mr.N.Viswanathan and Mr.S.Baskaran, learned counsel for the petitioners, Ms.Aparna Nandakumar, learned CGSC for the respondents 1 to 3 and Mr.Venkataswamy Babu SPC for the respondents 4 & 5.
>
> 2. Applicable duty on the enhance value, as determined by the Chartered Engineer, would come to around Rs.2 lakhs and above. Goods need not be detained for the disputed amount to be paid.
>
> 3. Mr.N.Viswanathan, learned counsel for the petitioners submitted that the disputed amount would

be paid in cash, to the competent authority.

4. Petitioners are directed to pay the duty applicable on the enhanced value, as determined by the Chartered Engineer. On payment of the same, goods detained in the Custom Fleet Stations, licensed by the Customs, be released. Till the date of release of goods, demurrage charges be waived. Other disputes raised in the writ petitions, would be decided."

25. The aforesaid direction has been passed in those cases where the importers have challenged the policy itself. Since none of the petitioners before me have challenged the Policy, the rationale of the above order of the Division Bench will not apply to them.

26. The authorities are also at liberty to initiate proceedings for assessment and adjudication of the consignments in question, in terms of the applicable statutory provisions and in accordance with law.

27. These writ petitions are disposed of in the aforesaid terms. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Customs,
Chennai II Commissionerate,
No.60, Rajaji Salai, Customs House,
Chennai - 600 001.

2.The Joint/Addl Commissioner of Customs(Gr.5),
No.60, Rajai Salai, Customs House,
Chennai - 600 001.

3.The Assistant/Deputy Commissioner of Customs (Gr.5),
No.60, Rajai Salai, Customs House,
Chennai - 600 001.

+10ccs to Mr.N.Viswanathan, Advocate sr.nos. 16762 to 16771

+3ccs to MS.R.Hemalatha, Advocate sr.nos.17057 to 17059

+1cc to Mr.KS.Ramaswamy, Advocate sr.no.16534
+1cc to Mr.T.L.Thirumalaisamy, Advocate sr.no.16576
+1cc to M/s.Hema Muralikrishnan, Advocate sr.no.16719
+2ccs to M/s.S.Sankara Narayanan, Advocate sr.no.16552

WP. Nos. 26049, 26054, 32154,32155, 32156, 32157, 32159, 32642, 32646, 32649 & 33982 of 2018

nr 08/03/2019