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W.P.Nos.35980 & 35987 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.12.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

W.P.Nos.35980 & 35987 of 2023
and
W.M.P.Nos.35972 & 35975 of 2023

M/s.Skylark Office Machines,
Shop No.4, Ground Floor, Door No.10,
Aziz Nulk, 4th Street, Thousand Lights,
Chennai 600 006.
Rep by its Proprietor, Rohit Jhunjihunwala.

... Petitioner in W.P.No.35980 of 2023

M/s.Excel Copiers,
UB-14D, Arunachal Bhawan,
Barakhamba Road,
New Delhi 110001
Rep by its Partner, Ankit Khetterpal

... Petitioner in W.P.No.35987 of 2023

Vs.

1.The Commissioner of Customs (Chennai II) Import,
Custom House,
No.60, Rajaji Salai,
Chennai 600 010.



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2.The Development Commissioner,
Office of the Development Commissioner,
MEPZ-SEZ,
Tambaram, Chennai 600045.

3.The Deputy Commissioner of Customs (S.I.I.B),
Custom House,
No.60, Rajaji Salai,
Chennai 600 010.

4.The Deputy Commissioner of Customs/Office Superintendent,
Special Economic Zone,
NDR Free Trade Warehousing Zone,
Nadiambakkam, Ponneri Taluk,
Thiruvallur 600 120.

... Respondents in both petitions

Common Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, to direct the respondents 1 to 4 herein forthwith to allow provisional release of 574 units of various models of second hand Highly Specialised Equipment- digital Multifunction Print, Copying & Scanning Machines, imported by the petitioner and which have been submitted for clearance before the respondents vide Bill of Entry No.1006906, 1006905 & 100697 respectively dated 11.08.2023 on execution of simple bond for 100% of enhanced value of goods and also payment of applicable total GST (Customs Duty is exempted) on the enhanced value, as assessed by the



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Chartered Engineers M/s.Supreme Techno Associates Pvt. Ltd., in their report directly submitted to the Officers of the S.I.I.B in a sealed cover.

For Petitioner
in both petitions : Mr.Akash Srinanda

For Respondent
in both petitions : Mr.H.Siddarth,
Junior Panel Counsel

COMMON ORDER

The issue involved in these writ petitions are pertaining to the release of various models of second hand Highly Specialised Equipment-digital Multifunction Print, Copying & Scanning Machines, imported by the petitioner.

2. Mr.H.Siddarth, learned Junior Panel counsel takes notice on behalf of the respondents. By consent of the parties, the main writ petition is taken up for disposal at the admission stage itself.



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3. The learned counsel for the petitioner would submit that in batch of writ petition in W.P.No.29673 of 2022, etc., this Court had already dealt with a similar issue and passed the order dated 23.11.2023. Therefore, the learned counsel for the petitioner would submit that the said order will squarely applicable to the present case also and hence, he requested this Court to pass similar order.

4. Per contra, the learned counsel for the respondent would submit that the previous batch of writ petitions were filed challenging the show cause notice. However, in the present writ petitions, no show cause notice has been issued by the respondents. Hence, he would submit that the said order will not applicable for the present writ petitions.

5. In reply, the learned counsel for the petitioner would submit that in the previous batch of writ petitions, in W.P.No.29673 of 2023, etc., the relief was sought only for the release of goods and the same were not filed against the issuance of show cause notice. Further, at the paragraph 21 clause (ii) of the aforesaid order dated 23.11.2022, this Court had



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directed only for the release of goods. Hence, he would submit that the said order is squarely applicable to the present case.

6. Heard the learned counsel for the petitioner and the respondent and also perused the materials available on record.

7. In the present case, the petitioner had sought for the release of goods and in a batch of writ petitions, this Court had already dealt with the similar issue and passed the following order on 23.11.2023:

“As the issue involved in all these writ petitions are similar, they are considered and decided by this common order.

2. W.P.Nos.28817 and 30506 of 2023 have been filed challenging the show cause notices issued by the first respondent dated 22.09.2023 and 05.10.2023 respectively. The other writ petitions have been filed seeking release of goods.

3. Learned counsel for petitioners submitted that the petitioners are duly registered firms and have been in the business of import and trading of secondhand highly specialized equipments ~ digital multifunction



print and copying machines etc. During the course of petitioners- business, their firms have imported consignment of several units of Secondhand Multifunction Print and copying machines in the year 2023 and sought for assessment and clearance of the above goods. As per the practice prevailing in the Chennai Customs, in respect of import of second hand capital goods, the Officers In~charge, have ordered for 100% examination under first check appraisal. Accordingly, as per the orders of the Officers, examination and inspection of the said machines were carried out by the Directorate General Foreign Trade [for brevity “DGFT“] approved Chartered Engineers under the supervision of Customs Officers In~charge. The Chartered Engineers have enhanced the C&F value for the consignment as against the actual transaction C&F value. Despite the goods having been examined by the DGFT approved Chartered Engineer in the presence of Customs Officers and also having submitted their Inspection Report and Valuation Certificate, the Customs Authorities have not allowed the clearance of the above consignment till date. Since the petitioners have imported a consignment of several units of



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secondhand highly specialized equipments ? digital multifunction print & copying machines in terms of para 8(a) to (d) vide Amendment Order dated 01.07.2021 in S.O.2844(E) issued by Ministry of Electronics and Information Technology [MEITY], they are exempted from Requirement of Compulsory Registration with BIS. Further, the subject goods are also permissible for imports as ?Free? in terms of para 2.31 Sl.No.1(d) under the category of secondhand capital goods without any conditions as per Foreign Trade Policy ? 2023 (w.e.f. 01.04.2023). Thus, there is no basis for customs authorities not to release the goods of the petitioners thereby causing huge losses on account of blockage of investment and losing shelf life of the machines.

4. While so, the first respondent has arbitrarily precipitated the matter by way of issuance of impugned Show Cause Notices on 22.09.2023 and 05.10.2023 to the petitioners in W.P.Nos.28817 and 30506 of 2023. Further, the respondent department now proposes to proceed against the petitioners for confiscation of the subject goods u/s.111(d) and 111(m) of the Customs Act, 1962 and for imposition of penalty against the petitioners u/s.112(a) of the Customs Act, 1962. These



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actions have been proposed to be initiated by the respondent department on a complete misconception and misreading of the relevant regulations. The presumption/conclusion inferred in the impugned show cause notice that the subject goods are prohibited goods is entirely fallacious and contrary to the actual scheme of Foreign Trade Policy 2023 and 2021 orders passed by MEITY. Hence, the petitioners in W.P.Nos.28817 and 30506 of 2023 have filed the present writ petitions challenging the show cause notices. The petitioners in other writ petitions have filed the same seeking for release of goods.

5. Learned counsel for respondents submitted that the petitioners have imported used copier machines and at the point of entry, the Customs Department required the petitioners to produce copies of authorization for import of such items with necessary approval of DGFT as per Foreign Trade Policy Guidelines and also to produce the Compulsory Registration Certificate of BIS as indicated by the Foreign Trade Policy of Government of India. Customs Authority is only a Nodal Agency to streamline and permit import and export based on policy guidelines



issued to them. Multi Functional Printers are classified as printers and plotters. As regards used goods imports, there are guidelines of DGFT, which envisage compulsory registration and also approval of DGFT.

6. Learned counsel further submitted that there has been no orders of customs but only verification process is going on and citing these writ petitions, the Customs Department has been blocked and the petitioners, if face an adverse order, they can resort to filing an appeal u/s.128 of the Customs Act, thereafter exhaust a further appeal remedy and then only, they have to approach the Writ Court. The petitioners are aware that as per DGFT policy applicable Compulsory Registration of the manufacturer under present CRO guidelines is required to be done with BIS and also the necessary authorisation has to be obtained from DGFT. The valuation of goods on import is only a procedural matter and not one for open permit for import. The valuation exercise is carried out by importer and by customs to show cause the value of goods and its identity and not on classification. The Multi Functional Devices would fall under category of printers and plotters only as clarified by MEITY. Further, the



Foreign Manufacturers Certification Scheme has to be complied for import. In view of multiple writ petitions filed against Customs Department as the petitioners are misinterpreting the single aspect of weightage and other requirements required for highly specialized equipments are trying into the classification challenge. Since the importers are not complying with the DGFT guidelines and the Compulsory Registration Orders applicable the said import would be treated as -prohibited- as compliance is not made by importers. Submitting as above, learned counsel prays for dismissal of the present writ petitions.

7. Heard learned counsel appearing for petitioners, learned Senior Standing Counsel and learned Central Government Standing Counsel appearing for respondents and perused the materials available on record.

8. The central issue to be decided in the present case is whether the materials imported by the petitioners falls under Clause 2.31 of the Foreign Trade Policy 2023 effective from 01.04.2023 under the category second hand goods.

9. It may be apposite to extract Clause 2.31 of the



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Foreign Trade Policy 2023 hereunder:

Import policy for Second Hand Goods:

2.31 Second Hand Goods

<i>Sl. No.</i>	<i>Categories of Second-Hand Goods</i>	<i>Import Policy</i>	<i>Conditions, if any</i>
<i>1</i>	<i>Second Hand Capital Goods</i>		
<i>I(a)</i>	i. Desktop Computers; ii. Refurbished/re-conditioned spares of re-furbished parts of Personal Computers/ Laptops; iii. Air Conditioners; iv. Diesel generating sets	<i>Restricted</i>	<i>Importable against Authorisation</i>
<i>I(b)</i>	<i>All electronics and IT Goods notified under the Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time</i>	<i>Restricted</i>	<i>(i) Importable against an authorization subject to conditions laid down under Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time.</i> <i>(ii) Import of</i>



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Sl. No.	Categories of Second-Hand Goods	Import Policy	Conditions, if any
			<i>unregistered/non-complaint notified products as in CRO, 2012 as amended from time to time is "Prohibited".</i>
<i>I(c)</i>	<i>Refurbished/re-conditioned spares of Capital Goods</i>	<i>Free</i>	<i>Subject to production of Chartered Engineer Certificate to the effect that such spares have at least 80% residual life of original spare.</i>
<i>I(d)</i>	<i>All other second-hand capital goods {other than (a) (b) & (c) above}</i>	<i>Free</i>	
<i>II.</i>	<i>Second Hand Goods other than capital goods</i>	<i>Restricted</i>	<i>Importable against Authorisation</i>
<i>III.</i>	<i>Second Hand Goods imported for the purpose of repair/refurbishing/re-conditioning or re-engineering</i>	<i>Free</i>	<i>Subject to condition that waste generated during the repair/refurbishing of imported items is treated as per domestic Laws/Rules/ Orders/ Regulations/ technical specifications/ Environmental/ safety and health norms and the imported item is re-exported as per the Customs Notification.</i>

10. By referring to Sl.No.I(b), learned Senior Standing Counsel and learned Central Government



Standing Counsel appearing for respondents submitted that the multi function devices imported by the petitioners would fall under that category. Therefore, before importing goods, they have to get authorization from DGM. However, learned counsel for the petitioner submitted that the goods mentioned in Sl.No.I(b) are required to be compulsorily registered, hence, the petitioners- goods would not fall under the category I(b), but it falls under the category I(d) which indicates that other than goods mentioned in I(a), I(b), I(c), all other second-hand capital goods can be imported freely without any restriction.

11. Now the issue is whether the goods of petitioners can be freely imported.

12. The Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate General of Foreign Trade, Udyog Bhawan, comes out with a similar policy in the year 2019 vide Notification No.5/2015-2020, dated 07.05.2019. Paragraph No.2 of the said policy is extracted hereunder:

2. Further, Para 2.31(I)(a) of Foreign Trade Policy, 2015-20 is revised as under:-



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S.No .	Categories of Second Hand Goods	Import Policy	Conditions, if any
1	Second Hand Capital Goods		
(a)	i. Desktop Computers; ii. Refurbished/re-conditioned spares of re-furbished parts of Personal Computers/ Laptops; iii. Air Conditioners; iv. Diesel generating sets	Restricted	Importable against Authorisation
(b)	All electronics and IT Goods notified under the Electronics and IT Goods (Requirement of Compulsory Registration) Order, 2012 as amended from time to time	Restricted	(i) Importable against an authorization subject to conditions laid down under Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012 as amended from time to time.



S.No .	Categories of Second Hand Goods	Import Policy	Conditions, if any
			(ii) Import of unregistered/non-complaint notified products as in CRO, 2012 as amended from time to time is "Prohibited".

13. Sl.No.(b), referred to above, states that all electronics and IT goods notified under the Electronics and IT Goods (Requirement of Compulsory Registration) Order, 2012, as amended from time to time are "restricted". Therefore, they are supposed to get authorization from the DGFT. When the said policy was in force, at that point of time also several imports have been made for importing second hand multi-function devices and similar issue was raised that these are all the multi function devices coming under Sl.No.(b). Therefore, unless otherwise authorization is obtained from the DGFT, the same cannot be imported.

14. The issue was dealt with by the Apex Court and the Apex Court passed an order in Spl. Leave to Appeal (C) No.7565 of 2021.

15. In the Notification No.5/2015~2020, dated



07.05.2019, only two clauses are available viz., (a) and (b), but, in the case of Foreign Trade Policy 2023, there are four clauses under Sl.No.I. This Court is of the considered view that as per Foreign Trade Policy, 2023, the petitioners- goods would not fall under the category I(b), but it falls under the category I(d) which indicates that other than goods mentioned in I(a), I(b), I(c), all other second-hand capital goods can be imported freely without any restriction. Therefore, if the petitioners not fall under clause I(b) automatically they fall under I(d). The Supreme Court has taken note of the said fact and stayed the confiscation of goods in a similar matter. Further, this Court, on a comparison of Notification No.5/2015~2020, dated 07.05.2019 and Foreign Trade Policy 2023, does not find any new changes brought in so that prohibited multi function devices should get authorization from DGFT. The petitioners stand on the same footing as that of the petitioners before the Supreme Court in Spl. Leave to Appeal (C) No.7565 of 2021. The order of stay of confiscation of goods passed by the Hon-ble Supreme Court is in force till date.

16. Further, learned Single Judge of this Court



also granted release of goods in W.P.Nos.1393 of 2022 etc. batch, wherein the learned Single Judge has dealt with all the aspects. The relevant portion of the said order reads thus:

“12. Whether a notification has been issued on 18.03.2021 under which, the goods in question, namely Multi-Function Devices are brought under the category of printers with effect from 18.09.2021, based on which, whether the petitioners are not entitled to get it released and also based on 01.04.2020 notification, whether the goods which are in question are prohibited goods or not, all these matters are pending before the law Courts.

13. In this regard, the policy decision taken by the Government i.e., the Revenue has already been put under challenge in a batch of cases before this Court, which are said to be pending.

14. Moreover, in the order dated 11.08.2021, the Hon-ble Supreme Court has taken note of these factors, where the arguments advanced on behalf of the Revenue before the Hon-ble Supreme Court was that, on and from 01.04.2020, the goods, according to the Department, are clearly prohibited goods and on and from that date, unless an order is made under Section 125 of the Customs Act, the



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goods stands confiscated, the Hon-ble Supreme Court had stayed the confiscation process and also has observed that, the notification dated 01.04.2020 is the subject matter of controversy before the Hon-ble Supreme Court, particularly in view of the subsequent notification dated 18.03.2021. Therefore, the goods which are in question were allowed to be released by way of provisional release on the same terms and conditions, which means, the enhanced duty has to be paid by the petitioners/importers as a condition precedent for getting release of these goods by way of provisional release.

15. Therefore, as of now, unmindful of the pendency of the litigations with regard to the applicability or otherwise of the notifications, namely notification dated 01.04.2020 or 18.03.2021, independently the prayer sought for by way of Mandamus can be considered and granted, because of the aforestated judgments, where, the learned Single Judge order dated 25.01.2021 has been confirmed by the Hon-ble Supreme Court by order dated 11.08.2021 by reversing the Division Bench order dated 04.03.2021.

16. In that view of the matter, the arguments advanced by the learned Senior Counsel appearing for the petitioners that, the issue raised in these



writ petitions especially in the context of the prayer of Mandamus sought for herein is covered by the said decision of the Court of Law including the decision of the Hon-ble Supreme Court dated 11.08.2021 is to be accepted. “

17. The issue in the present cases and the issue in the above W.P.Nos.1393 of 2022 etc. batch are one and the same. Therefore, the said order is squarely applicable to the cases on hand also.

18. Therefore, following the view taken by the Hon-ble Supreme Court and learned Single Judge of this Court, this Court is inclined to allow these writ petitions to the extent of releasing the goods provisionally.

19. Learned Senior Standing Counsel and learned Central Government Standing Counsel appearing for respondents also brought to the notice of this Court that in the cases dealt with by Hon-ble Supreme Court as well as the learned Single Judge, the goods were confiscated, but, in the present case, no confiscation has been made.

20. In the aforestated circumstances, this Court is of the view that the petitioners are in a better position than the petitioners before the Supreme Court and the



learned Single Judge. In view of the above findings, this Court does not find any impediment for the respondents to release the goods provisionally.

21. The other contention of respondents that the petitioners, without availing the appeal remedy, have straight away approached this Court is concerned, this Court finds that the goods were imported by the petitioners on 19.07.2023 and the department has not passed any order till date, which itself shows that the department is in a confused state of mind and that is the reason why they have not taken any decision till date. It is the duty of the department to pass appropriate orders within a reasonable time and they cannot unnecessarily detain the goods for a long period of time.

In the result,

(i) W.P.Nos.28817 and 30506 of 2023 are disposed of directing the petitioners to cause reply to the show cause notice issued to them and the respondent department is directed to consider the same and pass necessary orders within a stipulated time. As far as release of goods is concerned, the same shall be released provisionally.

(ii) W.P.Nos..29673, 27544, 27547, 27548, 28115,



28119, 29678, 29680, 29684 of 2023 & 30490, 30492, 30495, 30496, 30498, 30500, 30501 & 30503 of 2023 are allowed and the following order is passed:

(a) That there shall be a direction to the respondents to consider the plea of the petitioners to release the goods by way of provisional release on condition that, the petitioner shall pay/deposit the enhanced duty amount. On receipt of such enhanced duty amount paid by the petitioners, the goods in question shall be released within a period of three (3) weeks thereafter.

(b) For payment of such duty, quantification shall be made by the Customs forthwith within one (1) week from the date of receipt of a copy of this order. On receipt of such quantification, the payment shall be immediately made by the petitioners and on receipt of the payment in entirety, the goods shall be released as indicated above at the outer limit of three (3) weeks.

(c) It is made clear that this order will not stand in the way for Customs Department to go ahead with the further proceedings including the adjudication in the manner known to law.

(d) It is further made clear that in the earlier interim order passed in a related writ petitions by an another



Division Bench of this Court, that demurrage charges till date for the goods was directed to be considered for waiver. In this regard, if any application is filed by the petitioners seeking such a waiver of demurrage charges, the same shall be considered and decided by the respondents objectively.

No costs. W.M.P.Nos.28415 and 30149 of 2023 are ordered and the other writ miscellaneous petitions are closed.”

8. Following the above order, this Court is inclined to pass the following order:

(a) There shall be a direction to the respondents to consider the plea of the petitioners to release the goods by way of provisional release on condition that, the petitioner shall pay/deposit the enhanced duty amount. On receipt of such enhanced duty amount paid by the petitioners, the goods in question shall be released within a period of three (3) weeks thereafter.

(b) For payment of such duty, quantification shall be made by the Customs forthwith within one (1) week from the date of receipt of a copy of this order. On receipt



of such quantification, the payment shall be immediately made by the petitioners and on receipt of the payment in entirety, the goods shall be released as indicated above at the outer limit of three (3) weeks.

(c)It is made clear that this order will not stand in the way for Customs Department to go ahead with the further proceedings including the adjudication in the manner known to law.

(d)It is further made clear that in the earlier interim order passed in a related writ petitions by an another Division Bench of this Court, that demurrage charges till date for the goods was directed to be considered for waiver. In this regard, if any application is filed by the petitioners seeking such a waiver of demurrage charges, the same shall be considered and decided by the respondents objectively.

9. With the above directions, these writ petitions are ordered. No cost. Consequently, the connected miscellaneous petitions are also closed.



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22.12.2023

Speaking/Non-speaking order

Index : Yes / No

Neutral Citation : Yes / No

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To

1.The Commissioner of Customs (Chennai II) Import,
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Chennai 600 010.

2.The Development Commissioner,
Office of the Development Commissioner,
MEPZ-SEZ,
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KRISHNAN RAMASAMY.J.,

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3.The Deputy Commissioner of Customs (S.I.I.B),
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