(2018) 03 KL CK 0152

In the High Court Of Kerala

Case No : Custom Appeal No. 18 Of 2017

Commissioner Of Customs	APPELLANT
Vs	
M/S.Parag Domestic Appliances	RESPONDENT

Date of Decision : 14-03-2018

Acts Referred:

Customs Act, — Section 47, 112(a), 114AA, 125
Foreign Trade (Development and Regulation) Act, 1992 — Section 5, 6, 10, 11, 11(1), 11(2), 11(8), 11(9)
Environment (Protection) Act, 1986 — Section 6, 8, 10, 11, 11(1), 11(2), 11(8), 11(9), 25
Micro Small and Medium Enterprises Development Act, 2006 — Section 7, 13(2)
Hazardous and Other Waste (Management and Transboundary Movement) Rules, 2016 — Rule 3(1)(l), 3(1)(23), 3(1)(38), 13(2), 13(2)(a), 13(2)(b), 13(2)(c), 13(4), 15, 15(2)
Environment (Protection) Rules, 1986 — Rule 3(q)
E-Waste Management Rules, 2016 — Rule 2b, 3(1)(i), 3(1)(b), 9(1), 9(3)
Constitution Of India, 1950 — Article 286(1)(a), 286(1)(b), 286(2), 286(3), 366(29A)(a), 366(29A)(d), 366(29A), 366(29A), 366(29A)(c), 366(29A)(d), 366(29A)(e), 366(29A)(f)

Citation : (2018) 03 KL CK 0152

Hon'ble Judges : K. Vinod Chandran, J;Ashok Menon, J

Bench : Division Bench

Advocate : Sreelal N. Warrier, Vikram Choudhari, N.Viswanathan, P.A. Augustian, M.A. Baby, Linda.M. J

Final Decision : Partly Allowed

Judgement

1. The Department is in appeal against the orders of the Customs, Excise & Service Tax Appellate Tribunal [for brevity "Tribunal"].

2. The respondents had imported Multi Function Devices being Digital Photocopiers and Printers [for brevity "MFD"], which import was alleged to be in violation of the various enactments regulating import; upon which the authorities initiated proceedings for confiscation of goods and imposition of penalties. While the proceedings were pending, there were petitions filed, before this Court,

which are not relevant insofar as they only directed expeditious consideration of the matter, since the goods were detained from October 2016 and the importers were saddled with demurrage for the use of the ware house wherein the goods were detained. The Commissioner, by the orders impugned before the Tribunal, imposed redemption fine and penalties with a rider that the redemption of the goods shall solely be for the purpose of re-export as specified in Rule 15(2) of the Hazardous and Other Waste (Management and Transboundary Movement) Rules, 2016 [for brevity "H&OW Rules, 2016"].

3. The Commissioner, as against M/s.Atul Automation Pvt. Ltd., imposed a redemption fine of Rs.1 Crore and penalty under Section 112(a) of the Customs Act, 1962 [for brevity "Customs Act"] of Rs.50 lakhs, under Section 114AA of Rs.10 lakhs and also penalty under the aforesaid provisions on the Director respectively of Rs.10 lakhs and Rs.1 lakh. With respect to M/s Parag Domestic Appliances, the redemption fine imposed was Rs.30 lakhs, penalty under Sections 112(a) and 114AA on the importer respectively were Rs.16 lakhs and Rs.3 lakhs. On the Director of the said importer, the penalties imposed under Section 112(a) and 114AA were Rs.3 lakhs and Rs.30,000/-. The Tribunal, by the impugned order, reduced the redemption fine and penalty under Section 112(a) and deleted penalties under Section 114AA. The Tribunal having upheld the confiscation, however, directed release of the goods on payment of redemption fine and deleted the condition of re-export as mandated by the Commissioner's order.

4. The Tribunal at the outset, in its order noticed that the importers admitted that the import was in violation of the Import Policy applicable during the material time and that they were not contesting the confiscation of the imported items and the penal consequence thereof. It was also an admitted fact that the goods were used items imported for re-sale within this country and that it did not have the necessary import sanctions. The objections specifically raised by the importers before the Tribunal were that there was no violation of H&OW Rules, 2016 and that they were entitled to redemption of the goods. With respect to the violation of H&OW Rules, 2016, the Tribunal examined the definition of "waste" in the said Rules and found that MFDs, which were subjected to confiscation, cannot be considered as "waste". The certificates issued by the Authorised Chartered Engineers - M/s.Best Mulyankan Consultants Ltd. and M/s.ELBI Consultancy (India) Pvt. Ltd. - showed that the goods were fit for printing A3 size papers and can be put to productive use. Damage, if any, noticed were not to the extent which would compromise their functionality and the residual life was clearly certified. The Tribunal having found that the imported goods would not come under the definition of "waste" as per the H&OW Rules, 2016 held inapplicable the said rules.

5. As to the violations, the Tribunal looked at Schedule VIII, Entry 4(j), which refers to "used Multifunction Digital Photocopiers and Printers [MFDs]". It was observed that there were five documents which were required for importing such

MFDs. The first document was the country of origin, which, as produced by the importer, was stated to be from Canada. The import originated from China/Korea/ Japan and, hence, the department's objection regarding the non-applicability of the country of origin certificate to the consignments were upheld. The second document required was a certificate issued by the inspection agency approved by the Directorate General, Foreign Trade [for brevity "DGFT"]. The Tribunal though noticed the said requirement, did not say anything further on it. However, we notice that the Tribunal had at the first instance when considering whether the goods were "waste" referred to the certificates issued by the Authorised Chartered Engineers. The third requirement was of an Extended Producer Responsibility [for brevity "EPR"]. The Tribunal found that a Technical Review Committee under the H&OW Rules, 2016 had decided to defer the implementation of EPR; to commence only from 01.05.2017. It was held, the goods which were imported in October, 2016 did not require such EPR. The Tribunal also noticed that subsequent to the order of the Commissioner the importers had obtained EPR authorisation under the H&OW Rules, 2016. The 4th requirement was that the MFD shall be for printing A3 size and above, which, as admitted by the department, is satisfied. The 5th condition was an acknowledged copy of the annual return filed with the concerned State Pollution Control Board [for brevity "SPCB"] for import in the last financial year. The Tribunal found that the annual return has to be filed at the end of the year and the same can be effected only after the importation of goods. The Tribunal found that the importation of the goods were in violation of the Import Policy and also one of the conditions of H&OW Rules, 2016, viz., the country of origin certificate. The Tribunal noticed that the imports made of identical goods through the Ports at Kochi and Kolkatta by the very same importers earlier, were cleared by remitting redemption fees. Relying on the decision in Horizon Ferro Alloys Pvt. Ltd. vs. UoI [2016 (340) ELT 27 (P&H)], it was held that the subject goods though were restricted items, were not expressly prohibited for importation. Hence the finding that the goods were entitled to be released on payment of appropriate redemption fee.

6. The Tribunal found that the total assessable value taken for computing the redemption fine and penalties, was the enhanced value as determined by the Commissioner. The enhancement of value was specifically noticed as having not been contested by the importers. The importers, however, pleaded that the redemption fine as also the penalty imposed were harsh, which, coupled with the demurrage, would cast a huge liability on the importers. The Tribunal relying on two decisions of this Court in Commissioner of Customs, Cochin v. Office Devices [2009 (240) ELT 336 (Ker.)] and The Commissioner of Customs v. Navpad Enterprises [2012 (278) ELT 172 (Ker.)] found that the discretion under Section 125 has to be exercised in an objective manner. Finding that no reasoning has been recorded as to the imposition of fine and penalties and falling back upon "consistent practice of imposing 10% of value as fine", reductions were made. The redemption fine imposed on the respective importers were reduced to Rs.52

lakhs and 14 lakhs, on payment of which the goods were directed to be released. The penalties under Section114AA on the importers and the Directors were deleted. However, under Section 112(a), the penalty imposed was reduced to Rs.25 lakhs in the case of Atul Automation Private

Limited and that on the Director reduced to Rs.5 lakhs. In the case of Parag Domestic Appliances, the penalty under Section 112(a) was reduced to Rs.7 lakhs. There is no mention of the penalty under Section 112(a) on the Director of M/s.Parag Domestic Appliances.

7. The matter was heard on the questions of law to be framed on 14.12.2017, on which date the following questions of law were framed:

(i) Whether the Tribunal was justified in referring to the definition of "waste" under the Hazardous and Other Waste (Management and Transboundary Movement) Rules, 2016 to permit release of the goods when the original authority had specifically found the goods to be as defined under "other waste" of the very same Rules?

(ii) Whether the Tribunal was justified in ordering release of goods on payment of redemption fees merely relying on the principles of redemption when the subject goods were prohibited from being imported without sanctions and authorizations as per the Foreign Trade Policy framed under the Foreign Trade (Development and Regulations) Act, 1992, Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and e-Waste (Management and Handling) Rules, 2011?

(iii) Whether the Tribunal acted erroneously in law in permitting the release of goods which come under the category of "other waste" as defined in Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 when an illegal traffic of such goods, under Rule 15, mandates re-export of the goods at the importer's cost or transmission to authorized treatment, storage and disposal facility?

(iv) Whether the Tribunal seriously erred in not looking into the provisions of Foreign Trade Policy framed under the Foreign Trade (Development and Regulations) Act, 1992, Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and e-Waste (Management and Handling) Rules, 2011?

(v) Whether the Tribunal was justified in releasing the goods, in total disregard to the anti-dumping laws, the import of which were in violation of the mandatory requirements and preventive and precautionary conditions of import of 'other wastes', as defined under the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and e-Waste (Management and Handling) Rules, 2011?

(vi) Whether the Tribunal acted erroneously and in a perverse manner in releasing the goods when the assessee had been indulging in a regular pattern of import of prohibited goods, obtaining release of the same on payment of redemption fees and not complying with the modality of getting registered with the Central and State Pollution Control Boards as also filing of annual returns to the Board; of effective disposal of the goods after use by the consumers, resulting in a habitual non-compliance of the laws of import?

(vii) Whether on the facts and the circumstances of the case and the pattern of similar imports having been made without proper follow up of statutory dictates; the Tribunal acted with total disregard to environment laws and in a perverse manner to find that there was no intentional malfeasance or deliberate default on the part of the assessee?

(viii) Whether the Tribunal was justified in interfering with the redemption fee and penalty applying 'consistent practices' when no such practice is sanctioned by law?

(ix) Whether the decisions relied on by the Tribunal to understand the scope of Section 125 of the Customs Act, 1962, was relevant in the facts and circumstances of the instant case where the Tribunal itself had found violations manifest in the conduct of the assessee?

(x) Whether the Tribunal was justified in holding that the goods were not "expressly prohibited" but only restricted thus redeemable under Section 125 of the Customs Act, 1962, based on wrong interpretation of the terms "prohibition" and "restriction".

Both the appellant and the respondents were issued with copies of the same and the matter posted for further hearing to 15.01.2018.

The matter was elaborately heard on 15th, 16th and 17th of January, 2018 then on 23.01.2018 and on 16th & 21st of February 2018, on which last date judgment was reserved.

8. The learned Standing Counsel for the appellant, Sri.Sreelal Warriar, took us through various enactments and the Foreign Trade Policy (for brevity "FTP" only) to point out the gross illegalities committed by the importers, which, if permitted to continue and the goods released, would result in converting this country into a dumping ground for e-waste. Section 47 of the Customs Act, casts a bounden duty on the Customs authorities to satisfy themselves that the goods entered for home consumption are not prohibited goods and the importer has paid the import duty as assessed, failing which the authorities are entitled to confiscate the goods. The FTP as formulated by the Government of India, Ministry of Commerce and Industry, for the period between 01.04.2015 to 31.03.2020, has statutory force insofar as it being notified in exercise of the powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (for brevity "Foreign Trade Act" only). Clause 2.06 of the FTP speaks of the mandatory documents required for export or import of goods from and into India in addition to the bill of lading, bill of entry and the invoice-cum-packing list.

With respect to specific goods or category of goods subject to any restrictions or policy conditions or requiring NOC or product specific compliance, the Regulatory Authority has the power to notify additional documents for the purpose of export or import as required under any other statute. The principles as laid down in Clause 2.07 of the FTP empowers the DGFT to impose such restriction on import and export, inter alia, taking into account the human, animal or plant life or health. Clause 2.10 speaks of Actual User Condition (AUC) which makes import of goods freely by any person, of only such goods which are not restricted. If the import required an Authorisation, the actual user alone can import such goods unless the Actual User Condition is specifically dispensed with by the DGFT. With respect to import policy for second hand goods, a schedule has been provided under Clause 2.31, which includes "Photocopier machines/Digital multifunction Print and Copying Machines" which are importable only against an authorisation as per the conditions provided.

9. H&OW Rules, 2016 has been brought out in exercise of the powers conferred under Section 6, 8 and 25 of the Environment (Protection) Act, 1986 and in supersession of the earlier rules of 2008. It defines "waste" and "other wastes" respectively under sub-clauses (38) and (23) of sub-rule (1) of Rule 3. The Tribunal erred in applying the definition of "waste" for the subject goods confiscated by the appellant. The subject goods, MFDs, are "other waste", included under Part D of Schedule III under Basel No.B1110 (reference is to Basel Convention) being "Used multifunction print and copying machines (MFDs)". The import permitted into the country of an MFD by actual user or trader is only in accordance with the documents as specified in Schedule VIII of the H&OW Rules. Schedule VIII, under Entry 4(j), provides for five requirements one of which alone was complied by the importer. The MFDs imported are for providing A3 size and above but none of the other conditions are satisfied.

10. The e-Waste (Management and Handling) Rules, 2011 [for brevity "e-Waste Rules"] also have been brought out in exercise of the power conferred under the Environment (Protection) Act. Rule 3(q) contains the definition of a "producer" which takes in any person "who offers to sell imported electrical and electronic equipment". Rule 4 speaks of responsibility of producer to collect the e-waste generated on manufacture and on "end of life" of their products to channel it for recycling or disposal. The responsibility to dispose of the products at the "end of life" is the "Extended Producer Responsibility" as spoken of under the Rules. Rule 4(7) refers to an authorisation from the concerned SPCB in accordance with the procedure under Rule 9. Rule 9 speaks of grant of authorisation, which mandates every producer to obtain an authorisation from SPCB and by sub-rule (8) of Rule 5 mandates maintaining of records of the e-waste handled; which records are to be made available for scrutiny by SPCB. Schedule I of the said rules includes printers including cartridges and copying equipment. Rule 3 (l) defines 'extended producer responsibility' of any producer who is made responsible for environmentally sound management of their end of life products.

Hence any producer who either manufactures or sell electrical and electronic equipment would be obliged to dispose of the same after the utility of such equipment has ceased. The disposal also has to be, by environmentally sound measures which are to be scrutinized by the SPCB. The Tribunal according to the appellant, erred insofar as finding that the EPR is required to be filed only at the end of the year since the requirement as per the H&OW Rules is to provide the EPR under the e-waste Rules and an acknowledged copy of the annual return filed with the concerned SPCB for import in the last financial year. The records show that the importer has been importing such goods in the earlier years through Kolkota and Cochin Ports. Hence what was required is the annual return filed by them for the prior imports made in the last financial year. The e-waste Management Rules 2016 brought into force superseding the earlier rules from 01.10.2016, was also read to show similar provisions casting onerous responsibilities on the producer which includes importers who sell such equipment, to ensure disposal of such equipment at the end of their life in accordance with the Environment Protection Act and Rules; through environmentally sound measures. The importers admittedly have been importing MFDs in the earlier years and they have not complied with the conditions of 'EPR'.

11. The learned Senior Counsel appearing for the respondents/exporters would support the order of the Tribunal. It is the submission of the learned Senior Counsel that the respondents are registered as a micro unit by the Ministry of Micro, Small and Medium Enterprises as defined in the Micro, Small and Medium Enterprises Development Act, 2006 [for brevity "MSMED Act"]. The e-Waste Rules of 2011 and 2016, both exclude its application to such micro units established and certified under the MSMED Act. It is the submission of Atul Automation that they had specifically sought for EPR authorisation from the West Bengal Pollution Control Board, which was replied to refusing it, referring to Rule 2(b) of the e-Waste Rules. Despite that, it is contended that EPR as per e-Waste Rules is a measure of disposal of the products which does not, as of now, apply to the subject consignments. The subject consignments are MFDs capable of being operated for more than five years and the EPR is only with respect to disposal of such machines after its utility ceases. It is pointed out that the 57th meeting of the Technical Review Committee under the H&OW Rules, 2008 considered the implementation of H&OW Rules of 2016 and took a decision to defer the implementation of EPR till 30.04.2017 and insist on it only from 01.05.2017. It is also pointed out that e-Waste Rules 2016 came into effect from 04.10.2016 and the consignments reached Kochi Port in the months of October and November, 2016. The requirement as per the H&OW Rules of 2016, specifically Rule 13(4) is the verification of of documents prior to clearing. Even now the goods have not been cleared and the importers have now received the EPR- Authorisation under the e-waste Rules of 2016.It is submitted that in accordance with the e-waste Rules, 2016, Atul Automation had applied for an EPR, which was granted by the Central Pollution Control Board as per communication No.B-29016(22A)/(EPR)/16/WM-III/Division dated 21.04.2017.

The authorisation is valid for a period of 5 years and, hence, there can be no defect found on the importer having no EPR. Parag Domestic Appliances also obtained EPR Authorisation from the CPCB by communication No.B-29016(39A)/(EPR)/17/WM-IIIDivision dated 21.04.2017. The authorisations were verified by the Tribunal as seen from its order.

12. With respect to the requirements as seen from the H&OW Rules, it is argued that MFDs, do not require an authorisation from the Central Government and has been so exempted under Rule

13(2). The stipulation as per sub-rule (4) of Rule 13 is only that the documents as given in Column 3 of Schedule VII has to be verified. The country of origin certificate is of no consequence, since it does not in any manner alleviate the question of environmental pollution. There is also no specification as to the country of origin certificate; ie: as to who is to issue it and what exactly is to be indicated, whether it is the country of manufacture or where it was put to use or that from whose shores the export was made. As for the requirement of a certificate, it can be one as certified by the exporting country or by the agency approved by the DGFT for functionality; having residual life of not less than 5 years. In the present case, two approved agencies, Chartered Engineers, had certified that the machines are functional. At the first instance, the objection raised was only that a random checking was done. The subsequent agency which inspected the machines clearly indicated that all are functional. The defects noticed are minimal, which defects would occur on transportation. These could be made functional by effecting necessary repairs. EPR authorisation was also not necessary for reason of the micro establishment, registered under the MSMED Act, being exempted from the e-Waste Rules. Still they have now received it. Admittedly the MFDs are for printing A3 size and above. The copy of the annual return as per EPR, of Atul has to be filed only from the year 2017-18 when the goods would be liable for final disposal at which point an annual return would also have to be filed. Parag having commenced import only in the year 2014, disposal would commence only from 2022.

13. The learned Senior Counsel would also specifically draw the attention of this Court to the provision under Rule 15, of the H&OW Rules which alone speaks of a re-export. The Customs Act does not provide for any re-export. Rule 15 of H&OW Rules deems a transport to be illegal only in the specific instance enumerated under sub-clauses (i) to (iv). The specific claim raised in the case of the respondents herein is that the import is without permission of the Central Government in accordance with the Rules. As pointed out, Rule 13(2) does not require any authorisation from the Central Government. Hence, there can be no mandate of an authorisation and in the absence of such mandate, Rule 15 is not attracted. There can, hence, be no redemption fine imposed solely for the purpose of re-export of the goods. The learned Senior Counsel relies on Commissioner of Customs (Sea Port-Import), Chennai v. City Office Equipments [2016 (336) E.L.T. 19 (Mad.)], wherein the issue of provisional release of MFDs,

imported without authorisation was considered. It was found that the Commissionerates at different Ports were taking inconsistent views and, hence, there was a direction to bring out proper guidelines, so as to avoid discrimination and arbitrariness. The goods were directed to be provisionally released by the Division Bench of the Madras High Court.

14. Before we venture into a decision on the questions of law, there are certain essential facts and circumstances which are to be borne in mind. As we see from the records and as admitted by both sides, there is no manufacturing of MFDs within the country. The Central Government has permitted import of MFDs, that too used ones and it is a restricted item; meaning that there are conditions to be complied with for such import. The fact that there are no manufacturers within the country is evident from the fact that the FTP and H&OW Rules indicate a reservation made; that the policy would be reviewed when the MFDs are manufactured within the Country. The Central Government recognizing this fact has permitted import of MFDs which have a functional life of more than five years on conditions as has been laid down in the various enactments placed before this Court and discussed by the Commissioner in his order. It has also to be emphasized that used MFDs are not prohibited items; but are restricted items, which can be imported on conditions as stipulated in the various enactments.

15. The Commissioner has, in his order found contravention of the provisions of the Customs Act, FTP, Foreign Trade Act, 1992, H&OW Rules, 2016, Environment Protection Act and e-Waste Rules, 2011, with respect to the subject imports. The FTP requires an authorisation if the import is not by the actual user unless the authorisation has been exempted by the DGFT. H&OW Rules require specific documents to be produced to make it a valid import. The argument of the importers, who admit that they have not complied with the conditions is that the absence of the documents may vitiate the import, inviting the consequences of confiscation and penalty but a re-export or destruction of the goods by the Port or Customs authorities can be only on the specific instances as noticed in Rule 15 of the H&OW Rules. A defect as enumerated under sub-clauses (i) to (iv) alone can visit the importer with the consequence of a re-export or destruction at the cost of the importer deeming the shipment to be an illegal traffic, is the plea. The importers assert their right to get release of the goods on payment of the redemption fees.

16. Therefore the question first arises as to whether Rule 15 of the H&OW rules is attracted. Rule 15 of the H&OW Rule is extracted below:

"Rule 15. Illegal traffic:- (1) The export and import of hazardous or other wastes from and into India, respectively shall be deemed illegal, if,-

(i) it is without permission of the Central Government in accordance with these rules; or

(ii) the permission has been obtained through falsification, misrepresentation or fraud; or

(iii) it does not conform to the shipping details provided in the movement documents; or

(iv) it results in deliberate disposal (i.e., dumping) of hazardous or other waste in contravention of the Basel Convention and of general principles of international or domestic law.

(2) In case of illegal import of the hazardous or other waste, the importer shall re-export the waste in question at his cost within a period of ninety days from the date of its arrival into India and its implementation will be ensured by the concerned Port and the Custom authority. In case of disposal of such waste by the Port and Custom authorities, they shall do so in accordance with these rules with the permission of the Pollution Control Board of the State where the Port exists.

(3) In case of illegal import of hazardous or other waste, where the importer is not traceable then the waste either can be sold by the Customs authority to any user having authorisation under these rules from the concerned State Pollution Control Board or can be sent to authorised treatment, storage and disposal facility."

17. The learned Senior Counsel appearing for the respondents would assert that there is no illegal traffic as discernible from the definition available under Rule 15 of the H&OW Rules. We are unable to countenance such argument looking at Rule 15 which is extracted herein above. The Rule deems illegal, any export or import of hazardous or other wastes, (i) without permission of the Central Government in accordance with the Rules (ii) the permission obtained through falsification, misrepresentation or fraud (iii) non conformity of the shipping details provided in the movement documents and (iv) if it results in deliberate disposal (ie: dumping) of hazardous or other wastes in contravention of the Basel Convention or general principles of international or domestic law. Rule 15 is not a definition clause and it deems illegal certain specific instances and it cannot be said that any other illegality would not invite the rigor of Rule 15. A deeming provision creates a fiction, by which instances or aspects, which ordinarily and normally are not included in the connotation of a term; are by that deeming fiction included. This does not exclude the ordinary things which would be included under the term.

18. We place reliance on (2006) 3 SCC 1 [Bharat Sanchar Nigam Ltd. v. Union of India]. The issue was whether, in the provision of service of mobile connections, by way of SIM cards issued by the telecom service provider there was a sale, exigible to sales tax, as enabled by clause (d) of Article 366 (29A); for it being a transfer of right to use goods for consideration. Considering the enacting history of Article 366 (29 A), in the concurring judgment, the decisions of the Hon'ble Supreme Court holding six transactions to be not exigible to sales tax, which the State sought to tax, were referred to. The Parliament intervened by the 46th Amendment, introducing Article 366 (29-A), which by a deeming fiction treated

the six instances of transactions as sale of goods. From then on every provision in the Constitution and the laws where "tax on sale or purchase of goods" occurs, was deemed to include the six transactions as specified under clauses (a) to (f) of Article 366 (29-A).

We extract paragraphs 106 & 107:

"106. In the background of the above, the history prevailing at the time of the Forty-sixth Amendment and pre-enacting history as seen in the Statement of Objects and Reasons, Article 366(29-A) has to be interpreted. Each fiction by which those six transactions which are not otherwise sales are deemed to be sales independently operates only in that sub-clause.

107. While the true scope of the amendment may be appreciated by overall reading of the entirety of Article 366(29-A), deemed sale under each particular sub-clause has to be determined only within the parameters of the provisions in that sub-clause. One sub-clause cannot be projected into another sub-clause and fiction upon fiction is not permissible. As to the interpretation of fiction, particularly in the sales tax legislation, the principle has been authoritatively laid down in Bengal Immunity Co. Ltd. v. State of Bihar (1955) 2 SCR 603, SCR at p. 647:

"The operative provisions of the several parts of Article 286, namely, clause (1)(a), clause (1)(b), clause (2) and clause (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another." (S.R. Das, Actg. C.J.) We can also see pp. 720 and 721 (N.P. Bhagwati, J.)."

19. As a corollary it can also be stated that the deeming fiction does not exclude the ordinary transactions which would come within the ambit of a "sale or purchase of goods". Just as each sub-clause therein acts independently, so does the sub-clauses and sub-rules in Rule 15 of the H&OW Rules. An illegality simply defined, is something done in contravention of and against law. Any import which is carried out flouting the laws is an illegality, within which ambit is also taken the four instances as specified in Rule 15, by a deeming fiction. We would also notice that sub-clause (iv) also takes in any deliberate dumping of hazardous or other wastes in contravention of Basel Convention, and general principles of international and domestic law. When even violation of the general principles of law are deemed to be illegal, it cannot be said that violation of enacted laws are not illegal. What we have to see is whether there was any illegality attracting the rigor of re-export.

20. We agree with the contention of the Department that the Tribunal erred in looking at the definition of "waste" to find that the MFDs which have a functional utility, cannot be treated as "waste", when the Department's case was that it was "other wastes". The used MFDs imported come under the terminology "other waste" as per H&OW Rules, the effect of which has to be examined. The definition of "other wastes" and "waste" as available under the H&OW Rules,

specifically sub-clauses (23) and (38) of sub-rule (1) of Rule 3, are extracted hereunder:

"Rule 3(1)(23)

"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"

Rule 3(1)(38)

"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.

Explanation.- for the purposes of this clause,

(i) waste includes the materials that may be generated during, the extraction of raw materials, the processing of raw materials into intermediate and final products, the consumption of final products, and through other human activities and excludes residuals recycled or reused at the place of generation; and

(ii) by-product means a material that is not intended to be produced but gets produced in the production process of intended product and is used as such".

21. Going by the definition, "waste" means waste as normally understood; which cannot be put to any use nor has it any utility by way of transformation or consumption in a manufacturing activity. The used MFDs which are subject of import, are not waste as has been defined in the H&OW Rules as rightly found by the Tribunal, but that alone cannot result in an order for release. The MFDs are "other wastes", which definition on the contrary, do not answer the normal terminology of waste, as plainly understood. "Other wastes" are those items enumerated under Part 'B' and Part 'D' of Schedule III, which is permissible of import or export and includes all such waste generated indigenous, within the country. Hence, the definition of "other wastes" include such electronic and electrical equipment which, over a period of time, after its utility expires, becomes waste. These "other wastes", which have a utility period, if manufactured within the country or imported from outside, have to be dealt with when its utility ceases. This is why there is an EPR imposed on the manufacturer or importer or trader of such electrical and electronic equipment to ensure that the said goods supplied to the market is taken back after its utility expires and disposed of by environmentally sound measures. This would indicate that the Union Parliament and the Central Government were conscious of the potential of the electronic and electrical equipment, to be eventually converted to waste; which, if left without proper disposal, would affect and endanger the environment. This is the ultimate cause, intention and reason for the various rules regulating the management, transboundary movement and handling of such goods; which have a potential to be converted to e-waste. The Rules so framed are under the Environment Protection Act, and there can be no dispute

that the Customs Authorities have to satisfy due compliance of the rules and regulations, before clearance.

22. The specific illegalities as per the statutes and statutory rules, as found in the show cause notice, have been extracted in paragraph 33.1 of the order of the Commissioner, appended to Customs Appeal No.19 of 2017.

"(i) Import licence or authorisation issued by the Directorate General of Foreign Trade;

(ii) Country of origin certificate along with Bill of Lading and packaging;

(iii) Certificate issued by inspection agency as certified by the exporting country or the inspection and certification agency approved by DGFT for functionality of MFDs under import having residual life not less than five years and serial number;

(iv) When goods are imported by trader, importing on behalf of the actual users, he shall obtain one time authorisation (Form 7) and copy of the authorisation shall be appended to Form 6;

(v) Importer is required to procure and produce at the time of import an 'Extended Producer Responsibility Authorisation' under E-waste (Management & Handling) Rules, 2011, as amended from time to time as producer;

(vi) An acknowledged copy of the annual return filed with the concerned State Pollution Control Board (SPCB) for import during the previous financial year;

(vii) MFD shall be for printing A3 size and above".

The absence of documents alleged in the show cause against the other importer is also similar, as is seen from paragraph 28 of the order of the Commissioner, appended to Customs Appeal No.18 of 2017. The findings of the Commissioner are similar; so is the defence of the importers and, hence, we deal with Customs Appeal No.19 of 2017. The Commissioner has considered the absence of each of such documents separately in paragraph 33.2.

23. The first defect is absence of import licence or authorisation issued by the DGFT. FTP by clause 2.06 in addition to the Bill of Lading, Commercial Invoice and Bill of Entry, makes the import or export subject to any restriction or policy conditions or products specific compliance, as stipulated under any statute. The import policy as per clause 2.31, permits second hand goods to be imported and categorizes them as "free" and "restricted". Photocopier Machines/Digital Printer Machines are restricted and are importable only against authorisation. The respondents have produced an authorisation issued from the Ministry of Environment, Forests and Climate Change, which is not required in the case of MFDs. But no authorisation from the DGFT is produced. The said authorisation is not required if the import is made by an actual user. The respondents herein are not the actual users and have imported used MFDs for further sale within the country. As per the amendment made to the H&OW Rules, 2016 the actual user condition has been now deleted. Clause 2.13 of the FTP speaks of clearance of

goods from Customs against Authorisation, which Authorisation can be issued even subsequently to the arrival of the goods; but makes it clear that the facility will not be available to "restricted goods". Clause 2.14 makes it clear that the Authorisation cannot be claimed as a right. The absence of an Authorisation from the DGFT stands against the respondents-importers. The Foreign Trade Act by sub-section (8) of Section 11 enables confiscation of goods when there is any contravention of the provisions of the Act, or the Rules or orders made under the Act or the FTP. Sub-section (9) also provide for redemption of the goods on payment of the market value of the goods. Even if there is a violation there is scope for redemption of the goods under the Foreign Trade Act. But we shall come to that later.

24. The further requirements are that provided under Schedule VIII of the H&OW Rules,2016. The country of origin certificate to be produced as per the H&OW Rules according to the Commissioner and the Tribunal indicate discrepancies and the Tribunal has affirmed the findings of the Commissioner in this aspect. There is no appeal filed by the respondent-importer, which according to the importers is for reason of the Tribunal having released the goods. We find considerable force in the submission that the authority which issues the Certificate has not been specified. All the same, we are not impressed by the argument addressed, on the purpose of producing a certificate from the country of origin, being not specified or ascertainable. A country of origin certificate presumably is insisted, since the H&OW Rules, in the case of an illegal traffic, mandates re-export and in that event the country of origin is obliged to take back the goods, as per the Basel Convention, provided such country is a signatory. But the Rules are not explicit on who has to issue such certificate and there is no guidance to understand the word 'origin'; whether it is of the shipment or of the manufacture or the country where it was earlier used. There is clear ambiguity and in that context has to be held in favour of the importer especially since the used MFDs are restricted items, which are permitted to be imported, provided they have a further life of minimum five years; which they possess as certified by approved agencies.

25. The further ground raised by the Commissioner is the insufficiency of certificate by the Inspection Agency from the country of origin or that issued by an agency approved by the DGFT. In the present case, the importer had engaged an approved agency which made random checking of goods and issued a certificate of functionality of more than five years (specifically seven years). This was doubted by the Commissioner insofar as the entire numbers of machinery having not been verified and only a random checking carried out. The Department itself carried out an inspection of the individual machinery, through another approved agency, which has resulted in that agency furnishing a certificate. From the Commissioner's order it is seen that the certificate disclosed that certain machinery on attempting to be operated, was not functioning. There were defects noticed and it was reported that there should be some repair carried out to make it functional. We cannot agree with the Commissioner that this would indicate that such machinery is not functional and has been brought

into the country for disposal and would result in environmentally sensitive waste being dumped within the country. If that be so, then there should have been a finding that the goods are "waste" as defined in H&OW Rules. The Department on the contrary asserts that the goods are "other wastes", the import of which is only restricted and not prohibited. We are also inclined to agree with the Tribunal that the report of the certifying agency does not indicate that the functionality is totally absent. The damages or defects noticed would not result in completely compromising their functionality according to the approved agency. The certifying agency appointed by the Department certified that the machines could be used for more than five years. We do not find any reason to find that the import is of machines which are not functional as provided under the H&OW Rules. The imported goods are "other wastes" which have a potential of becoming an e-waste after its functionality expires till which time it can be used.

26. The next ground is that the goods imported by a trader on behalf of the actual user has to obtain a one time authorisation under Form 7, which has to be appended to Form 6. Neither Form 7 or form 6 is produced. In this context, Section 13(2) of the H&OW Rules are relevant and the same is extracted hereunder:

"S.13(2) For the import of other wastes listed in Part D of Schedule III, the importer shall not require the permission of the Ministry of Environment, Forest and Climate Change. However, the importer shall furnish the required information as per Form 6 to the Customs authorities, accompanied with the following documents in addition to those listed in Schedule VIII, wherever applicable. For used electrical and electronic assemblies listed at serial numbers 4(e) to 4(i) of Schedule VIII (Basel No.B1110), there is no specific requirement of documentation under these rules;

(a) the import license from Directorate General of Foreign Trade, if applicable;

(b) the valid consents under the Water (Prevention and Control of Pollution) Act, 1974 (25 of 1974) and the Air (Prevention and Control of Pollution) Act, 1981 (21 of 1981) and the authorisation under these rules as well as the authorisation under the E-Waste (Management and Handling) Rules, 2011, as amended from time to time, whichever applicable.

(c) importer who is a trader, importing waste on behalf of actual users, shall obtain one time authorisation in Form 7 and copy of this authorisation shall be appended to Form 6".

27. We have to notice from the above provision that no permission of the Ministry of Environment, Forest and Climate Change is required for import of "other wastes" listed in Part D of Schedule III; which alone could be considered as an authorisation from the Central Government. The DGFT is a person appointed by the Central Government under Section 6 of the Foreign Trade Act and the Authorisation required from the DGFT as per the FTP, is not one from the Central Government. The importer also has to furnish information as per Form 6

to the Customs authorities accompanied with documents shown as (a), (b) and (c) in addition to those listed in Schedule VIII; wherever applicable. Schedule VIII lists out the documents required for "used multifunction print and copying machines (MFDs)" as below:-

"(a) The country of Origin Certificate along with bill of lading and packaging;

(b) The certificate issued by the inspecting agency as certified by the exporting country or the inspection and certification agency approved by Directorate General Foreign Trade (DGFT) for functionality, having residual life of not less than five years and serial number.

(c) Extended Producer Responsibility - Authorisation under e-waste (Management and Handling) Rules, 2011 as amended from time to time as Producer;

(d) The MFDs shall be for printing A3 size and above.

(e) An acknowledged copy of the annual return filed with concerned SPCB for import in the last financial year".

28. Section 13(2) exempts any specific requirement of documents for electrical and electronic assemblies listed at serial Nos.4(e) to 4(i) of Schedule VIII. Entry 4(j) is not exempted and indicates the specific requirements in column 3. The Department, in the instant proceedings, insists for an authorisation under Form 7 appended to Form 6. Form 6 is not a requirement as seen from Entry 4(j) of Schedule VIII of H&OW Rules. The learned Standing Counsel for the Department, however, urge that Section 13(2) itself makes it mandatory. We are unable to accept that; since Form 6 is required only wherever it is made applicable. Looking at Schedule VIII, we see that the list of documents required against the various entries, specifically provided for "duly filled Form 6". The movement document in Form 6 is insisted as against Entries 1, 2, 3, 4(a), 4(b), 4(c), 4(d) and 4(e). Under Entry 4(j), it is absent. Hence, Form 6 is not required for MFDs. The learned Standing Counsel would urge that the Basel Convention insists on the movement document. We cannot but notice that the signatory nations, to the Convention have the obligation to ensure the incorporation of the terms of the Convention, agreed upon, in the domestic laws. The Courts are to interpret what the law lays down and not what the Convention proposed. Form 6 is not a requirement as per the H&OW Rules, 2016.

29. Then comes the requirement of Form 7. Under clause (c) of section 13(2) an importer who is a trader importing waste on behalf of actual user should obtain one-time authorisation in Form 7. The respondents admittedly have not applied for any such authorisation before the SPCB. The first contention was that it was not required as they are a Micro Establishment registered under the MSMED Act. A certificate is also produced by the importers which indicates their registration under the MSMED Act. However, the registration is seen classified as 'D' which refers to a Micro Enterprise that too dealing only in services. The Commissioner has found that the registration under the MSMED Act was for services "of repair

of computers and personal and household goods, repair of computers and peripheral equipment" and not manufacture or trading in MFDs. We do not think that on the basis of registration under the MSMED Act, for services, there could have been any exemption from e-Waste Rules for the activity of import and trading in used MFDs which the Rules treat to be, akin to a production as per the definition of "producer". The MSMED Act under Section 7 classifies enterprises as engaged in the manufacture or production of goods pertaining to any industry specified in the First schedule to the Industries (Development and Regulation) Act, 1951 [under sub-clause (a)] and those engaged in providing or rendering of services [under sub-clause (b)]. Electrical and Electronic equipment is included in the Schedule and the respondents' registration is not as a manufacturing or production enterprise. The exemption is not applicable to the respondents. The learned Senior Counsel on being queried, with the above reasoning, gave up the contention of exemption; fairly and rightly so.

30. We were then showed a Notification, No. G.S.R.670(E) dated 06.07.2016 issued by Ministry of Environment, Forest and Climate Change amending the H&OW Rules which at Para 3 reads as follows:

"3. In the said rules, in Schedule III, in the Note, for the portion beginning with the words "... Import permitted in the country" and ending with the words "domestically manufactured", the following shall be substituted, namely:-

"... Import permitted in the country to the actual users or trader in accordance with the documents required and verified by the Custom Authority as specified under Schedule VIII of these rules. The policy for free trade for multifunction print and copying machine to be reviewed once the MFDs are domestically manufactured".

Hence a trader could also import MFDs without authorisation from the actual user and Form 6 would not be required.

31. Looking at clauses (a) to (c) of Rule 13(2) of H&OW Rules, it has to be noticed that the import licence from DGFT is not insisted by Schedule VIII, but an authorisation for any trader who is not an actual user is insisted upon by the FTP which, we have already found, the importers have not obtained. We have also found from the Foreign Trade Act that the absence of an authorisation under the FTP; nevertheless would enable redemption of the goods. The valid consents under the Water Act, Air Act and the authorisation under H&OW Rules as also the e-Waste Rules are required only when it is made applicable.

32. Insofar as MFDs are concerned, under Entry 4(j), what is further required is an EPR-Authorisation under the e-Waste Rules of 2011, which we immediately deal with. The e-Waste Rules of 2011 was not applicable when the import was made in October, since the e-Waste Rules of 2016 had been brought into effect on and from 01.10.2016 in supersession of the earlier Rules. It is also seen from the e-Waste Rules of 2011 that there is no EPR-Authorisation specified as in the e-Waste Rules of 2016. 'EPR' is defined under Rule 3(1)(l) as responsibility of any

producer of electrical or electronic equipment, for their products beyond manufacturing until environmentally sound management of their end-of-life products. 'Authorisation' as defined under Rule 3(1)(b) is permission for handling, collection, reception, storage, transportation, dismantling, recycling, treatment and disposal of e-waste granted under sub-rule (3) of Rule 9. Rule 9(1) makes it mandatory inter alia for every producer of electrical and electronic equipment to obtain an authorisation from the PCB. Sub-rule (3) of Rule 9, as referred to in the definition clause of 'authorisation', also deals with the consideration of an application filed for authorisation, after satisfaction of the applicant's possession of appropriate facilities, technical capabilities and equipment to handle e-waste safely. As contented by the importer; the activities for which authorisation is to be obtained, under the e-Waste rules of 2011, is for disposal of e-waste. In the import of used MFDs and sale of the same within the country, there is no disposal of e-waste as such.

33. More significantly, the e-Waste Rules of 2011 was found to be insufficient to ensure protection of environment and the e-Waste Rules, 2016 was brought in. The learned Senior Counsel would also specifically refer to the recommendations of the Committee on the issue of retrospective implementation of e-Waste Rules, 2016; the decision on which is as follows:

"The need for environmentally sound management of e-waste has been recognized all over the world. In the EU this need took the form of a directive by the EU to its members way back in 2003 to collect e-waste in certain quantity from all households. In India, the 2011 rules was a response to this need in view of the environmental consequences haphazard recycling or disposal of the e-waste. The main issue in the management of the e-waste is its collection. Taking into consideration the fact that various hazardous constituents form part of the EEE supplied by the producers, the major responsibility of collection of the e-waste and its channelization to the environmentally sound recycling / disposal facilities should rest with the producers. Accordingly, the 2011 e-waste Rules made this provision as EPR. However, despite EPR there has not been much progress in collection of e -waste or its channelization to recycling and disposal facility as stated above. Therefore, in the E -Waste (Management) Rules, 2016 a provision has been made for every EPR authorization holder to collect and channelize e -waste with respect to annual specified target". (emphasis supplied by us)

It is pertinent that as on the date of import, e-Waste Rules of 2016 was in force and if at all an EPR had to be obtained under Schedule VIII of H&OW Rules, 2016, it is an EPR under the e-Waste Rules of 2016. The EPR requirement at (c) in Schedule VIII is that "under the e-Waste Rules of 2011", as amended from time to time. The learned Standing Counsel alertly points out that the supersession of e-Waste Rules, 2011 was "except as respects things done or omitted to be done before such supersession". But the import being after 01.10.2016, the day on which the e-Waste Rules 2016 came into effect, there was nothing done by the Department against the said import under e-Waste Rules, 2011 before the supersession. There can also be found no omission under the e-Waste Rules, 2011, since as of now both the importers have EPR issued by the Central PCB under e-Waste Rules, 2016. Both the EPR are dated 24.01.2017 and the Tribunal has referred to that in its order.

34. We were also shown the EPR issued to the importers by the Central Pollution Control Board. We see from the EPR issued to Atul Automation that their collection target commences from 2018-19, since their import commenced from 2011. As far as Paraag Domestic Appliances is concerned, collection target as per their EPR is 'nil' upto 2021-22. This indicates that the MFDs imported by Parag have a functionality upto 2021-22. We also have to notice that sub-rule (4) of Rule 13 of the H&OW Rules provides for verification of the documents before the clearing of consignment of wastes listed in Part D of Schedule III, the documents being those in Column 3 of Schedule VIII. The EPR obtained by the importers are after the orders passed by the Commissioner. The goods have not yet been cleared and we do not find anything to upset the finding of the Tribunal that there is an EPR now obtained by the importer; thus satisfying the requirement under Schedule VIII of the H&OW Rules.

35. Yet another objection of the Commissioner was with respect to the absence of acknowledged copy of the annual return filed with the concerned SPCB for import during the previous financial year. The Tribunal found that the consignment was just imported and only at the end of the financial year could there be an annual return filed. As was noticed by the Committee appointed under the e-Waste Rules of 2011, which went into the implementation of the e-Waste Rules of 2016, a provision has been made for every EPR authorization holder to collect and channelize e-waste with respect to annual specified target only by e-Waste Rules of 2016. As is indicated in the EPR Authorisation obtained by the importers, under the e-waste Rules of 2016, their disposal is yet to commence. There cannot hence be any insistence for the annual returns.

36. The learned Standing Counsel for the Department has a contention that there was a requirement for a return filed before the SPCB even as per the e-Waste Rules of 2011 under Form No.3. The form indicates the name and address of the producer/collection centre/dismantler/recycler, the name of the authorized person, the total quantity of e-waste sold/purchased/sent for processing during the year and its details as also the quantity purchased and processed. These returns are only with respect to disposal of e-waste, which in the case of both the importers have not commenced. We do not think that there is any requirement for the importer to have filed a return before the SPCB prior to the instant imports.

37. Now we come to the order of redemption solely for the purpose of re-export. As found by us, the defects noticed, possible of being upheld, are insofar as the (i) absence of the authorisation issued by the DGFT, (ii) discrepancies in the country of origin certificate, (iii) lack of Extended Producer Responsibility-

Authorisation under the e-Waste Rules, 2011 and (iv) absence of returns before the PCB. As to the certificate issued by the inspection agency and Form 6 & Form 7, under the H&OW Rules we have upheld the contention of the importers. We have also found that there is no requirement for an EPR under the e-Waste Rules of 2011 for the instant imports and the importers have an EPR under the e-Waste Rules of 2016. The returns to be filed before the PCB is of disposal and the EPR obtained by the importers do not mandate any disposal of e-waste, in any prior years. What remains is the absence of authorisation issued by the DGFT.

38. Before we look at the issue of redemption fee/fine and the orders passed, we have to necessarily answer the questions of law framed by us on the basis of the reasoning above. We find that the Tribunal could not have relied on the definition of "waste" under the H&OW Rules to permit release of the goods finding that the goods do not come under that definition. Merely for the reason that the subject goods do not come under the definition of "waste", it cannot be released since they come under the definition of "other waste" and are restricted items requiring authorisation from the appropriate authorities. On the 1st question of law framed, we find that the Tribunal was not justified in referring to the definition of 'waste' under the H&OW Rules, since the subject goods, MFDs, were 'other wastes' under the said Rules. However, there would be no consequence adverse to the importer merely for the goods being classified as 'other wastes' since then it only means that they are restricted items possible of import if they have a functionality of minimum five years. With respect to questions raised as Nos.(ii) to (vii) it cannot but be observed that the primary document required for import of restricted goods,viz: the Authorisation of the DGFT is not available. The importers do not even have a case that they had applied for one. They assert that the DGFT refuses to issue such an authorisation and in such circumstance, considering the requirement of MFD's, which is even evident from the policy of the Central Government, they have been importing the same and getting release of the goods on payment of redemption fine. We cannot countenance such a contention but the fact remains that even in the teeth of the violation alleged the goods can be redeemed.

39. The violation being evident only to the extent of the authorisation under the FTP, the redemption under Section 11 of the Foreign Trade Act alone can facilitate release of the goods. The contention of the importer, then is that there is a specified 'Adjudicating Authority' under the FTP and the Commissioner cannot exercise such powers of redemption available under the Foreign Trade Act. There is also no seizure of goods from the premises of the respondents as contemplated under Section 10 of the Foreign Trade Act. The Commissioner who has issued the show cause notice under the Customs Act cannot adjudicate the issue arising under the Foreign Trade Act and the FTP framed under the statute. We agree that the Commissioner could not have adjudicated the violation under the Foreign Trade Act and the FTP and in such circumstance ought to have forwarded the files for adjudication to the DGFT. There is no mandate that the Adjudicating Authority under the Foreign Trade Act could proceed for confiscation

only when there is a search and seizure under section 10. Section 11 (1) prohibits any export or import other than in accordance with the Act, the rules and orders made thereunder and the FTP. Section 11(2) speaks of a penalty when there is a contravention and Section 11(8) a consequential confiscation; subject only to redemption under Section 11(9). In the consequence of the violation of the Foreign Trade Act and FTP, the Commissioner could not have released the goods nor could the Tribunal do so. However the re-export ordered by the Commissioner was not warranted since even a violation of the FTP permitted redemption of goods. The Commissioner never looked into the provisions of the Foreign Trade Act and the issue does not arise from the order of the Tribunal, to be considered in the confined jurisdiction we exercise herein, restricted to the questions of law arising from the order of the Tribunal. All the same we have the solemn duty to apply the correct law as has been declared in paragraph 16 of 2018 (1) KLT 784 (SC) Authorised Officer, S.B.T Vs Mathew. We cannot ignore the dictate of the statute though we are constrained to confirm the order of the Tribunal for release of the goods. We hence answer the questions of law framed by us in favour of the importer in so far as the violations alleged of the H&OW Rules, 2016, the e-Waste Rules, 2011 and e-Waste Rules, 2016. As far as the violation of FTP is concerned we answer the question in favour of the importer in so far as the release of the goods since there is a redemption possible by the Adjudicating Authority under the Foreign Trade Act, who has not even been apprised of the violation.

40. Questions (viii) to (x) relate to the issue of reduction of redemption fee. The Tribunal relied on the consistent practices in reducing the redemption fee and penalty and has relied on two decisions of this Court, Office Devices and Navpad Enterprises, as cited herein above. Obviously the decisions were cited by the Tribunal, without looking into it, since on a reading we find that it is the same decision twice reported in two volumes of the same journal. Be that as it may, the principle of redemption fine in lieu of confiscation, as the importer in the afore-cited decision, stated correctly, is with a view "to prevent the importers from earning any profits by such import done contrary to the exemption rules". This was accepted by the Division Bench of this Court. We do not think we should interfere with the reduction of the redemption fine as made by the Tribunal.

41. Admittedly the goods were imported without an authorisation from the DGFT, which was an essential requirement as per the FTP. In the present case, the Commissioner has thought it fit to impose 20% of the value as redemption fine, obviously without looking into the Foreign Trade Act. The Tribunal reduced it to 10%. We would not interfere with that, since the appeal to the Tribunal was only by the importer. The penalty imposed under Section114AA has been deleted by the Tribunal, which, we find, to be proper. There cannot be any allegation of false or incorrect material, statement or declaration having been produced. The penalty under Section 112 (a) sustained by the Tribunal cannot also be interfered with.

42. On the reasoning above considering the fact that the goods detained, but for the violation of FTP, are restricted goods possible of importation and even in the teeth of the violation could be redeemed; we direct the release of the goods on payment of the redemption fine as modified by the Tribunal, the penalty under Section 112(a) as also a simple bond without sureties for 90% of the enhanced valuation. We however make it clear that we do not mean to, in any manner, pre-empt the consideration of redemption fine by the DGFT. We direct the release on payment of the amounts as above, because the fine that could be imposed by the DGFT for redemption, is the market value for which we have made provision by way of security bond. If at all the DGFT imposes fine then the 10% imposed by the Commissioner shall be given set-off since then there was no ground on which the Commissioner could have imposed a redemption fine. If not; the violation on import shall be sufficient ground for the redemption fine, as imposed by the Commissioner; since the DGFT either has to impose fine at the market value or decide not to confiscate the goods and then release the goods without any condition. The importer would be entitled to raise all contentions before the DGFT and also avail of the appellate remedies available under the Foreign Trade Act.

43. The question of law at (viii) to (x) are answered in favour of the importer subject however to the proceedings before the DGFT. If the release is not effected within 90 days then the Commissioner would be entitled to sell the goods to any person with EPR under the e-Waste Rules- 2016 and all consequences under the Customs Act and the Foreign Trade Act would follow. De-hors that, the files would be transmitted to the DGFT for adjudication under the Foreign Trade Act within two weeks.

The appeals are partly allowed leaving the parties to suffer the respective costs.

