IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.03.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

W.A.Nos.1096 to 1098 of 2021
and
C.M.P.Nos.6936, 6934 & 6937 of 2021

The Director General of Foreign
Trade and Additional Secretary to the
Government of India,
Department of Commerce,
Ministry of Commerce and Industry,
Govt. of India, New Delhi. ...Appellant in all appeals

Vs

1. M/s.Best Mega International,
GL-6, Ansal Bhawan, K.G.Marg,
New Delhi - 110 001,
Rep. by its Proprietor Rajes Khetterpal.

...1st Respondent in
W.A.No.1096/2021

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 Rohit Jhunjhunwala.

...1st Respondent in
W.A.No.1097 of 2021

1. M/s.Excel Copiers,
UB-14D, Arunachal Bhawan,
Barakhamba Road,
New Delhi - 110 001.
Rep. by its Proprietor Ankit Khatterpal

...1st Respondent in
W.A.No.1098 of 2021

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),
No.60, Rajaji Salai, Customs House,
Chennai - 600 001.

4. The Deputy Commissioner of
Customs (Gr.5),
No.60, Rajaji Salai, Customs House,
Chennai - 600 001. ...2nd to 4th Respondents in all appeals

COMMON PRAYER: Writ Appeals filed under Clause 15 of Letters Patent to set aside the common order dated 25.01.2021 passed in W.P.Nos.8574, 8575, 8576 of 2020.

WP.8574 of 2020: Writ Petition filed under Article 226 of the Constitution of India, praying Directing the respondents 1 to 3 herein to forthwith release 136 units 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 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 in line with the directions of this Honourable Court in WP Nos.16126 of 2019 and 16 others batch dated 10/09/2019.

WP.No.8575 of 2020:

Writ Petition filed under Article 226 of the Constitution of India, praying Directing the Directing the respondents 1 to 3 herein to forthwith release 564 units of the old and used digital multifunction print copying and scanning machines of A3 size vide Bill of Entry No.7262568 dated 17.3.2020 on payment of applicable total Customs Duty on the enhanced value by the Chartered Engineers M/s.ELBI Consultancy (India) Pvt. Ltd Chennai vide their Report No.ELBI/ CHE/ 2020/0251 dated 21.5.2020 in line with the directions of this Honourable Court in WP Nos.16126 of 2019 and 16 others batch dated 10/09/2019.

WP.No.8576 of 2020:

Writ Petition filed under Article 226 of the Constitution of India, praying Directing the respondents 1 to 3 herein to forthwith release 323 units of the old and used digital multifunction device (print and copying) machines vide Bill of Entry No.7420131 dated 9.4.2020 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-025/2020-2021 dated 22.5.2020 in line with the directions ofthis Honourable Court in

WP Nos.16126 of 2019 and 16 others batch dated 10/09/2019.

For Appellant : Mr.V.Chandrasekaran
(in all appeals)

For Respondents: Mrs.AL.Ganthimathi
for R1
Mrs.R.Hemalatha, SSC
for R2 to R4
(in all appeals)

COMMON JUDGMENT
(Delivered by T.S.Sivagnanam,J)

These writ appeals filed by the Director General of Foreign Trade is directed against the common order dated 25.01.2021 passed in W.P.Nos.8574, 8575, 8576 of 2020.

2. In the said writ petitions, the appellant was the fourth respondent and the respondents 1 to 3 were the Customs Department. The writ petitions were allowed with a direction to release the consignments in question upon remittance of enhanced duty as quantified.

3. The Customs Department had filed writ appeals challenging the common impugned order in W.A.Nos.642, 687, 688, 690, 691, 694, 696, 697 & 698 of 2021 and the appeals were allowed by this Court, by judgment dated 04.03.2021. The operative portion of the judgment reads as follows:

> "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.
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> 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 quantities 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

Analog Photocopier Machine	Digital Photocopier Machine
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."

4. In the above decision, the learned Standing Counsel for the appellant-Department was also heard and the stand taken by them in the writ petitions was also noted and the writ appeals were allowed. Thus, following the above decision, these writ appeals are allowed on the same lines. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

hvk

To

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

2. The Commissioner of Customs (Gr.5),
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GSM(CO)
CB(05/07/2021)