IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 04.03.2021
CORAM
THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

W.A.No.642, 687, 688, 690, 691,
694, 696, 697 & 698 of 2021
and
C.M.P.Nos.2867, 3835, 3839, 3842, 3843,
3850, 3854, 3855 & 3856 of 2021

1.The Commissioner of Customs (Gr.5),
Chennai II Commissionerate,
No.60, Rajaji Salai, Customs House,
Chennai - 600 001.

2.The Additional Commissioner of Customs (Gr.5),
No.60, Rajaji Salai, Customs House, Chennai - 600 001.

3.The Deputy Commissioner of Customs (Gr.5),
No.60, Rajaji Salai, Customs House,
Chennai - 600 001. .. Appellants in all WPs

-vs-

1.M/s.Best Mega International
GL-6, Ansal Bhawan,
K.G.Marg, New Delhi - 110 001,
Rep. by its Proprietor - Rajesh Khetterpal
... 1st Respondent in WA.642 of 2021

1.GRS GRAPHICS,
No.120, Munish Plaza, 20,
Ansari Road, Darya Ganj, New Delhi- 110 002.
Rep.by its Proprietor Ramesh Kumar Mohan.
.... 1st respondent in WA.687 of 2021

1.M/ S CITY OFFICE EQUIPMENT
No. 16, Aziz Mulk,
4th Street Tihousand Lights Chennai 600 006
Rep. by its Proprietor Pawan Kumar Jhunjhunwala
.... 1st respondent in WA.688 of 2021

1.M/S.DELHI PHOTOCOPIERS
No. B-30/2,
3rd Floor Jhilmil Industrial Area Delhi 110 095,
Rep. by its Proprietor Jitendar Mohan
... 1st Respondent in WA.690 of 2021

1.M/S. ASIAN COPIERS
No. BG 6/54A, Paschim Vihar New Delhi 110 008
Rep. by its Proprietor Mr. Akshay Khetterpal
... 1st Respondent in WA.691 of 2021

1.PRIUS TECHNOLOGIES
Cabin No. 2, B-7,
Prabhat Kiran Building,
Rejendra Place,
New Delhi - 110008,
Rep. by its Proprietor Mr. Ankit Khetterpal
... 1st Respondent in WA.694 of 2021

1.M/S.SKYLARK OFFICE MACHINES
Shop No.4, Ground Floor,
Door No.10, Aziz Mulk 4th Street,
Thousand Lights, Chennai-6,
Rep. by its Proprietor Rohit Jhunjhunwala
... 1st Respondent in WA.696 of 2021

1.M/S.EXCEL COPIERS
UB-14D, Arunachal Bhavan,
Barakhamba Road, New Delhi-110 001,
Rep. by its Partner Ankit Khetterpal
... 1st Respondent in WA.697 of 2021

1.M/S.SRI GANAPATHY ENTREPREISES
No. 2, Kanagadoss Street,
Gandhi Nagar Nagalkeni, Chrompet,
Chennai 600 044
Rep. by it Proprietor Mr. K. Saravana Kumar
... 1st Respondent in WA.698 of 2021

2.The Director General of Foreign Trade and
Additional Secretary to the Government of India,
Department of Commerce,
Ministry of Commerce and Industry,
Government of India, New Delhi.
... R2 in WA.642, 687, 688, 690, 691,
694, 696, 697, 698 of 2021

Appeal under Clause 15 of the Letters Patent Act to set aside the order dated 25.01.2021 made in W.P.No.8574, 11165, 11113, 11151, 11157, 11371, 8575, 8576 & 11049/2020 respectively

Common Prayer in W.P. No. 8574, 8576, 11151, 11157, 11165, 11371, 8575, 11049 and 11113 of 2020.

These Writ Petitions are filed under Article 226 of the Constitution of India praying to Writ of Mandamus to direct the respondents 1 to 3 herein to forthwith release 136 units (W.P. No. 8574 of 2020), 323 units (W.P. No. 8576 of 2020) 115 units (WP. No. 11151 of 2020), 119 units (W.P. No. 11157 of 2020) 136 units (W.P. No. 11165 of 2020), 437 units (W.P. No. 11371 of 2020) 564 units (W.P. No. 8575 of 2020), 129 units (W.P. No. 11049 of 2020) and 482 units (W.P. No. 11113 of 2020) of the old and used digital multifunction print, copying and scanning machines of A3 size vide Bill of

Entry No.7492161 dated 21.4.2020 (W.P. No. 8574, of 2020), Bill of Entry No.7420131 dated 9.4.2020 (W.P. No. 8576 of 2020), Bill of Entry No. 3915065 dt 03.07.2019 (WP. No. 11151 of 2020), Bill of Entry No. 7491233 dt 21.04.2020 (W.P. No. 11157 of 2020), Bill of entry No. 5172821 dated 04.10.2019 (W.P. No. 11165 of 2020), Bill of Entry No. 5245411 dt 10.10.2019 (W.P. No. 11371 of 2020), Bill of Entry No.7262568 dated 17.3.2020 (W.P. No. 8575 of 2020), Bill of Entry No. 8170385 dated 14.07.2020 (W.P. No. 11049 of 2020) and Bill of Entry No. 4245812, dt 27.07.2019 (W.P.No.11113 of 2020) on payment of applicable total Customs Duty on the enhanced value by the Chartered Engineers M/s.Supreme Techno Associates Private Limited, Chennai, vide their Report No.STA/IR/ O and VC/ C-026/2020-2021 dated 22.5.2020 (W.P.No. 8574 of 2020) No.STA/IR/ O and VC/ C-025/2020-2021 dated 22.5.2020 (W.P. No. 8576 of 2020) M/s. National Marine Consultants Inc, Chennai vide their Report No. NMCI / IND / C / 19-20 / 125, dt 10.07.2019 (W.P. No. 11151 of 2020) Supreme Techno Associates Private Limited, Chennai vide their Report No. STA / IR / O and VC / C-054 / 2020-2021 dt 11.06.2020 (WP. No. 11157 of 2020) M/s.National Marine Consutants Inc, Chennai, vide their Report No. NMCI/IND/C/19-20/201 dt. 21.10.2019 (WP. No.11165 of 2020) M/s. National Marine Consultants Inc, Chennai, vide their Report No. NMCI/IND/C/19-20/209 dated 25.10.2019 (WP. No. 11371 of 2020) M/s.ELBI Consultancy (India) Pvt. Ltd, Chennai, vide their Report No.ELBI/ CHE/ 2020/0251, dated 21.5.2020 (W.P. No. 8575 of 2020) Chartered Engineer vide its report dated 25.07.2020 M/s. National Marine Consultants Inc, Chennai, vide theri Report No. NMCI / IND / nC / 19-20 / 145,dt.10.08.2019 (WP. No. 11113 of 2020) in line with the directions of this Honourable Court in WP Nos.16126 of 2019 and 16 others batch, dated 10.09.2019, vide its report dated 25.07.2020, VIS-a-VIS in terms of the interim order passed by the division bench of this Honourable Court in W.P.Nos. 15621 to 15623 of 2018 dated 13.02.2019 and 09.04.2019(W.P. No. 11049 of 2020)

For Appellants in all appeals	:	Ms.Aishwaya Bhati Additional Solicitor General Assisted by M/s.R.Hemalatha Senior Standing Counsel
For Respondents R1 in all WAs	:	Mr.Arvind Dattar Senior Counsel Mr.A.R.L.Sundaresan Senior Counsel for Mr.N.Viswanathan in W.A.Nos.642, 687, 688, 690, 691, 694, 696 & 697 of 2021 for Mr.S.Baskaran in W.A.No.698 of 2021

R2 in all WAs : Mr.V.Chandrasekaran [For DGFT]

COMMON JUDGMENT

T.S.SIVAGNANAM, J.

These appeals have been filed challenging the common order and direction in W.P.No.8574 of 2020, etc batch dated 25.01.2021.

2.The petitioners had filed the writ petition for a direction upon the appellants herein to forthwith release of 136 units of old and used multifunction print, copying and scanning machines of A3 size vide various bills of entry on payment of applicable total customs duty on the enhanced value by the Chartered Engineers in line with the directions issued by the Court in W.P.No.16126 of 2019, etc. batch dated 10.09.2019. By the impugned order, the writ petitions were allowed and the consignments in question were directed to be released upon remittance of the enhanced duty as quantified based upon the valuation of a Certified Engineer. The adjudication proceedings to be initiated/will continue to be concluded as expeditiously as possible. The revenue being aggrieved by such order, have filed these appeals. With the consent on either side, W.A.No.642 of 2021 is taken as the lead case which has been filed challenging the order in W.P.No.8574 of 2020 filed by M/s.Best Mega International, New Delhi.

3.We have elaborately heard Ms.Aiswarya Bhati, learned Additional Solicitor General assisted by Ms.R.Hemalatha, learned Senior Standing Counsel for the appellant/revenue and Mr.Arvind Datar and Mr.A.R.L.Sundaresan, learned Senior Counsels appearing for Mr.N.Viswanathan and Mr.S.Baskaran, learned counsels appearing for the writ petitioner and Mr.V.Chandrasekaran, learned Standing Counsel for the Director General of Foreign Trade [DGFT] who have also filed an independent appeal which is yet to be numbered.

4.We note the facts in W.P.No.8574 of 2020 to understand the background under which the respondent importer had approached the Writ Court. The respondent importer is a partnership firm engaged in the business of import and trading of Second hand Digital Multifunction Printing and Copying Machines, Medical Equipments, etc. and during the course of business had imported a consignment of 136 units of old and used digital multifunction from the overseas supplier at Singapore. The bill of entry was filed on 21.04.2020 with the Chennai Customs House with request for assessment and clearance of goods in terms of the provisions of the Customs Act, 1962 [the Act]. The petitioner would state that the Customs Department have ordered for 100% examination under first check appraisement and the Officers of Group-5 had arranged for examination of the machines by an approved Chartered Engineer who had submitted a report dated 22.05.2020. According to the petitioner, in terms of the said report all the machines are having the features of printing, copying and scanning and the machines cannot be considered as Hazardous Waste, Electrical or Electronics Assemblies or e-waste equipments. The petitioner would state that the Department of Revenue are not allowing the clearance of the consignment though 55 days had lapsed since the bill of entry was filed and more than 29 days since examination report was submitted on the premise that the imported machines are covered under the category of Printers, Plotters and therefore, registration with BIS is not mandatory as per Circular No.1/2019 dated 02.05.2019 followed by Notification S.O.1236(E) dated 01.04.2020.

5.The petitioner's case is that printers are covered under CTH and ITC [HS] Code No.8443 32 10 to 8443 32 50 and 8471 60 24 and the products are since listed in Sl.No.7 of the Schedule of the Electronics and Information Technology Goods [Requirements for Compulsory Registration] Order, 2019, it is mandatory for registration with BIS for the products whereas MFDs and scanning machines were covered under CTH 8443 31 00 and this product is not specifically listed in the registration order and therefore, it is not mandatory for registration with BIS for the machines imported by the respondent/writ petitioner. Further, the contention of the respondent is that the MFDs are distinctly different product and their technical features, process, sizes, weight are different and are classified under different and specific individual heading from that of printers and plotters as mentioned in the schedule to the notification dated 07.02.2012 and the amendments which were made subsequently by including other products. The petitioner's further case is that the Ministry of Electronics and Information Technology [MeitY] classified the MFDs under the category 'Printers and Plotters' vide circular dated 02.05.2019 and notification dated 01.04.2020 whereas the Ministry of Commerce and other Ministries have classified the product under the nomenclature as imported multifunction print and copying machines. Thus, it is the argument of the writ petitioner that the machines which have been imported by them are freely importable and since the Department has refused to release the goods, the petitioner has approached this Court by way of filing the writ petitions.

6.The Customs Department had filed a counter affidavit in the writ petition raising preliminary objections. Firstly, the Customs Department are implementing authorities who are bound to act only in accordance with the directions/policy decisions of the nodal authorities as constituted for the same and the import of second hand MFDs are regulated under various statutory provisions and has to be allowed clearance subject to fulfilment of each and every condition stipulated independently. The conditions being hereunder.

> "i.Compliance of procedures and production of mandatory documents specified in the provisions of Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 read with E-Waste Management Rules, 2016.
>
> ii.Production of authorization/import license issued by the DGFT authorities since the subject goods are restricted under Para 2.31 of FTP 2015-20.
>
> iii.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 (hereinafter referred to as CRO) dated 07.09.2012 and subsequent clarifications given in letters dated 25.06.2013 and 07.11.2014 issued by Ministry of Electronics & Information Technology (MeitY)."

7.Further, it is contended that the requirement of BIS registration for the notified goods is mandated in the Compulsory Registration Order [CRO], 2012 as compulsory one and failure of which requires either re-export of the goods or deformation as scrap in order to avoid eco-damage to the Country as well as to ensure safety of public users. Further, it was contended that the dispute raised by the respondent in the writ petition is relevant to the condition set forth by MeitY on the status of MFDs being certified in CRO, 2012 and MeitY had consistently held that the MFDs are basically with additional features like scanning, copying, etc. and all the three items, namely, printers, scanners and copying machines are independently notified under CRO, 2012 and that as per established international practice, only generic names are quoted as notified in the CRO, 2012 as it would be impossible to notify all individual items that runs to thousands and the MFDs falling under the generic category or family of notified printers and therefore, BIS registration is mandatory for import. Further objection was with regard to the maintainability of the writ petition contending that the writ petition is premature as the adjudication mechanism is yet to commence and the prayer requires to be rejected. Further, it was stated that the respondent importer did not produced the mandatory documents required to be filed for verification and none of the above statutory provisions have been complied with which has resulted in issuance of show cause notice as statutorily required under the Act. Further with regard to the contention of the appellant attempting to bring the machines under CTH 843 31 00 is in fact disputing the policy matter of MeitY which is the nodal agency and implementing authority for

CRO that mandates requirement of BIS registration for the imported/used MFDs.

8.The other objection raised was that these statutory authorities which are nodal authorities which have laid down the condition have not been impleaded in the writ petition and the writ petition was filed only again the implementing agency and therefore, liable to be dismissed. The various orders passed by this Court and the other High Courts on which the respondent/writ petitioner had placed reliance have been dealt with and in paragraph 22 of the counter affidavit, the following tabular column has been incorporated which is quoted herein below:

Sl.No.	Date	Particulars	Remarks
1.	06.04.2018	W.P.No.2728 of 2018 - High Court of Andhra Pradesh	The High Court directed release of the goods - which was challenged by MeitY before the Hon'ble Apex Court in Special Leave to Appeal (c) No.17307/2019 and Record of Proceedings dated 24.07.2020 evident of the same. [Kindly refer to Page No.27 of Respondents typed set]
2.	24.01.2019	Atul Automations case - Hon'ble Apex Court reported as 2019 (365) ELT 465(SC)	Issues with regard to adherence to authorisation from DGFT - release of goods vis-a-vis distinction between prohibited & restricted goods, classification of the MFDs under the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 and release thereof subject to DGFT. Question of applicability of CRO 2012 by MeitY not raised. It is a case wherein the importer had exhausted all statutory remedies after due adjudication - 1st appeal to Tribunal - appeal in the High Court & further appeal to Hon'ble Apex Court - Adjudicatory mechanism fully availed.

Sl.No.	Date	Particulars	Remarks
3.	25.04.2019	Commissioner of Customs, Chennai II vs. City Office Equipment by Division Bench of Madras High Court - reported as 2019 (367) ELT 920 (Mad)	This Hon'ble Court held that the compliance with the three conditions as set forth in Para 8 above is vital for the purpose of the provisional release of the consignment and further there are distinguishing feature of the facts herein vis-a-vis the facts found by the Hon'ble Apex Court in case Atul Automations reported as 2019 (365) ELT 465 (SC). Thus the prayer sought for in the present writ petition was analysed threadbare by this Hon'ble Court and provisional release was declined due to non-compliance of each of the condition as set forth in Para 8 above, instead directions for due adjudication proceedings was ordered.
4.	10.06.2019	Writ Appeal No.1720 of 2019	Another Division Bench of this Hon'ble Court was pleased to follow the decision of the coodinate Bench as indicated in the Serial No.3 abvoe and fixed a time frame for the completion of the adjudication process.
5.	25.06.2019	Genuine Copier Systems rendered by this Hon'ble Court reported as 2019 (368) ELT 923 (Mad)	This Hon'ble Court declined to grant release of the consignment and instead directions for the adjudication proceedings was granted by following the orders of the divisional bench as indicated in the serial No.3 above.

Sl.No.	Date	Particulars	Remarks
6.	10.09.2019	W.P.Nos.16126 of 2019 (batch cases)	Batch of cases filed seeking to DECLARE Para 2.31 of the FTP issued by DGFT as ultravires along with Interim prayer for provisional release of the MFDs pending final adjudication. The division bench granted INTERIM DIRECTION for the release of the MFDs upon the payment of duty on the enhanced value as determined by the Chartered Engineer. The main writ petition challenging the vires of Para 2.31 of the FTP is still pending.
7.	27.09.2019	W.M.P.No.24857 of 2019 in W.P.No.25286 of 2019 by the Division Bench of this Hon'ble High Court.	This Hon'ble Court took note of the final order passed by a coordinate Division Bench in Serial No.3 above and also the Interim Order granted by another coordinate Division Bench in Serial No.6 above but inter alia was not inclined to grant provisional release and instead ordered notice in the main Writ Petition. The Division Bench was further pleased to grant Liberty to the petitioner therein to submit a representation seeking relief in terms of the amendment to the policy dated 07.05.2019.

Sl.No.	Date	Particulars	Remarks
8.	17.12.2019	W.P.No.5372 of 2019 and etc cases	This Hon'ble Court was pleased to direct proceedings for adjudication to be conducted on merits and in accordance with law. The prayer for clearance of used MFDs upon the payment of duty was not granted.
9.	29.05.2020	Record of proceedings in SLP(C) Diary No.4012/2020 and etc cases - Hon'ble Supreme Court of India	On appeal by the Department, the Hon'ble Apex Court declined to interfere in the interim order dated 10.09.2019 passed by this Hon'ble High Court (Serial No.6). But the question of law was left open to be considered in an appropriate case which is SLP(C) 17307/2019 which was also listed on the same day.
10.	24.07.2020	Record of proceedings in SLP(C) No.17307/2019 - Hon'ble Supreme Court of India	This is an appeal preferred by MeitY as against the final order passed by the Hon'ble High Court of Andhra Pradesh in W.P.No.2728 of 2018 dated 06.04.2018. Hence the issue with regard to non-compliance of the provisions of CRO, 2012 order is till pending before the Hon'ble Supreme Court.

On the above grounds, the Customs Department opposed the relief sought for in the writ petition.

9.The Director General of Foreign Trade who was impleaded as the 4th respondent has filed the counter affidavit stating that the goods are prohibited goods and that the printers, plotters and scanners are specifically listed in Sl.Nos.7 and 9 in the schedule and the copying machines are specifically listed in Sl.No.26 of the Registration Order and notifications dated 07.09.2012 and 07.11.2014 and it is incorrect to state that MFDs are distinctly different. It was further stated that the respondent importer shall re-export such prohibited goods or else the Customs Authorities shall deform the goods beyond goods and dispose of the goods as scrap under intimation to MeitY. Further, it is reiterated that the goods imported by the respondent/writ petitioner are restricted to import prior to the Notification No.5 dated 07.05.2019 and has made prohibited goods for import in terms of paragraph 2.31 of the Foreign Trade Policy [2015-2020] under Notification No.5 dated 07.05.2019. Further, in terms of the Registration Order, 2012 vide Notification No.50/2015-2020 dated 08.01.2019, registration has been made mandatory for these category of goods. Further, with regard to the decisions relied on by the respondent/writ petitioner, it is submitted that they are not applicable to the cases on hand as there was a challenge when the goods were classified as restricted category and not prohibited category and that appears to be the reason for issuing direction for release of the goods in the earlier decision. With the above averments, the Director General of Foreign Trade prayed for dismissal of the writ petition.

10.Mr.V.Chandrasekaran, learned Standing Counsel appearing for DGFT submitted that the Department has filed a separate writ appeal but the same is yet to be numbered and there may be a slight delay in filing the appeal because necessary instructions had to be obtained from New Delhi. In any event, the decision rendered in these writ appeals will equally apply to the appeal filed by the DGFT.

11.The learned Writ Court while allowing the writ petition by the impugned order has chronicled the relevant events in paragraph 2 of the order. In paragraph 2(vii), the learned Writ Court has stated that the import being the subject matter of adjudication before the revenue authorities, the Court refrains from dealing further with this aspect of the matter [factual aspect]. Therefore, we can safely conclude that the events which have been mentioned in paragraphs 2(i) to 2(vi) are placing on record the events which have taken place prior to the import, namely, various notifications which were in vogue. Discussion starts from paragraph 3 of the impugned order, wherein the learned Writ Court has taken note of the various directions issued by the Hon'ble Division Bench and the Single Benches of this Court and the orders passed by the Hon'ble Supreme Court on appeals filed against those orders and has observed that on the question of interim release, the Court need not look further than the orders that are on record and the position that equally placed petitioners [importers] have been granted the benefit of interim release pending adjudication. It was observed that in such circumstances, it would not be proper to take a different view only in the case of some writ petitioners while others have obtained the benefit of release.

With regard to the question as to whether the condition imposed by MeitY is mandatory and whether non-compliance of the same would lead to confiscation, the Court referred to the decision of the High Court of Telangana at Hyderabad in RR Marketing vs. The Union of India and others [W.P.No.28391 of 2019 dated 21.01.2020] and observed that though the SLP filed by the revenue was admitted by the Hon'ble Supreme Court, provisional release has been permitted in the said case by order dated 18.09.2020.

12.Ms.R.Hemalatha, learned Senior Standing Counsel would clarify that the goods were provisionally directed to be released by the High Court of Telangana at Hyderabad and the direction for provisional release granted by the Hon'ble Supreme Court was in respect of other cases. This clarification is taken on record.

13.Further, the learned Writ Court has taken note of the orders passed by the Tribunals, wherein the orders of adjudication which were against importers were reversed and the appeals were allowed. Thus, the learned Writ Court concluded that the Hon'ble Supreme Court has consistently taken a view in favour of provisional release in such cases, noticing that in identical cases, release has been ordered and there would be no justification to take a contra view in few cases alone. Accordingly, writ petitions were allowed with the aforementioned directions.

14.The four broad propositions which have been framed by the learned Additional Solicitor General are that (1) decisions granting provisional release may not be treated as a precedent, (2) there are three statutory requirements which are to be taken note of, namely, the CRO 2012, the Foreign Trade Policy and the Hazardous Waste Management Rules, (3) the writ petition is not maintainable as there is no vested right for provisional release, there is an efficacious statutory mechanism prescribed under Section 110A and 130 of the Act, that there has been no fact finding by the competent authority under Section 110A, that the customs authorities being only the implementing authority, the writ petition ought to have been dismissed on the ground of non-impleadment of MeitY, the respondent/writ petitioner having not challenged any of the statutory requirements, provisional release cannot be ordered and (4) the change in the legal position after the notification dated 07.05.2019 under the Foreign Trade Policy and the notification dated 01.04.2020 in the CRO are very relevant which would dis-entitle the respondent/writ petitioner to any relief.

15.Mr.Arvind Dattar, learned senior counsel would submit that there is no necessity for the respondent/writ petitioner to challenge the notification as the product imported by the respondent is entirely different and is not a printer and therefore, MeitY is neither necessary nor a proper party. Furthermore it is submitted that the respondent importer cannot be compelled to approach the Court for each and every import when there are several orders passed by the Hon'ble Supreme Court, this Court and other High Courts directing release of similar machines. Further, it is submitted that there may be change of law in April 2020 but all the imports done by the petitioner was prior to 01.04.2020. Further, the issue relating to non-impleadment/non-joinder was not taken at the earliest point of time. Further, it is submitted that unless the order and direction issued by the learned Writ Court was perverse while exercising appellate jurisdiction, this Court will not interfere with the order. To support such contention, the learned senior counsel referred to the relevant paragraphs in the impugned order. Therefore, it is submitted that the learned Writ Court rightly issued directions for provisional release of the goods after taking note of all the orders of the Hon'ble Supreme Court and this Court. Referring to the schedule to the notification dated 07.09.2012, it is submitted that MFDs which have been imported by the petitioner is not a printer and therefore, condition in clause 3(1) of the notification will not apply and there can be no prohibition for import of those goods. Further by referring to the Alert issued by the Directorate of Revenue Intelligence [DRI] dated 11.07.2017, it is submitted that the notification states that MeitY has informed the Department that second hand items if notified also require registration under the provisions of the order and in the absence of any such notification, there cannot be any prohibition for the import. The learned senior counsel elaborately referred to the various orders passed by the other High Courts where provisional release was granted.

16.Mr.AR.L.Sundaresan, learned senior counsel while supplementing the arguments of Mr.Arvind Dattar, learned senior counsel submitted that the CRO will not apply and therefore, authorization for import of MFDs is not required as it cannot be considered as restricted item. In this regard, the learned senior counsel painstakingly took us through various entries as well as the amendments which were brought to the circular by adding several items to the original list of fifteen items. Further, it is submitted that by circular No.1/2019, the Department wanted to expand and clarify what is a printer by stating that the MFD is also a printer, however, by way of circular, the earlier notification cannot be superseded. By notification dated 01.04.2020 while adding certain other items to the original list, further clarification was issued and such clarification can at best be prospective. These three limbs of arguments made by the learned senior counsel are without prejudice to each other. Elaborate reference was made to the entries in the Customs Tariff Act, HSN classification, etc. which we had pointed out is beyond the realm of writ proceedings and it was never pressed into service when the writ petitions were heard. In any event, these classification issues cannot be dealt with by us. Once we have expressed our opinion on this issue, the learned senior counsel proceeded to canvass other points. With regard to the decisions which were pressed into service by the learned Additional Solicitor General, it is submitted that those are distinguishable on facts.

17.The learned Additional Solicitor General, in reply, would submit that it is incorrect to state that the revenue has not been able to show any perversity in the order passed in the writ petitions and the four propositions which were advocated by her would clearly show that the order calls for interference. Furthermore, the bills of entry were filed in April 2021 and before even the Department could act, the writ petitions have been filed. Therefore, the revenue was right in contending that the writ petitions were not only premature but not maintainable on account of non-joinder of proper and necessary parties.

18.The first issue we need to take note of is as to the various orders of provisional release passed by this Court, the other High Courts and the Hon'ble Supreme Court. To understand the scope of the directions issued in those orders, we have extracted the tabulated statement as found in the counter affidavit of the Customs Department.

19.In our considered view, there are two reasons as to why this Court should independently consider the cases on hand. Firstly, the orders passed by the various Courts in the above referred cases are all orders granting provisional release. The question would be whether such an order of provisional release can be cited to be a precedent. Identical issue was considered in the case of Union of India vs. Manju Goel [2015 (321) ELT 19 (SC)], wherein it was held that an order of provisional release is, at all times, an interlocutory exercise and does not finally adjudicate on any liability. In Mala Petrochemicals & Polymers vs. The Additional Director General, Directorate of Revenue Intelligence and another [2017 (353) ELT 446], it was held that the power under Section 110 of the Act involves exercise of discretion, the scope of judicial review is to examine if the discretion has been rightly exercised and that it is not based on irrelevant materials and is fair and reasonable in circumstances and undoubtedly it is not an appellate power. Further, it was held that drawing of a distinction between seizure of imported goods as a result of undervaluation and seizure of imported goods upon misdeclaration cannot per se be said to be irrational, on the contrary failure to draw such a distinction and treat all types of wrongful imports on an equal footing might result in miscarriage of justice and that is perhaps, why Section 110A has been worded in the way it has, leaving some margin to the Customs in the exercise of their discretion subject, of course, to the recognized legal limits. The above decisions were relied on in the case of Additional Director General [Adjudication] vs. Its my Name Private Limited [MANU/DE/1823/2020].

20.In the case of Malabar Diamond Gallery Pvt. Ltd. vs. The Additional Director General, Directorate of Revenue Intelligence and others [2016 (241) ELT 65 (Madras)], the Division Bench of this Court pointed out that one of the important aspects to be taken note by the authorities while exercising their powers under Section 110A of the Act is whether, import of goods is prohibited, within the meaning of Section 2(33) of the Customs Act and where, in the Customs Act or any other law for the time being in force, such prohibition is mentioned. Therefore, we need to examine as to whether such goods are restricted or prohibited items.

21.The Ministry of Communication and Information Technology by notification S.O.2357(E) dated 07.09.2012 in exercise of its powers conferred under Section 10(1)(p) of the Bureau of Indian Standards Rules, 1987 issued the Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order, 2012. Clause 3 of the Order deals with prohibition regarding manufacture, storage, sale and distribution, etc. of goods, which reads as follows:

> "3.Prohibition regarding manufacture, storage, sale and distribution, etc. of goods:-
>
> (1) No person shall by himself or through any person on his behalf manufacture or store for sale, import, sell or distribute Goods which do not conform to the Specified Standard and do not bear the words "Self declaration - Conforming to IS (Relevant Indian Standard mentioned in column (3) of the Schedule) on such Goods after obtaining Registration from the Bureau:
>
> Provided that nothing in this Order shall apply in relation to manufacture of Goods meant for export.
>
> (2) The substandard or defective Goods which do not conform to the Specified Standard mentioned in column (3) of the Schedule shall be deformed beyond use by the manufacturer and disposed off as scrap."

22.Schedule to the Order lists out the various products and the Indian Standard Number and the Title of Indian Standard.

For the purpose of these cases, the following two entries would be relevant:

Sl.No. (1)	Product (2)	Indian Standard Number (3)	Title of Indian Standard (4)
7.	Printers, Plotters	IS 13252:2003	Information Technology Equipment – Safety – General Requirements
8.	Scanners	IS 13252:2010	Information Technology Equipment – Safety – General Requirements

23.In terms of clause 3 above, no person shall import goods which do not conform to the Specified Standard and do not bear the words "Self declaration – Conforming to IS"on such goods after obtaining registration from the Bureau. However, such restriction will not apply in relation to manufacture of goods meant for export which is not the case before us. The schedule lists out the Printers and Plotters as Information Technology Equipments and General requirements to be complied with and similar is the case in respect of Scanners.

24.By notification S.O.2905(E) dated 07.11.2014, the Government included another fifteen products in addition to the fifteen products which were mentioned in the notification dated 07.09.2012. The MeitY issued office memorandum dated 10.03.2017. The necessity for such office memorandum was on account of investigation into large scale import of used MFD in violation of Environment Protection Act and Rules and Foreign Trade Policy. The memorandum mentions about how traders from various parts of India especially Delhi and Kolkata are regularly importing large quantifies of MFDs through Cochin Port and none of the importers produce any documents to Customs Department to prove compliance of the Registration Order, 2012. Further, it was mentioned that printers are covered under Electronics and IT Goods (Requirements for Compulsory Registration) Order, 2012 mandating Indian safety standards for the notified goods and must be registered with BIS before sale in India. It is further stated that since second hand Multifunction printers are registered with BIS nor they have sought permission from MeitY for their import, such imports would be in violation of Compulsory Registration Order, 2012.

25.The Directorate of Revenue Intelligence also issued Alert Circular No.07/2017 dated 11.07.2017 reiterating the stand taken by the Ministry. Another circular was issued by the MeitY in Circular No.1 of 2019 dated 02.05.2019 clarifying that MFDs which are basically printers with additional features like photo copy, scan, fax, etc. are covered in the category “Printers, Plotters”notified under the Order dated 03.10.2012.

26.The argument of the respondent importer is that the earlier notification which had only listed out the printers and plotters cannot now be expanded to cover MFDs by virtue of a Circular and therefore, the same is without jurisdiction. We will deal with this contention a little later.

27.The MeitY by notification in S.O.1236(E) dated 01.04.2020 added another twelve products to the schedule to the Registration Order, 2012. In paragraph 2 of the notification, it has been stated as follows:

> “2.Since the Multifunction Devices [MFDs] are basically printers with additional capabilities like Fax, Scan, Photocopy, etc., thus, it is clarified that they are covered under the category of Printers/Plotters notified vide Gazette Notification dated 3rd October 2012. The other provisions of the aforesaid Gazette notification dated 3rd October 2012 would apply as before.”

28.In terms of the above condition, the Ministry has stated that MFDs are basically printers with additional capabilities and they are covered under the category of Printers/Plotters notified vide gazette notification dated 03.10.2012.

29.The first limb of the argument of the respondent/writ petitioner is that the equipment imported by them is not a printer/plotter. The second limb, with prejudice to the first argument, is that even if the Ministry wants to classify the MFDs as printers, it could not have been done by virtue of the circular as the schedule to the order was by a statutory notification. The third submission is that inclusion of MFDs under the category of printers and plotters can at best be prospective, i.e. post April 2020.

30.In our considered submission, all the three arguments have to necessarily fail. Firstly, the notification including printers in the schedule requiring certification of authorization has not been questioned. The stand of the Department is that the MFDs are also printers with additional features. The office memorandum which was issued dated 10.03.2017 made this position clear. The argument of the respondent is that the schedule in the control order cannot be modified by way of office memorandum/circular. The MeitY had issued circular dated 02.05.2019. A reading of the said circular shows that it is a clarification issued with regard to

MFDs. A clarification is to be understood as a clarification of an existing position and not a new inclusion. This being the settled interpretation, the respondent/writ petitioner cannot contend that MFDs cannot be included under the category of Printers by way of a clarification. The position appears to be that the Department has always classified MFDs under the category of Printers and the position stood clarified thereafter and the need for such clarification arose on account of unethical imports which was taken note of by MeitY while issuing office memorandum dated 10.03.2017. It has clearly stated that the traders of various parts of India, especially Delhi and Kolkata, are regularly importing large quantities of used MFDs through Cochin Port and none of them have produced any documents before the Customs Department to prove compliance of the Registration Order, 2012. Therefore, on account of unscrupulous person resorting to such imports, the necessity arose for the MeitY to issue clarification/circular. Therefore, it has to be necessarily taken that for all purposes, the Department has been consistent in their stand that MFDs are covered within the scope of Printers. This was made doubly clear by issuing of the notification dated 01.04.2020.

31.We find that in none of the above referred decisions which were referred to by the respondent, the above contentions have been dealt with. In any event, with utmost respect we would humbly observe that any direction issued for provisional release being interlocutory in nature cannot be cited as a precedent. It was lamented before us by the respondent/writ petitioner that how may times the respondent can approach the Court for relief when several consignments of the same item has been released. Unfortunately the respondent/writ petitioners are before a Constitutional Court exercising power under Article 226 of the Constitution of India and not before the Customs Authorities or before the Special Valuation Branch of the Customs Department. Thus, we are constrained to observe that the change in the legal position, especially after the notification dated 07.05.2019 and the notification dated 01.04.2020, is of utmost significance which cannot be brushed aside.

32.The non-compliance of the CRO may lead to serious consequences. However, we do not wish to express anything in this regard because the learned Single Bench was not inclined to touch upon the merits of the matter but proceeded to grant release based on various orders passed by the High Courts and Hon'ble Supreme Court. As mentioned above in our most respectful view, those being orders of provisional release cannot be pressed into service by the respondent/writ petitioner, more particularly, after the issuance of the notification dated 01.04.2020 and this is of utmost relevance because the bills of entry in almost all the cases have been filed post 01.04.2020. Even if certain bills of entry have been filed prior to notification, the law prevailing on the date of examination for considering the release of goods would have to be made applicable and if so, the notification S.O.1236(E) dated 01.04.2020 needs to be applied. In the light of the above reasoning, we are of the considered view that the stand taken by the Department was fully justified.

33.It was argued by the learned senior counsels for the respondents that invariably the Department does not take a decision on the request for provisional release and to demonstrate the same, the details of certain other writ petitions which were filed even earlier by other importers was placed before this Court for consideration. One startling feature which struck our eye on perusal of the details is that there has been import of substantial quantity/number of these type of machines and invariably in all cases writ petitions have been filed before this Court without exhausting the remedy of provisional release under the Act or without undergoing the process of adjudication. By way of illustration, if we take up the case of the respondent, M/s.Best Mega International, the petitioner in W.P.No.8574 of 2020, we find that the application for provisional release was filed on 09.06.2020 and the writ petition was filed on 18.06.2020. Thus, it is clear that no reasonable time was granted to the Department to examine the application. On perusal of the application filed by the respondent/writ petitioner dated 09.06.2020, we find that the application is not a simple application for provisional release but in fact it covers most of the grounds which have been raised in the writ petition. It is rather surprising that an application for provisional release would contain such details without even the Department calling upon the respondent importer to furnish details or to give explanation.

34.In the light of the above, we hold that the contention advanced by the learned Additional Solicitor General merits acceptance. The orders of provisional release passed pursuant to the directions issued by the Writ Court being interlocutory in nature cannot be considered as a precedent. Merely by stating that identical imports were allowed to be provisionally cleared can be no reason to permit the respondent to clear the goods by way of issuance of a writ of Mandamus. This is more so in the instant case, because the matter is being considered after the notification in CRO dated 01.04.2020 which has made the items as prohibited items. Admittedly, none of the statutory notifications or amendments are put to challenge before this Court and we do not accede to the argument that the respondent need not challenge the provisions of the statutory notification as according to them, MFDs are not printers. The

High Courts even under the normal course when matters travel by way of an appeal to this Court, are precluded from ruling on classification issues. Thus, these are all matters well beyond the purview of the writ jurisdiction and it is at best left to the decision of the Department who are bound to strictly implement the directions and the notification issued by the Government from time to time bearing in mind environmental protection and public interest.

35.Furthermore, we note that the earlier interim orders granted for provisional release were during the regime when the goods were treated as restricted goods requiring license for importation or certification but there is drastic change in the legal position as of 1st April 2020 as the goods have become prohibited. This subtle yet very relevant distinction has to be taken note of to treat the present set of cases on a different yardstick. The decision of the High Court of Telangana which was pressed into service by the learned senior counsel for the respondent is an interim order and not a final order. In fact some other grounds which were canvassed before us, if needs to be adjudicated, then we may have to do the role of an Officer of Customs or an Officer who deals with classification of the products for the purpose of levying and collecting customs duty which we are not required or expected to do. As mentioned above, the circulars being clarifications would date back to the date of notification originally issued and the argument that it will be prospective, i.e. post 01.04.2020 is rejected.

36.The learned Additional Solicitor General is also right in her submissions in contending that MeitY is proper and necessary party to the writ petition as the Customs Department is only an implementing authority who obviously cannot supersede or over reach the notification issued by the MeitY exercising power under the provisions of the Bureau of Indian Standards Rules and the CRO.

37.The learned Writ Court in paragraph 7 of the impugned order has pointed out that there are conflicting decisions of the two Division Benches. As already mentioned, there can be no two similar orders in respect of directions for provisional release unless and until the Department concedes that the goods are identical and the same relief needs to be granted and two of the Division benches have directed the importers to approach the Department seeking release of the goods and we fully subscribe to the said view because in a writ petition, the Court cannot give a declaration as regards the classification of the goods.

38.The learned Additional Solicitor General rightly referred to the observations made by the High Court of Kerala in the case of Commissioner of Customs vs. Shri Amman Dhall Mill

[Cus.Appeal No.14 of 2020 dated 22.01.2021], wherein it has been observed that exercise of power and discretion under Section 125 of the Customs Act are specific and generally governed by the applicable policy, notification, etc. In the said case, the imported goods was green peas and the Court observed that the primary authority has noted that by keeping in view the stand taken by the Union of India before the Hon'ble Supreme Court in Agricas LLP case, the available stock position of green peas is treated as surplus and declined release and ordered confiscation. Though in the said case, the Court examined the correctness of the order passed by the Tribunal in an appeal filed under Section 130 of the Act, it observed that the Tribunal fell in clear error of law by holding that release of goods is the only option to the Customs Commissioner due to the language of Section 125 of the Customs Act. Further the Court faulted the Tribunal and observed that if the reasoning is adopted both by the primary authority and the appellate Tribunal, then Exim Policy, notifications are defeated and opens floodgates for the import of green peas and such contingencies are commented by the Hon'ble Supreme Court in Agricas Case. Further, it faulted the Tribunal for having ignored the relevant notifications, the mandate of FTDR Act and the Customs Act, 1962. For all the above reasons, we hold that an order of provisional release could not have been ordered by the learned Writ Court in these cases before us and it should have been best left to the Department to take a decision in the matter.

39.Further, we had an occasion to consider though not a similar case but a case where the Department took a view that the items imported which are MFDs are restricted items in terms of para 2.17 of the Foreign Trade Policy. The importer in the said case went through the process of adjudication and ultimately being unsuccessful was before this Court by way of an appeal under Section 130 of the Customs Act in C.M.A.No.4719 of 2018 in the case of M/s.Unitech Enterprises vs. CESTAT by judgment dated 17.02.2021, we dismissed the appeal with the following reasoning:

> "18.The appellant had imported 36 units of Old/Used Analogue Photocopiers without obtaining a license. Having accepted the stand taken by the Department, the appellant requested that his case may be adjudicated. Therefore, the dispute was only with regard to 201 units of Old/Used Digital Multi functional (Print and Copying) Machines. The import was effected by filing of Bill of Entry dated 13.08.2009. The Department was of the prima facie view that the item imported is a restricted item in terms of para 2.17 of the FTP which allows import of second hand capital goods including

refurbished/reconditioned spares without obtaining a license. There are two limbs to para 2.17 of the FTP and for easy reference, we quote the same hereunder:

Para 2.17 of the Foreign Trade Policy

"All second hand goods, except second hand capital goods, shall be restricted for imports and may be imported only in accordance with provisions of FTP, ITC(HS), HBP vl. Public Notice or an Authorisation issue in this regard.

Import of second hand capital goods, including refurbished/re-conditioned spares shall be allowed freely. However, second hand personal computers/laptops, photocopier machines, air conditioners, diesel generating sets will only be allowed against a license.

Import of re-manufactured goods shall be allowed against a license."

19.In terms of the above, all second hand goods except second hand capital goods are restricted for import. It is not in dispute that 201 machines which were imported by the appellant were second hand goods. Thus, going by the first limb of para 2.17, license is required. In the second para, the Policy allows import of second hand capital goods including refurbished/reconditioned spares without obtaining any license. There is a restriction for import of second hand Photocopier machines and other items mentioned therein. The appellant did not produce a Chartered Engineer's certificate when the goods were imported. Therefore, the goods were subjected to examination by Docks Officer in the presence of a Chartered Engineer and certified that the goods are 4 to 10 years old, they are used and not reconditioned and the value of the second hand goods was appraised as USD 69395 [C&F]. The appellant's argument before the adjudicating authority is that the imported item is totally different and it can neither be considered as a photocopier machine nor part of computer and therefore, freely importable. The adjudicating authority took note of the unamended FTP and also the position after the amendment by notification dated 19.10.2005 and on facts, found that the digital multifunction machine imported by the appellant performs the function of photocopying as well as printing. It further held that the function is same as of the photocopying machine with additional facility of printing when connected to a computer. The correctness of this finding was re-examined by the Tribunal and in our considered view very elaborately. It analysed various uses of the machine and drew a comparative chart which is as follows:

Analog Photocopier Machine	Digital Photocopier Machine
1. The original document is scanned to create an optical image	1. The original document is scanned to create an optical image
2. The image is directly projected on to the photoreceptor	2. The optical image is converted to digital data which is sent to the printer engine to create the printed image on to the photoreceptor
3. The image is developed on the photoreceptor and copied on the paper.	3. The image is developed on the photoreceptor and copied on the paper.

20.From the above, it is seen that except for additional feature in column No.2, there is no other distinction between a digital photocopier and a analog photocopier. This factual position is not being seriously contested by the appellant but the appellant would seek to bring their goods under the category 'freely importable' because they are capital goods. This contention was rejected by the Tribunal after taking note of the functionality of the machine which was imported and after taking note of the various Customs Tariff Headings and pointed out that photocopying machines are classified under various Tariff Headings such as 8443 3920, 8443 3930, 8443 3940, 8443 3950. Thus, it was pointed out that photocopying machines do not have any single entry in Tariff and copying machines whether or not combined with printers and facsimile machines are classified elsewhere as also machines which perform two or more functions of printing, copying or facsimile transmission as in the case of the imported goods. Further the Tribunal noted that DGFT notification No.31/2005 dated 19.10.2005 uses the expression “photocopier machines” and therefore, there is no warrant to read the expression appearing in the DGFT notification as conforming to any one particular expression used in the Tariff as these expressions are not identical and no Tariff item is mentioned in the DGFT notification."

40.In the result, the writ appeals are allowed and the order passed in the writ petitions are set aside. The appellant, Customs Department is directed to consider the applications filed by the respondent/writ petitioners for provisional release and pass orders on merits and in accordance with law within a period of four weeks from the date of receipt of a copy of this judgment. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

cse

To

1.The Director General of Foreign Trade and
Additional Secretary to the Government of India,
Department of Commerce,
Ministry of Commerce and Industry,
Government of India, New Delhi.

2.The Commissioner of Customs (Gr.5),
Chennai II Commissionerate,
No.60, Rajaji Salai, Customs House,
Chennai - 600 001.

3.The Additional Commissioner of Customs (Gr.5),
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4.The Deputy Commissioner of Customs (Gr.5),
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+9cc to Mr.AL.Gandhimathi, Advocate, S.R.No. 14551
+8cc to Mr.R.Hemalatha, Advocate, S.R.No. 13913
+1cc to Mr.S.Baskaran, Advocate, S.R.No. 13960

W.A.No.642, 687, 688, 690, 691,
694, 696, 697 & 698 of 2021

JP I(CO)
GN(15/04/2021)