

(2020) 12 CESTAT CK 0018

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 20098 Of 2020

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Date of Decision : 15-12-2020

Acts Referred:

Customs Act, 1962 — Section 111(d), 111(o)
Hazardous and other wastes (Management And Transboundary Movement) Rules, 2016
— Rule 3(1)(23), 3(1)38, 13, 13(2)

Citation : (2020) 12 CESTAT CK 0018

Hon'ble Judges : S.S. Garg, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : S. Sankarnarayanan, Rama Holla

Final Decision : Allowed

Judgement

1. The present appeal is directed against the impugned order dated 21/11/2019 passed by the Commissioner of Customs (Appeals) whereby the

Commissioner has rejected the appeal of the appellant and upheld the order passed by the Additional Commissioner of Customs, ICD, Bangalore.

2. Briefly the facts of the present case are that the appellant imported 127 units of old and used Digital Multifunctional Devices (MFDs) with standard

accessories from Singapore. They filed Bill of Entry No. 2677800 dated 01/08/2017 with all the documents and the goods were subjected to first

check examination and the Chartered Engineer has given his report dated 23/08/2017 wherein he enhanced the value of the impugned goods from

USD 25,035 (c&f) to USD 34,115 (c&f) only. It appeared to the Department that the appellant has undervalued the goods and has violated the

provisions of Hazardous and other wastes (Management & Transboundary Movement) Rules, 2016, E-Waste (Management) Rules, 2016 and the

Bureau of Indian Standards Act, 1986 read with Electronics & IT Goods

(Requirement of Compulsory Registration) Order 2012 as well as provisions of FTP 2015-20 applicable to the said goods. On the allegation of these contraventions, a show-cause notice was issued. Appellant filed detailed reply to the show-cause notice submitting that they had not violated the provisions of Hazardous and other wastes Rules, 2016 as well as Compulsory Registration Order, 2012. Appellant fairly conceded that the impugned goods are restricted goods and they did not possess the authorization from the DGFT. After following the due process, the adjudicating authority vide Order-in-Original dated 25/03/2019 determined the value of the impugned goods as Rs.22,71,815/- (Rupees Twenty Two lakhs Seventy One Thousand Eight Hundred and Fifteen only) and ordered for absolute confiscation of the impugned goods under Section 111(d) and 111(o) of the Customs Act, 1962 for contravening the provisions of Hazardous and other wastes Rules, 2016, E-waste (Management) Rules, 2016 and the Bureau of Indian Standards Act, 1986 read with Electronics & IT Goods Order 2012 as well as provisions of FTP 2015- 20. Aggrieved by the said order, appellant filed appeal before the Commissioner and the Commissioner vide the impugned order rejected the appeal of the appellant. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that this issue has been considered by the Tribunal in large number of cases and it has been consistently held in favour of the importer. He further submitted that the Commissioner in the impugned order has held that the appellant did not possess the requisite registration with the Bureau of Indian Standard as per Compulsory Order, 2012 issued by the Ministry of Electronics & IT Goods. He submitted that this finding is wrong because registration with the Bureau is required only for the goods which are finding place in the schedule to the CRO 2012 and for which the specified Indian standards are prescribed. As far as impugned MFDs are concerned, no Indian Standards are specified and so the same cannot be notified in the schedule to the CRO 2012 and therefore registration cannot be insisted upon. For this submission, he relied upon the findings of this Tribunal in the case of Sri Venkateswara Repro Graphics and others wherein the Tribunal in the

Final Order No. 20330 &" 20340/2019 dated 03/04/2019 has held as follows:

Next, we turn to the observations of the adjudicating authority that the import has been made in violation of the Electronics and

Information Technology (Requirement for Compulsory Registration) Order, 2012 (CRO). We have perused the said order; the goods notified

under the said Order; as well as the letter issued by the Jt. Secretary in the Ministry of Electronics and Information Technology to Jt.

Secretary (Customs), CBEC. The schedule attached to the CRO order specifies various goods which are required to take compulsory

registration. While we find that printers and photocopiers find place in the schedule, the MFD does not find place in the said order. In this

connection, the Hon'ble High Court of Andhra Pradesh and Telangana in the order cited by the appellant has examined the same issue

and has concluded that the item MFD was not notified under the CRO and as such, it is not open to the Customs authorities to blindly apply

the directives of Department of Electronics and Information Technology through the letter dt. 16/12/2016 to the appellant's goods. In

view of the above, we are of the view that the appellants cannot be held to have violated the provisions of the Compulsory Registration

Order.

4.1. He also submitted that in another decision of the Tribunal in the case of M/s. S.R Enterprises, this Tribunal vide Final Order No. 21308 &

21309/2019 dated 20/12/2019 has also considered this issue and has ordered as under:

11. It is clear from the exclusive categorization of the impugned goods as multifunctional devices that the prescription of

standards to be conformed by each of the machines, when intended to function separately, that make up this composite machine are not

applicable to the impugned goods; hence the need for certification under Bureau of Indian Standards Act is not mandated.

4.2. He further submitted that in para 12 of the impugned order the appellate authority has held that the appellants have not complied with the

provisions of Hazardous and others wastes (Management and Transboundary Movement) Rules, 2016, E-Waste (Management) Rules, 2016. As per

the learned counsel this finding in the impugned order is not accepted by the

appellant for the reason that the Apex Court in the Civil Appeal No.

1057/2018 dated 24/01/2019 in the case of Commissioner of Customs Vs. M/s. Atul Automations Pvt. Ltd. has considered this issue and has ordered

as follows:

“The Central Government had permitted the import of used MFDs with utility for at least five years keeping in mind that they were not

being manufactured in the country. The Chartered Engineer commissioned by the Customs authorities had certified that the MFDs were

capable of utility for the next 5 to 7 years without any major repairs. Considering that at import they had utility, the High Court rightly

classified them as “other wastes” under Rule 3(1)(23) of the Waste Management Rules, which reads as follows:

“Other wastes means wastes specified in Part B and Part D of Schedule III for import or export and includes all such waste generated

indigenously within the country.”

11. Rule 13(2) provides the procedure for import of other wastes listed in Part D Schedule III. Item B1110 of the Schedule mentions used

Multifunction Print and Copying Machines (MFDs). Entry 4(j) lists out five documents required for import of used MFDs. The respondents

have been found to be substantially compliant in this regard and the requirement for the country of origin certificate has been found to be

vague by the High Court. Form 6 has rightly been held to be not applicable to the subject goods.”

4.3. He also submitted that the issue of Hazardous Waste with regard to MFDs has also been considered by this Tribunal in the case of S.R.

Enterprises cited supra and has held as under:

“9. On perusal of the records as well as the submissions of both sides, it would appear that an issue which has been disputed time and

again at various places in India, and can be said to have attained finality, is sought to be reopened within this jurisdiction. It is clear from

the decision of the Hon’ble Supreme Court in re Atul Automations Pvt. Ltd. that the impugned goods are to be considered as “other

wastes” and the prohibition, applicable upon nonconformity with the conditions for import of “hazardous waste”, would not apply

to the impugned goods.”

4.4. As far as absolute confiscation of the goods are concerned, the learned counsel submitted that this issue has also been considered by the Tribunal

in various decisions and it has been consistently held that the import of MFDs are not liable to absolute confiscation and the Tribunal in various

decisions has ordered for release of the goods on payment of redemption fine and penalty in addition to the normal duty.

5. On the other hand, the learned AR also submitted the written submissions and defended the impugned order on the ground of violation of Customs

Act and Foreign Trade Policy, 2015-20 and also violation of Hazardous and other Waste (Management and Transboundary Movement) Rules, 2016

and Bureau of Indian Standards. In support of his submission, he relied upon the following decisions:

a. CC, Chennai-II Vs. City Office Equipment &" 2019 (367) E.L.T. 920 (Mad.)

b. L.N.S. Impex Vs. Principal Commissioner of Customs, Hyderabad &" 2019 (367) E.L.T. 700 (Telangana)

6. After considering the submissions of both the parties and perusal of the material on record, we find that this issue of import of MFDs has been

considered by various decisions passed by this Tribunal as well as the High Court and the Apex Court, in the case of Atul Automation Pvt. Ltd. and

other cases relied upon by the appellant cited supra in the submission of the learned counsel for the appellant. As far as violation of the Bureau of

Indian Standard as per Compulsory Registration Order 2012 and also the violation of Hazardous and other waste (Management & Transboundary

Movement) Rules, 2016 and E-waste (Management) Rules, 2016 are concerned, this Tribunal in Atul Automation vide Order No. 21592-

21594/2017 dated 08/08/2017 has specifically covered all the issues raised and disputed in the present appeal. The relevant findings in the said

decision are reproduced herein below:

&"8. On the first point regarding importation being in violation of Import Policy, the same being an admitted fact, does not require further

elaboration. On the second point regarding violation of provisions of Hazardous Waste Rules, 2016, we have carefully examined the

submissions of the appellants. First of all, we note that the original authority held against the appellants substantially on the ground that the

product is waste. In this connection, we have perused the definition &"waste&".

Rule 3(1)38 of the Hazardous and Other Wastes

(Management and Transboundary Movement) Rules, 2016 defines waste as under:-

“waste” means materials that are not products or by-products, for which the generator has no further use for the purposes of production, transformation or consumption.

9. We note that the products under import are MFDs having used as digital multifunctional devices as intended. It is not clear as to how

when the product imported in the form of whole machine and having certified functional life of 5/7 years, the same can be considered as

waste. Even if the items imported require certain reconditioning, repair, it will not make the product as waste. We have perused the

certificates issued by the authorised Chartered Engineers, M/s. Best Mulyankan Consultants Ltd. and M/s. ELBI Consultancy (India) Pvt.

Ltd., Chennai with reference to present impugned consignments. A perusal of these certificates will clearly show that the imported items

cannot be considered as waste. It is specifically mentioned that the items imported are in full form and fit for use for printing A3 size papers

and they are capable of being put to productive use and the machines were not in a damaged condition to such an extent which will

compromise their functionality. The residual life of these machines has been certified. In the face of these technical opinions and facts as

recorded, we find that the imported items cannot be considered as waste.

10. Examining the conditionalities as mentioned in Hazardous Waste Rules 2016, we note the Schedule VIII (entry 4(j)) stipulates 5

documents to be produced by the importer. The first one is regarding country of origin which in the present case, the importer produced the

certificate from Canadian authorities. We find force in the objection raised by the Revenue regarding the non-applicability of such

certificate to the present consignments. The consignments have originated from China / Korea / Japan as admitted by the importer and were

initially being supplied by Canadian authorities cannot be correlated and now with the Bills of Lading are from various ports of USA etc. As

such, the country of origin certificate to be issued by competent authority of that country is not satisfactorily produced in the present

consignments. To that extent, there is a violation of the said rules.

11. The next condition is regarding certificate issued by inspection agency approved by DGFT regarding functionality and residual life of

the goods. We note that the original authority held against the appellants regarding violations of these provisions. The present

consignments which are imported for which Bills of Entry were filed in October to November 2016 are governed by the 2016 Rules which

superseded the 2008 Rules. The learned counsel for the appellant drew our attention to the decision of Technical Review Committee under

the 2016 Rules. The decision of the meeting held on 18th and 19th October 2016 recorded that the Extended Producer's Responsibility

(EPR) authorisation requirement under 2016 Rules are to be produced on application to the Pollution Control Board and a time line is

prescribed for the same. After considering these time lines, the Committee decided that the implementation of EPR can start from 01/05/2017

and advised the Customs authorities to permit clearance of the imported goods without EPR authorisation till 30/04/2017.

12. Regarding Schedule III Part D of the Hazardous Waste Rules, 2016, we note that the said part deal with list of other waste for import

and export without permission of Ministry of Environment. Entry No.B1110 deals with electrical and electronic assemblies destined for

direct reuse and not for recycling or disposal. The condition for import of used MFDs was mentioned therein. The said condition was later

amended vide Notification dt. 06/07/2016. The effect of amendment is that the trader also can import the said MFDs which are not

domestically manufactured.

13. Regarding production of EPR authorisation under 2011 Rules, we note that the appellant has produced an authorisation dt. 21/04/2017

issued by the Central Pollution Control Board. Another condition is the MFDs shall be for printing A3 size or above. As per the technical

certificate issued by the Chartered Engineer, same stands fulfilled. In any case, there is no dispute on this fact in the impugned proceedings.

The final condition is regarding acknowledgement copy of the annual return to be filed with State Pollution Control Board. We note that the

appellant has to file the annual return at the end of the year and the same will

be effected after the importation of goods.

14. Regarding applicability of Rule 13 of 2016 Rules, we note that the same deals with hazardous and other waste. In terms of definition of

“waste” in the rules, we find that used machines with residual life of 5 or 7 years cannot, per se, be considered as “waste”.

15. In view of the above detailed analysis, we find that the importation of the impugned goods is in violation of Import Policy of the relevant

time and also of some of the conditions of Hazardous Waste Rules 2016. The violation of Hazardous Waste Rules is with reference to

country of origin certificate. Other conditions mentioned therein have substantially been fulfilled as discussed above.”

This decision of the Tribunal has been upheld by the Apex Court reported in 2019 (365) E.L.T. 465 (S.C). Further, we find that in the case of

Commissioner of Customs, Ludhiana Vs. B.E. Office Automation Products Pvt. Ltd. 2012 (371) E.L.T. 592, the Division Bench of this Tribunal has

also relied upon the decision of the Atul Automations and has held that there is no violation of the Bureau of Indian Standard and Hazardous Waste

(Management) Rules as well as Foreign Trade Policy Rules, 2015-20. Further the Tribunal in the case of Value Marks Traders Pvt. Ltd. Vs. CC,

Chennai vide its Final Order No. 41864/2018 has held as under:

“However, a perusal of the Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order, 2012 at

page 32 onwards of the paper book, brings out that although printers, plotters find a place at Sl. No. 7 & 8 respectively of the Schedule to

the Notification, there is no reference to Multifunction Devices. Even in the Notification dt. 07/11/2014 wherein Sl. No. 16 to 30 was added

to the earlier list, only Copying Machine/Duplicators have been found at Sl. No. 26. Evidently, the MFDs which is a combination of

printers, scanners, copiers etc. and a separate genre of machines do not find a specific entry in the schedule to the said notification. Ld.

Advocate has also drawn our attention to the order dt. 06/04/2018 of High Court of Telangana and Andhra Pradesh in WP No. 2728/2018

preferred by M/s. R.R. Marketing where inter alia, the Hon’ble Court held that 2012 order would not apply to MFDs. The relevant

portion of the High Court’s order is reproduced as under:

As regards the applicability of the Electronics and IT Goods (Requirement for Compulsory Registration) Order (CRO), 2012,

the communication dated 06/12/2016 makes it clear that only repaired/refurbished/secondhand items, if notified, would require registration.

The learned Assistant Solicitor General could not produce before us any notification issued thereunder relating to the MFD (Multifunction

Devices) printers and photocopiers whereby such registration would be a condition precedent prior to their import. In the absence of such a

notification, it is not open to the Customs Authorities to blindly apply the directive of the Department of Electronics and Information

Technology, Ministry of Communications and Information Technology, under the letter dated 06/12/2016, to the petitioner firm's

goods.

6.1. Further we find that the appellants in the present appeal are not disputing the enhancement of value made by the Customs on the basis of the

report of the Chartered Engineer. Further, we find that the ground of absolute confiscation has also been considered in all the decisions cited supra

and it has been consistently held that the goods (MFDs) are not liable for absolute confiscation and can be released on payment of redemption fine

and penalty. In this regard, this Tribunal in the case of S.R. Enterprises Vs. Commissioner of Customs, Bangalore in Final Order No. 21308-20309

dated 20/12/2019 has held as under:

12. In view of the settled law, as per decision of the Hon'ble High Court of Kerala, the Hon'ble Supreme Court as well the

practices followed elsewhere in the country, the findings of the first appellate authority in the impugned order are not in accordance with

law. the absolute confiscation of the goods must be set aside in the face of restrictions that are not prohibition.

We also find that this order of the Tribunal in the S.R. Enterprises has been confirmed by the High Court of Karnataka vide Order CSTA No. 5/2020

dated 03/09/2020.

6.2. As far as absolute confiscation as ordered in the impugned order is concerned, we are of the considered opinion that in view of the various

decisions cited supra, wherein it was consistently held that the absolute confiscation is not justified and goods can be released on payment of

redemption fine and penalty. In the earlier decisions, this issue has been considered and it has been held that 10% and 5% of the enhanced value would be proper for redemption fine and penalty respectively. We adopt the same yardstick in arriving at the redemption fine and penalty and order that imported goods may be allowed for clearance on payment of redemption fine @ 10% and penalty @5% of the reassessed value besides payment of applicable Customs duty.

7. In view of our discussion above, by following the ratio of the various decisions cited *supra*, we are of the considered opinion that the impugned order is not sustainable in law and therefore set aside and the case is disposed of as per the above directions.

(Order was pronounced in Open Court on 15/12/2020)