

Shrishti Digital Solution Vs. Additional Commissioner of Customs

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Court : Chennai

Decided On : Jun-05-2013

Judge : The Honourable Mrs.Justice CHITRA VENKATARAMAN

Appellant : Shrishti Digital Solution

Respondent : Additional Commissioner of Customs

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

5. 6.2013 CORAM: THE HONOURABLE MR.JUSTICE R.SUDHAKAR
W.P.Nos.1439, 1603, 1850, 1851, 2122, 2123, 2310, 2314, 2440, 2441, 2478,
2503, 2513, 2514, 2610 and 2629 of 2013 M.P.No.1 of 2013 (16 Petitions)
W.P.No.1439 of 2013: Shrishti Digital Solution YE141, Trivenipuram Jhuns, Allahabad Uttar Pradesh 211 019 rep. by its Proprietor, Dhananjay Dwivedi. .. Petitioner Vs. The Additional Commissioner of Customs (Gr.5) Customs House, No.60, Rajaji Salai Chennai 600 001. .. Respondent and batch cases For Petitioners in W.P.Nos.1439, 1603, 2440, 2441, 2503, 2513 and 2514 of 2013 : Mr.C.Natarajan, Sr. Counsel for Mr.N.Viswanathan For Petitioners in W.P.Nos.1850, 1851, 2122, 2123, 2310, 2314, 2478, 2610 and 2629 of 2013 : Mr.A.K.Jayaraj For Respondents in W.P.Nos.1439, 1603, 1850 and 1851 of 2013 : Mr.K.Mohanamurali, SCGSC For Respondents in W.P.Nos.2122, 2123, 2310, 2314, 2440, 2441, 2478, 2503, 2513, 2514, 2610 and 2629 of 2013 : Mr.T.Chandrasekaran, SCGSC COMMON

ORDER

In all these writ petitions, the petitioners seek issuance of writ of Certiorarified Mandamus to call for the records connected with the Order-in-Original No.19915 of 2012, dated 17.12.2012 passed by the respondent, to quash the same and to consequently direct the respondent to assess and permit clearance of the secondhand digital multifunction print and copying machines as per the Bills of Entry.

2. As all the petitioners are aggrieved by a common order dated 17.12.2012 passed by the respondent and are similarly placed, suffice it to refer to the facts leading to the filing of W.P.No.1439 of 2013.

3. The petitioner in W.P.No.1439 of 2013 is engaged in the business of importing and trading in Secondhand Digital Multifunction Print and Copying Machines as well as Secondhand Photocopier Machines, besides trading in accessories, parts and consumables for the said machines. The petitioner imported a consignment comprising 96 units of old and used Digital Multifunction Print and Copying Machines of various models from the overseas supplier and filed a Bill of Entry bearing No.7380417, dated 13.7.2012 with the Customs House, Chennai and sought clearance of the goods under ".free importability". as secondhand capital goods in terms of Para 2.17 read with Para 9.12 of Foreign Trade Policy 2009-2014 and Para 2.33 of Hand Book of Procedures V.1 2009-2014. The particulars of Bills of Entry in respect of other petitioners are as under: S.No.W.P.No.Bill of Entry No.Date 1 1603/2013 7806870 30.8.2012 2 1850/2013 7242453 28.6.2012 3 1851/2013 8039175 25.9.2012 4 2122/2013 8039176 25.9.2012 5 2123/2013 7443194 20.7.2012 6 2310/2013 7634583 10.8.2012 7 2314/2013 8351514 30.10.2012 8 2440/2013 7638714 11.8.2012 9 2441/2013 7843003 3.9.2012 10 2478/2013 7712642 21.8.2012 11 2503/2013 7871906 6.9.2012 12 2513/2013 7242548 28.6.2012 13 2514/2013 7783631 28.8.2012 14 2610/2013 7485723 25.7.2012 15 2629/2013 8106152 3.10.2012 4. On filing of the Bill of Entry, the Customs Officer (CFS) with the assistance of the DGFT approved Chartered Engineers unloaded the machines from the containers and examined the machines and an inspection report was submitted on 23.8.2012 to the Customs

Officer confirming that all the machines are in working condition with designed functions for re-use; that the average possible residual life of all the units is minimum five years; that the consignment is fit for re-use; and that the value of the impugned goods was enhanced marginally as against the actual transaction C&F value.

5. After series of litigation seeking provisional release of goods or on adjudication, the matter came to rest before me in a batch of writ petitions (W.P.No.28285 of 2012, etc. batch) which came to be disposed of on 9.11.2012. The operative portion of the said order is as under: ".6. In this case, it is not for the Court to decide as to the applicability and effect of the DGFT Notification at this stage. The nature of order that is to be passed by the Assessing Authority cannot be prescribed as the provisions of the Customs Act enables the Authority to decide the importability of the goods including restriction if any and adjudicate for the purpose of confiscation and release on payment of fine and penalty as is warranted. To this course of action, the Customs Department is agreeable and Mr.Ravi Anantha Padmanabhan on instruction states that the Customs Department will assess and adjudicate the matter, if required, in terms of the provisions of the Customs Act. The said statement is recorded.

7. In such view of the matter, the competent authority of the Customs Department viz., the Assessing Authority is directed to assess the goods in question in terms of the Customs Act read with the relevant Foreign Trade Policy as may be applicable and if it is found that the issue requires adjudication, the same shall be adjudicated taking into consideration the practice that is followed in similar cases without discrimination. Such exercise to be done preferably within a period of three weeks from the date of receipt of a copy of this order. The petitioners in each case represented by their counsel undertake that they will co-operate with the Customs Department for early disposal of the matter."

6. After passing of the order dated 9.11.2012, the petitioners, it appears, have made further representations to the competent authority on 16.11.2012 and 17.11.2012. Thereafter, the impugned order came to be passed by the respondent in respect of all the imports by a common Order-in-Original No.19915 of 2012,

dated 17.12.2012. The respondent formulated the following issues for consideration: (i)whether the secondhand Digital Multifunction (Print & Copying) Machines consigned to India after 5.6.2012 are restricted for import in terms of para 2.17 of the FTP (2009-2014); and (ii)whether the used Digital Multifunction (Print & Copying) Machines imported into India without obtaining prior permission of the Mo EF, are covered under the category of 'Hazardous Wastes' in terms of the provisions of the Hazardous Waste (Management, Handling and Trans-boundary Movement) Rules, 2008, and held as follows: ".12. In view of my above findings, I pass the following order: (a) I hold that the subject secondhand Digital Multifunction Print & Copying machines are restricted for import under Para 2.17 of the Foreign Trade Policy 2009-2014. (b) I hold that the subject goods are Hazardous Waste as per Rule 3(1)(iii) of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008. (c) As the goods had been imported without a licence from DGFT and without permission from the Ministry of Environment & Forests (Mo EF), I order confiscation of the subject goods under Section 111(d) of the Customs Act, 1962 read with Sec 3(2) and Sec 11(1) of the Foreign Trade (Development and Regulation) Act, 1992. (d) I hold that the subject goods which had been imported without prior permission from Ministry of Environment & Forests (Mo EF) are illegal traffic and order the same to be re-exported within 30 days at the cost of the importer in terms of Rule 17(2) of the Hazardous Waste (Management, Handling and Trans-boundary Movement) Rules, 2008. (e) I impose a penalty of Rs.50,000/- (Rupees fifty thousand only) on the importers in respect of each of the seventeen Bills of Entry, under Section 112(a) of the Customs Act, 1962."

7. It is the contention of Mr.C.Natarajan, learned Senior Counsel and Mr.A.K.Jayaraj, learned counsel for the petitioners that a conjoint reading of the Foreign Trade Policy 2009-2014 and the Hand Book of Procedures V.1 2009-2014 as applicable makes it clear that the restriction with regard to import of secondhand goods is relatable to personal computers and laptops only. All other secondhand capital goods like photocopier machines/Digital Multifunction Print and Copying Machines, including refurbished/reconditioned spares, are freely importable. It is further submitted that the condition that is required to be complied with is only with regard to the import of spares, whereas the goods imported by the

petitioners are photocopier machines, digital multifunction print and copying machines, which though fall under restricted category in the Foreign Trade Policy 2009-2014 are freely importable as per Para 2.33 of the Hand Book of Procedures V.1 2009-2014.

8. The learned Standing Counsel for the respondents contended that the secondhand Digital Multifunction Print & Copying machines are restricted for import under Para 2.17 of the Foreign Trade Policy 2009-2014 and, therefore, the same cannot be freely imported. The learned Counsel reiterated the department's stand as set out in the impugned proceedings.

9. I have heard both sides at length and given anxious consideration to the issues involved in these cases. RESTRICTION ON IMPORT OF IMPUGNED GOODS:

10. 1. To understand the issue as to whether there is a restriction for import in terms of Para 2.17 of the Foreign Trade Policy 2009-2014, it will be useful to refer to the following provisions of the Foreign Trade Policy 2009-2014 and the Hand Book of Procedures V.1 2009-2014: ".Foreign Trade Policy 2009-2014:

2. 4. Procedure: DGFT may, specify procedure to be followed by an exporter or importer or by any licensing/regional authority or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and FTP. Such procedures, or amendments if any, shall be published by means of a Public Notice. 2.6. Principles of restriction: DGFT may, through a notification, adopt and enforce any measure necessary for: (a) Protection of public morals; (b) Protection of human, animal or plant life or health; (c) Protection of patents, trademarks and copyrights, and the prevention of deceptive practices; (d) Prevention of use of prison labour; (e) Protection of national treasures of artistic, historic or archaeological value; (f) Conservation of exhaustible natural resources; (g) Protection of trade of fissionable material or material from which they are derived; and (h) Prevention of traffic in arms, ammunition and implements of war. 2.7. Export/Import restricted goods/services. Any goods/service, the export or import of which is ".Restricted". may be exported or imported only in accordance with an Authorization/Permission/Licence or in accordance with the procedure prescribed in a notification/ public notice issued in

this regard. 2.17. Secondhand Goods. For Secondhand goods, the Import Policy Regime is given as under: Import Policy Conditions, if any I. Second Hand Capital Goods Group (a) Restricted Category (i) Personal Computers/ Laptops (ii) Photocopier machines/ Digital multifunction Print & Copying Machines (iii) Air conditioners (iv) Diesel generating sets Restricted Allowed to be imported only as per provisions of FTP, ITC (HS), HBP v1, Public Notice or an Authorization issued for import of the specified second hand item. (b) Free Category (i) Refurbished/reconditioned spares of Capital goods Free Subject to conditions specified in Para 2.33 of HBPv1 (ii) All other secondhand capital goods Free II. All other Secondhand Goods Restricted 9.12. ".Capital Goods". means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. It also includes packaging machinery and equipment refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector. Handbook of Procedures V.1 2009-14:

2. 33. Import of Second Hand Capital Goods. (a) Import of second hand capital goods including refurbished/reconditioned spares, except those of personal computers/laptops, shall be allowed freely, subject to conditions for following categories: (b) Import of second hand computers including personal computers/laptops and refurbished/ reconditioned spares thereof is restricted. (c) Import of refurbished/reconditioned spares of capital goods, other than those of personal computers/laptops will be allowed on production of a Chartered Engineer certificate that such spares have atleast 80% residual life of original spare.". 10.2. A reading of the various provisions referred to above, makes it abundantly clear that the import of secondhand capital goods, except personal computers/laptops, which will also be allowed to be imported on production of a certificate from a Chartered Engineer to the effect that such spares have at least 80% residual life of original spare. The petitioners, if at all required, will have to satisfy the conditions

stipulated in Para 2.33 of the Handbook of Procedures. In the present case, the Hand Book of Procedures V.1 2009-2014 permits import of secondhand capital goods freely and there is no other restriction imposed. 10.3. The restricted category of import as specified in Para 2.17 of the Foreign Trade Policy 2009-2014 with regard to second hand goods comes with conditions attached and those conditions are to be found either in the Foreign Trade Policy 2009-2014, ITC (HS), Hand Book of Procedures V.1 2009-2014, Public Notice or an Authorization issued for import of the specified secondhand item. In these cases, the respondent has not been able to show any specific bar except what is contained in Para 2.33 of Hand Book of Procedures V.1 2009-2014. If the importers in these cases are able to satisfy that the goods though restricted under Para 2.17 of the Foreign Trade Policy 2009-2014 are eligible to be imported in terms of Para 2.33 of Hand Book of Procedures V.1 2009-2014, the respondent cannot merely on the plea of restricted category goods decline to release the goods. 10.4. It is trite law that Foreign Trade Policy 2009-2014 and Hand Book of Procedures V.1 2009-2014 have to be read together to give a purposive interpretation. In the present case, there is no conflict between the Foreign Trade Policy 2009-2014 and Hand Book of Procedures V.1 2009-2014. This is evident from the fact that only in the case of spares certain conditions have been imposed for import, though falling under the restricted category under the Foreign Trade Policy 2009-2014. However, insofar as the Digital Multifunction Print and Copying Machines are concerned, no such condition has been imposed in the Hand Book of Procedures V.1 2009-2014. A conjoint reading of Para 2.33 of Hand Book of Procedures V.1 2009-2014 and Para 2.17 of Foreign Trade Policy 2009-2014, which says that imports should be in accordance with the procedure prescribed, would only mean that the Hand Book of Procedures V.1 2009-2014, which prescribes the manner of import of secondhand capital goods has to be followed and if the procedure contemplated therein is followed, then the benefit of free import should be granted to the present crop of goods, as they are freely importable. 10.5. The above said view of this Court is fortified by a decision of a learned Single Judge of this Court (VINOD K.SHARMA,J.) in Priyam Enterprises v. The Commissioner of Customs and others (W.P.(MD) No.12268 of 2012 and batch cases, dated 17.9.2012). In this decision, the learned Single Judge formulated the following question for determination: ".19. The question of

determination in this case therefore is whether the goods imported by the petitioner though under restricted category could be freely imported subject to conditions laid down under para 2.33 Handbook or not.". and held as under: ".20. The answer is to be in favour of the petitioner, for the simple reason that while placing the imported goods under the restricted category, procedure has been laid down for import of these goods, which provides that the goods can be imported as per the procedure of FTP, ITC (HS), HBP Vol.I, Public Notice or an authorization issued for import of the specified of second hand item.

21. The Handbook of Procedures under para 2.33 lays down that the import of secondhand capital goods except those of personal computers/laptops shall be freely allowed, subject to the conditions contained therein which are produced above.

22. Therefore, while placing the imported goods under Restricted category it is laid down that the photo copier machine/Digital Multifunction Printing and Copying Machine can be freely imported subject to the condition laid down in para 2.33 of the procedures. ...

26. The word used in para 2.17 of FTP is ".or". and ".not". and therefore on correct interpretation of para 2.17, it has to be held that the restricted goods can be imported as per FTP, ITC (HS), HBP Volume I, Public Notice or an authorization issued for import of the specified second hand item. In case the contention of learned counsel for the respondents has to be accepted the word should have been ".And". and not ".or".. It is only in the permitted goods under HBP were to be subject to authorisation then statutory FTP should have used the word ".AND". and not ".OR".. The statutory FTP itself permits some restricted goods to be imported freely under para 2.33 of HBP Vol-I, and the goods imported by petitioner fall in that category.". (emphasis supplied) 10.6. The decision in Priyam Enterprises case, supra, was upheld by a Division Bench of this Court in the Commissioner of Customs and others v. City Office Equipment and others, (W.A.Nos.890 of 2012 and batch cases, dated 14.3.2013). The Division Bench, after referring to provisions contained in the Foreign Trade Policy 2009-2014 and Hand Book of Procedures V.1 2009-2014, held as under: ".22. Thus the procedure

on import of second hand capital goods is governed by Clause 2.33 of the Hand Book of Procedures (Vol.1). As may be seen from the heading, the reference is about second hand capital goods in general alone and is not a separate para to deal exclusively with second hand capital goods falling under restricted category. Thus, dealing with the procedure on the import of second hand capital goods, it specifically refers to some of those restricted items of second hand capital goods, namely, personal computers/laptops, which could be imported only subject to the conditions specified in the para. Thus, while Clause 2.33 allows free import of second hand capital goods, including refurbished/reconditioned spares as per sub clause (a) of Clause 2.33, one can say from the clear terms of the provision that there is no distinction made between second hand capital goods and second hand refurbished/reconditioned capital goods for purposes of free import. Except for those specifically mentioned restricted category of second hand capital goods which are not allowed free import, all other second hand capital goods including other enumerated restricted category of second hand capital goods are permitted free import. Thus, with no distinction maintained between other restricted category of second hand capital goods and second hand capital free goods, we do not find any good ground to read in Clause 2.33, a restriction on the free import of second hand digital multifunction print and copier machines. Thus reading sub clause (a) to Clause 2.33, if there is a restriction to be read on free import, it is only with reference to personal computers/laptops from among the restricted category of second hand capital goods group, which means, other restricted category under second hand capital goods group, specified in Para 2.17, namely, photocopier machine/digital multifunctional printing and copying machines, air conditioners, diesel generating sets, like other goods falling under free category, are permitted to be imported freely. Under sub clause (b) of Clause 2.33, there is a specific reference to the import of second hand computers, including personal computers/laptops and refurbished/reconditioned spares thereof, which suffer restricted import. Sub clause (c) of Clause 2.33 is with reference to import of refurbished/reconditioned spares of capital goods, such as what is covered under sub para (b), namely, personal computers/laptops. Thus, the refurbished/reconditioned spares of capital goods could be allowed for import only on production of Chartered Engineer's certificate that such spares have at least

80% of residual life of original spares. Thus, with classification of goods carrying conditions on import specifying the manner of import, the import policy regime on second hand capital goods dealt with under Para 2.17 is laid down in clear terms in Clause 2.33 of the Hand Book of Procedures (Vol.1) that there could be no confusion in the matter of understanding which type of second hand capital goods goes for free import and what goes for import with conditions. As already noted, Hand Book of Procedures (Vol.1) also specifically deals about refurbished/reconditioned spares of capital goods (Clause 2.33(c)). Thus, even though photocopier and digital multifunction print and copying machines fall under restricted category in second hand capital goods group, yet, going by the only condition specified in Clause 2.33 of the Hand Book of Procedures (Vol.1), we do not find any justifiable ground to accept the contention of the revenue that there exists a conflict between Para 2.17 of the Foreign Trade Policy and Clause 2.33 of the Hand Book of Procedures (Vol.1). Thus, when Para 2.17 of Foreign Trade Policy specifically refers the circumstances or the conditions under which the import policy regime is laid, in the absence of any other restriction specified anywhere either in the policy or in the Hand Book of Procedures (Vol.1) with reference to any of those specified restricted category of second hand capital goods - photocopier machines and digital multifunction printing and copying machines as falling in line with personal computers and laptops, the mere instance of photocopier and digital multifunction printing and copying machines being restricted category of second hand capital goods, cannot bring them under any assumed restriction on par with personal computers/laptops for the purpose of imports into this country. Contrary to the assertion of the Revenue, the import policy regime, as spoken to in Para 2.17, touches on compliance of conditions alternative and not on cumulative basis. In the circumstances, we reject the plea of the revenue.". (emphasis supplied) 10.7. In view of the above, the reasoning and the findings of the respondent in paras 10.1, 10.2 and 10.3 are untenable and contrary to the law laid down by this Court. It also stems from a misreading of the Foreign Trade Policy 2009-2014. Therefore, para 12(a) of the order holding that secondhand Digital Multifunction Print and Copying Machines are restricted for import under Para 2.17 of the Foreign Trade Policy 2009-2014 is contrary to law and accordingly, is liable to be set aside. IMPORTED GOODS WHETHER

HAZARDOUS WASTE:

11. 1. The next issue that was considered by the respondent is whether the provisions of the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 will be attracted to the imports in question. While answering the issue in the affirmative, the respondent held that the subject goods are hazardous wastes as per Rule 3(l)(iii) of Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, which reads as under: ".Rule 3. (l) ".hazardous waste". means any waste which by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger or is (wrongly printed as ".in".) likely to cause danger to health or environment, whether alone or when in contact with other wastes or substances, and shall include - (i) & (ii) (iii) wastes specified in Part A or Part B of the Schedule III in respect of import or export of such wastes in accordance with rules 12, 13 and 14 or the wastes other than those specified in Part A or Part B if they possess any of the hazardous characteristics specified in Part C of that Schedule.". and the goods fall under Basel No.B1110 of Part B of Schedule III, which reads as follows: B1110 Electrical and electronic assemblies - Electronic assemblies consisting only of metals or alloys**** - Waste electrical and electronic assemblies scrap (including printed circuit boards) not containing components such as accumulators and other batteries included on list A, mercury-switches, glass from cathode-ray tubes and other activated glass and PCB-capacitors, or not contaminated with constituents such as cadmium, mercury, lead, polychlorinated biphenyl) or from which these have been removed, to an extent that they do not possess any of the constituents mentioned in Schedule 2 to the extent of concentration limits specified therein.**** - Electrical and electronic assemblies (including printed circuit boards, electronic components and wires) destined for direct reuse and not for recycling or final disposal. **** Import permitted in the country by the actual users with Mo EF permission and DGFT license.". 11.2. According to the respondent, the goods imported specifically fall under Third Sub-entry of Basel No.B1110 and his interpretation that it is a hazardous waste, as found in paragraph 11.6 of the order, is as follows: ". 11.6. a. Though the term ".waste". is not defined in the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, any goods

or substances specified in the said schedule have to be treated as hazardous waste. The heading of Part (B) of Schedule III begins with ".List of hazardous waste". Therefore, whatever is specified in part B of schedule III is to be treated as hazardous waste. b. There are 3 sub-entries under Basel No.B1110. The second sub-entry begins with 'waste electrical and electronic assemblies'. The 3rd sub-entry begins with 'electrical and electronic assemblies'. Thus, the word waste is missing in the 3rd sub-entry. It is a conscious omission by the legislature with the clear intention of bringing used electrical and electronic assemblies imported for direct re-use under the definition of Hazardous Waste. Waste electrical and electronic assemblies as mentioned in the 2nd sub-entry of Basel No.B1110 cannot be re-used whereas electrical and electronic assemblies mentioned in the 3rd sub-entry of Basel No.B1110 can be re-used. Both are treated as hazardous waste by the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008." 11.3. The above said finding of the respondent is per se incorrect and misconceived, as what is contemplated in Basel No.B1110 of Part B of Schedule III is waste electrical and electronic assemblies. In the present case, what has been imported is not assemblies, but complete machines. It is not a part of a machine. What has been imported is not a waste or disposed of assemblies, but a complete machine, which is in working condition and that has been verified by the Chartered Engineer at the behest of the Customs Department. The Chartered Engineer certified that the machines are in working condition with residual life. This fact is not disputed by the respondent. Therefore, on misconceived interpretation, by placing reliance on Part B of Schedule III, the respondent is trying to bring a complete machine under the category of electrical and electronic assembly and treating it as a waste, for which reliance has been placed on the definition of the words ".waste". and ".disposal". in terms of Basel Convention. The Customs Department has not given any specific finding based on verification of the machines that what is imported is waste, which by reason of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger or is likely to cause danger to health or environment, whether alone or when in contact with other wastes or substances. In the absence of such a finding, merely on the basis of various definitions, the goods imported cannot be said to be waste. On a overall reading of the order, it is

clear that the authority has tried to give an interpretation in such a manner that the goods imported will fall under the category of hazardous waste, without satisfying himself as to whether the goods imported are hazardous waste per se. 11.4. The reference to the Basel Convention and Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 has no relevance to the goods in question which are complete machines, as verified and accepted by the respondent/department itself. It is, therefore, not clear as to how the clearance of Ministry of Environment and Forest is required. The finding in para 11.6(g) of the order that Digital Multifunction Print and Copying Machines imported for the purpose of direct use is a waste in terms of Article 2 of the Basel Convention is on a misreading of the term ".waste".. No material has been placed by the respondent to prove that the goods imported are waste intended for disposal at the country of export. This finding is based on conjectures and surmises. In any event, as has been already pointed out, the goods in question are complete machines and not electronic assemblies. The verification by the Customs Department with the help of Chartered Engineer dispels such a finding. 11.5. It has been rightly pointed by the learned Senior Counsel appearing for the petitioners that even as per ITC(HS) Classifications of Export and Import Items 2009-2014, Vol.3-A, assemblies fall under a totally different category. They are parts of machines. To clarify this position, the EXIM Code relating to parts of engines, which are defined as assemblies, can be referred to in the following chapters: EXIM Code Item Description Policy 8409 91 Suitable for use solely or principally with spark ignition internal combustion piston engines: Valves, inlet & exhaust, piston, piston rings, piston assemblies: Valves, inlet & exhaust, piston, piston rings, piston assemblies:

8409. 99 11 Valves, inlet & exhaust Free 8409 99 12 Pistons Free 8409 99 13 Piston rings Free In contrast, EXIM Code 8443 31 00 speaks about machines, which are the goods under import in the present case. The said Code reads as under: EXIM Code Item Description Policy 8443 31 00 Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data processing machine or to a network. Free There is a clear distinction between machines and assemblies. The authority failed to take note of the same. In fact, on classification of export and import items, ITC(HS) is binding on the authorities. On inspection it is clarified that imported

goods are complete machines and not electrical and electronic assemblies. Since I have already held that Part B of Schedule III does not apply to the goods in question, the finding in para 11.7 of the order that the goods imported are electrical and electronic assemblies as per Third Sub-entry of B1110 is incorrect and a misconceived finding. 11.6. In para 11.8 of the order, the respondent relies upon Rule 13(2) of Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008. Rules 13(1) and 13(2) of the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 read as under: ".Rule 13. Import and export of hazardous wastes.- (1)No import of the hazardous wastes from any country to India for disposal shall be permitted. (2)The import of hazardous waste from any country shall be permitted only for the recycling or recovery or reuses.". 11.7. Placing reliance on the above Rule, the respondent came to hold that the goods imported are hazardous waste. This finding should be in consonance with the definition of ".hazardous waste". under Rule 3(l)(iii) of Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, which has been extracted supra. If it does not fall under that category, then it is not a case of hazardous waste import. Only if it falls under the category of hazardous waste as per Parts A and B of Schedule III, Rule 13 of Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 will come into play. 11.8. Apropos of the plea that the Chartered Engineer is not competent or authorized to give the certificate with regard to the residual life of the goods imported, it is to be seen that when the very same Customs Department had taken an objection for import of secondhand Digital Multifunction Print and Copying Machines, in a batch of mandamus filed by the importers, a common order was passed on 12.10.2011 in W.P.Nos.21732 of 2011, etc. batch by Chitra Venkataraman,J.

as under: ".Pursuant to the directions of this Court, the Assistant Commissioner of Customs has filed an affidavit giving the name and address of the Chartered Engineer to inspect the imported materials and to give an opinion about the year of manufacture and the possible residual life of imported second hand machine. The Assistant Commissioner of Customs suggested that the Pollution Control Board may also be directed to find out whether there are hazardous materials in the imported goods.

2. Taking note of the said statement, this Court directs the Chartered Engineer, M/s. Inspectorate Griffith India Private Limited, 23, Rajaji Salai, 4th Floor P.T. Lee Chengalvaraya Naicker Maligai, Chennai and the Member Secretary of the Tamil Nadu Pollution Control Board to inspect the goods involved in W.P.Nos. 21732, 21733 and 21985 to 21988 of 2011 and 22081 of 2011 and give their opinion within a period of two weeks from today. The petitioners herein are directed to extend necessary co-operation for conducting inspection by the Chartered Engineer. The report of the Chartered Engineer along with the opinion of the Pollution Control Board shall reach this Court on or before 27.10.2011. Post on 27.10.2011." and consequently inspection was done. The department accepted the order without demur. To plead differently in the present case is against the established practice and procedure followed by the Customs Department. 11.9. Besides, it is erroneous on the part of the respondent to come to the conclusion that the goods imported are hazardous wastes without any material by merely interpreting the provisions of the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008. There is no material before the respondent to come to the conclusion that the goods in question are hazardous wastes per se. If the goods imported are found to be hazardous wastes by any competent authority on inspection, then appropriate action can be taken. To declare certain goods imported as hazardous wastes per se based on the officer's interpretation of the Rules would be preposterous and untenable in law. 11.10. In this context, it is to be noticed that in the batch of cases filed before the Madurai Bench no such plea has been taken in respect of the very same goods imported contemporaneously, falling within the very same Foreign Trade Policy 2009-2014, which came into effect from 5.6.2012. Contradictory stands cannot be taken by the respondent in respect of identical imports made by different importers. 11.11. This Court, therefore, has no hesitation to hold that the respondent has not made out a case that the goods imported would fall under the provisions of the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 or that it is a hazardous waste as per Rule 3(l)(iii) of the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008. As a consequence, paragraphs 12(c) and 12(d) of the order cannot be justified. The order of confiscation of the goods under Section 111(d) of the Customs Act, 1962

read with Sections 3(2) and 11(1) of the Foreign Trade (Development and Regulation) Act, 1992 is bad. The finding with regard to prior permission from Ministry of Environment and Forest also does not apply in view of the finding that there is no material to substantiate the plea that the goods imported are hazardous waste. CONFISCATION OF GOODS, IMPOSITION OF PENALTY & THE PROVISIONS OF THE CUSTOMS ACT¹²¹. The impugned order ordering confiscation of the goods with a direction to re-export, coupled with imposition of penalty, also suffers from the vice of arbitrariness and capriciousness in the proceedings under the Customs Act, 1962.

12.2. Section 124 of the Customs Act, 1962 contemplates issuance of show cause notice before confiscation of goods or imposition of penalty and it reads as follows: ".Section 124. Issue of show cause notice before confiscation of goods, etc. No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person - (a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty; (b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and (c) is given a reasonable opportunity of being heard in the matter: Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.". 12.3.

Admittedly, no show cause notice has been issued for confiscation or for imposition of penalty and therefore there is a statutory violation in the order confiscating the goods and imposing penalty. While disposing of W.P.No.28285 of 2012, etc. batch on 9.11.2012, liberty was given to the department to assess the goods in terms of the Customs Act, 1962 read with the Foreign Trade Policy as may be applicable and if it is found that it requires adjudication, it was stated the same should be adjudicated taking into consideration the practice followed in similar cases without discrimination. In fact, Mr.Ravi Anantha Padmanabhan, learned counsel for the Customs Department, on instructions, had informed the Court that the department will assess and adjudicate the matter if required in terms of the provisions of the Customs Act and that is recorded in paragraph (6) of the

earlier order, which is extracted in paragraph (5) of the present order. Therefore, the department is bound to issue show cause notice before adjudicating the matter for confiscation of goods and levy of penalty. Hence, the procedure prescribed under Section 124 of the Customs Act, 1962 has not been followed and on that ground also the impugned order is liable to be set aside. 12.4. It has to be mentioned here that there is no material to show that the petitioners have waived the requirement of issuance of show cause notice insofar as confiscation of goods and imposition of penalty are concerned. 12.5. In such view of the matter, though the said plea has not been specifically raised by the petitioners showing the shallowness in the preparation of the cases, the Court will not turn a blind eye to such a glaring irregularity in the proceedings. ALTERNATIVE REMEDY¹³¹. In the counter affidavit filed by the Deputy Commissioner of Customs, in paragraph 2(ix), a plea has been taken that the petitioners have bypassed the statutory appeal remedy in terms of the Customs Act, 1962 and have come forward with these writ petitions. 13.2. This plea of the respondent need not be set against the petitioners for the following reasons. The order passed by this Court earlier directing the authority to consider the claim of the petitioners for release of the goods was in terms of Section 47 of the Customs Act, 1962 and the petitioners were given an opportunity to submit their contentions for release of the goods for home consumption. 13.3. If the authority had found that the goods are prohibited goods or cannot be released for home consumption and are liable for confiscation, then the authority should have proceeded in terms of Section 124 of the Customs Act, 1962. In this case, after considering the claim of the petitioners for clearance under Section 47 of the Customs Act, the impugned adjudication order has been passed confiscating the goods and imposing penalty. This order of confiscation of goods and imposition of penalty runs counter to Section 124 of the Customs Act. 13.4. Admittedly, in this case no show cause notice has been issued calling upon the petitioners/importers to state as to why the goods should not be confiscated and penalty should not be imposed. The mandate of Section 124 of the Customs Act, 1962 has not been followed rendering the order arbitrary and contrary to the statutory provision. In any number of cases, the Supreme Court has held that when the authority acts contrary to the statutory provision or in an arbitrary and capricious manner, the party aggrieved is entitled to seek protection under Article

226 of the Constitution of India. The statutory remedy is of no avail. The order in the present case, on the face of it, cannot be sustained. On this ground also the impugned order has to go and, therefore, the plea of alternative remedy is rejected. 13.5. Furthermore, the issue of import of secondhand Digital Multifunction print and copying machines has been considered in a large number of writ petitions and at the earlier stage the goods were allowed to be cleared pending adjudication and in the batch of writ petitions, which has been referred to earlier, the writ petitions were allowed and the writ appeals filed by the department have also been dismissed holding that the goods are very same goods are freely importable. In such circumstances, the plea of alternative remedy has no legs to stand. 13.6. The department has also not taken a plea in the writ petitions disposed of earlier at the Madurai Bench that the filing of writ petitions bypassing the remedy under the statute is not maintainable. IMPOSITION OF PENALTY¹⁴ In view of the findings recorded in paragraphs 10.7, 11.11 and 12.5 of this order, the impugned order imposing penalty on each of the petitioners/importers under Section 112(a) of the Customs Act, 1962 is unsustainable in law. CONCLUSION: For the foregoing reasons, these writ petitions are allowed and the common impugned order under challenge is set aside. The respondent is directed to release the goods imported forthwith. No costs. Consequently, connected miscellaneous petitions are closed. 5.6.2013 Index : Yes Internet : Yes Note to Registry: Issue order copy on 6.6.2013 sasi W.P.Nos.1439, 1603, 1850, 1851, 2122, 2123, 2310, 2314, 2440, 2441, 2478, 2503, 2513, 2514, 2610 and 2629 of 2013 R.SUDHAKAR,J.

After pronouncement of the order, an oral request was made by the learned counsel for the petitioner seeking waiver of demurrage and container charges. It is open to the petitioners in each one of the petitions to make an application to the appropriate authority and the same shall be considered in the light of the order passed by this Court. 5.6.2013 GLN R.SUDHAKAR,J.

(sasi) COMMON

ORDER

IN W.P.Nos.1439, 1603, 1850, 1851, 2122, 2123, 2310, 2314, 2440, 2441, 2478, 2503, 2513, 2514, 2610 and 2629 of 2013 M.P.No.1 of 2013 (16 Petitions)
5.6.2013

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