Usha Micro Process Controls Ltd. Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-30-1989

Reported in : (1991)LC138Tri(Delhi)

Appellant : Usha Micro Process Controls Ltd.

Respondent : Collector of Customs

Judgement :

1. M/s. Usha Microprocess Controls Ltd., New Delhi, have filed an appeal being aggrieved from the order passed by the Collector of Customs, New Delhi.

2. Briefly the facts of the case are that the appellants are manufacturers of computers. They had filed a bill of entry in the Import Cargo Unit, C.W.C. Gurgaon Road, New Delhi on 11th August, 1983, registered at S.No. 31994, for the clearance of parts of graphic terminals, parts of floppy disk drives and cable etc. as per invoice attached to the said bill of entry, imported into India in one consignment covered under Airway Bill No. 229-1394-3718 (Kuwait Airways) executed on 7-7-1983 at Los Angeles. On examination of the said consignment conducted in the Air Cargo Unit in the presence of the representative of the appellants, it was found that the contents of the said consignment were, in fact, 75 complete units of Eagle IIE computers of models Eagle I, Eagle II and Eagle III in SKD condition 30 units each of Eagle I and Eagle II and 15 units of Eagle III. It was also noticed that instead of 225 diskettes appearing at S.No. 18 of the said invoice 225 pieces (75 sets) of software programmed packs, containing the computer language "Ultra Care", "C/M and C BASIC" and "Spell-binder" along with

the matching software manuals, meant for each type of above mentioned models of computers, were also found.

During the course of investigations, the said importers submitted the said suppliers printed list effective from April, 1983 showing the retail prices of complete units of computers model Eagle I, Eagle II and Eagle III as US $ 1595.00, US $ 1995.00 and US $ 2995.00, respectively and also a telex dated 25-4-1983 from the above said suppliers communicating a reduction of US $ 150 from US $ 400, said to have been communicated earlier for non-supply of the softwares. In other words, US $ 250.00 was the price per set of software. As per the enquiries conducted by the Special Investigation Branch, maximum 40% discount was being given on retail prices normally offered to the wholesale buyers and the price was known as distributors' price and was inclusive of after sale service and warranty. This is corroborated with the supplier's telex dated 16-4-1983 addressed to the importers wherein it was stated that the standard discount of 40% applicable to dealers remained unchanged. The appellants had also submitted a telex dated 18-4-1983 wherein it was confirmed by the suppliers that an additional 10% discount over and above the distributors' discount was also available to the purchasers for buying the computer parts without system warranty. The revenue authorities were of the view that a total discount of 50% was admissible on the retail price for arriving at the wholesale prices in the normal course of trade of computer systems and after deducting US $ 250.00 from the retail prices, as shown in the supplier's printed price list, the wholesale prices of Eagle I, II and III worked out to US $ 672.50, US $ 872.50 and US $ 1372.50 respectively as against the declared prices of US $ 445.00, US $ 695.00 and US $ 795.00.

The appellants had sought clearances against two import licences Nos.

PD 2234803 dated 25-5-1982 and PD 2239246 dated 28-6-1983 in the relevant column of the said bill of entry for the clearance of the said consignment. However, the appellants had produced only one import licence No. PD 2234803 dated 25-5-1982, and that import licence allowed the import of goods as mentioned in list I and list II attached with the import licence. The appellants had imported data terminals, whereas only graphic terminals were allowed to be imported under the

said import licence and the appellants were allowed to import parts of floppy disk drive as detailed at (a) and (b) of S.No. 1 of list II attached to the said import licence and the appellants instead had imported floppy disk drive in two parts, namely, floppy disk drive and floppy logic board which do not need any assembling and are ready for use. The import licence produced by the appellants was for the end-use of process control system and the process control system is for monitoring control, chemically and physically variable like temperature, pressure, flow and are mainly used in chemical and machinery tool plants, thermal plants and laboratory situations etc., whereas the type of computers under import supplied by M/s. Eagle Computers, U.S.A. were for data processing as mentioned in the manuals found in the consignment and could not be used for chemical process controller. In view of this, it appeared that the import licence for the end-use of process control system produced by the said importers for the clearance of the said goods was not valid for the said imports.

The Department of Electronics had clarified that the importers' phased manufacturing programme had only been approved for process control system and not for mini computers/microprocessor based system; that the importer's phased manufacturing programme had been approved for Usha Data Loggers DL-1000 and Usha Data Logger DL-2000 and that their phased manufacturing programme for manufacture of mini computers/microprocessor based system had finally been rejected by the competent authority. Furthermore, from the commercial and the publicity brochure of the importers being circulated by them for marketing their products in the country, it was established beyond doubt that the importers had been manufacturing only business computers and not process control systems. The newspaper "Business Standard" of 10th November, 1983 and the "Business World" magazine of September 26, October 9, 1983 make it further clear that the importers had been manufacturing and selling business computers only. In view of the above, it appeared that: (i) the price per set of Eagle I, II and III in SKD condition is US $ 672.50, US $ 872.50 FOB respectively. Accordingly, the total FOB value of these computer parts is US $ 162.50 against US $ 46,125.00.

(ii) The price of 225 pieces of software programmed packs (75 sets) with manuals, declared as 225 blank diskettes, is US $ 18750.00 instead of US $ 225.00 declared for the blank diskettes.

(iii) The import of software programmed packs has been attempted in the guise of blank diskettes contrary to the provisions contained in para 5(9) read with para 22 of the Import Policy AM-83.

(iv) The computer parts, excluding softwares, valued at US $ 67,162.50 have been imported without the cover of a valid import licence inasmuch as the said parts have not been imported in accordance with the end-use mentioned in the said import licence No. PD 2234803 dated 25-5-1982.

(v) The goods declared as graphic terminals are in fact data terminals and have been imported without a valid import licence in view of list I and II attached to the said Import Licence.

As such the said M/s. Usha Microprocess Control Ltd. were called upon to show cause to the Collector of Customs, New Delhi as to why: (i) The entire goods under import, namely, Data Processing Computer parts and software with manuals should not be valued at US $ 67,162.50 and US $ 18,750.00 respectively (total US $ 85,912.50 FOB) against the declared total price of US $ 46,350.00 FOB for the purposes of assessment under Section 14 of the Customs Act, 1962.

(ii) The computer parts of data processing computers valued at US $ 67,162.50 not being covered under the said import licence No. PD 2234803 dated 25-5-1982 for the reasons explained above and having been imported in contravention of Section 3(1) of Import (Control) Order, 1955 as amended read with Section II of the Customs Act, 1962 be made applicable under Section 3(2) of Import & Export (Control) Act, 1947, be confiscated under Section 111(d) of the Customs Act, 1962.

(iii) The software programmed packs with manuals valued at US $ 18,750.00 be not confiscated under Section lll(d) of the Customs Act, 1962 as the same has been imported without the cover of valid import licence and also in contravention

of the provisions contained in para 5(9) read with para 22 of Import Policy AM-83.

(iv) The software programmed packs along with the manuals invoiced as diskettes and declared as blank should not be confiscated under Section lll(i) of the Customs Act, 1962 for the reasons that the same were not included in the declaration/entry made under the Act ibid.

(v) The computer parts as well as the software programmed parts with manuals should not be confiscated under Section lll(m) of the Customs Act, 1962 as the same did not correspond in respect of value and other material particulars with the entry made under the Act ibid, inasmuch as the goods valued at US $ 85,912.50 were found to be under valued to the tune of US $ 39,562.50.

Further the said M/s. Usha Microprocess Control Ltd. were also asked to explain as to why penal action should not be taken against them under Section 112 of the Customs Act, 1962.

M/s. Usha Microprocess Control Ltd. vide their letter dated 24-11-1983, in reply to the show cause notice, inter alia, submitted as under:- (a) That the difference in party's invoice and department's evaluation was because of the following two reasons:- (i) That valuation for software (wholesale price was US $ 250 each.

Hence the total price (wholesale) of 225 pieces of software programmed packs (75 sets) had been computed to be US $ 18750; that to arrive at the price (wholesale of hardware that should be substracted from the wholesale price of system and not from the retail price of system and as such that had led to a wrong valuation of hardware; that to illustrate that point, the following calculations could be done for Eagle II:-Eagle System Retail price US $ 1995.50(hardware & software) Wholesale price As such the correct FOB value of computer parts would be US $ 57,787.50 rather than 67,162.50 (ii) that Eagle III was higher retail price, not because of its hardware but mainly due to the software; that software prices varied from model to model and those were $ 350, $ 300 and $ 700 for Eagle I, Eagle II and Eagle III respectively; that hardware and software evaluation should be as follows for Eagle I, Eagle II and Eagle III:-Qty.

Hardware Exten.

Software Exten.

Total System Unit Price (b) Regarding the end-use of process control system, the party pleaded that as per the definition given in the import policy for computer system, process control systems, automatic data processing systems, computer systems were all same things and the words were used synonymously; that thus their industrial licence allowed them to manufacture and sell micro processor based systems/data processing systems/computer.

(c) Regarding the difference between graphic terminals and data terminals, the party submitted that graphic terminals were intelligent terminals whereas data terminals were normally dumb terminals and a graphic terminal had a micro processor which was capable of processing data and could direct the graphics either on the screen of the terminal or on the printer to which it was attached and their terminal could do that and as such it was a graphic terminal as allowed under our Import Licence.

(d) Regarding the floppy Disk Drives imported by the party it was submitted that those were mentioned in the list attached to the Import Licence as (A) and (B) of the parts; that the other items (C) and (H) were basically the hardware required to enclose the floppy drive in a box if it was supplied separately; that the cables etc.

required for that hardware were managed locally and were not imported although they were allowed to do so under the import licence and as such there was no contravention of the import licence at all.

(e) Regarding the software the party submitted that the software programme packs with manuals had been supplied to them by mistake by the suppliers as they ordered only for blank diskettes and asked for the permission to re-export; that programmed diskettes could be copied out to blank diskettes in only two minutes and as such there would be no benefit in their importing programmed diskettes nor were they trying to import 75 numbers each of similar diskettes since even one diskette would suffice. The party further requested for passing early orders in the

case without granting any personal hearing to them.

3. The learned adjudicating authority did not accept the contention of the appellants and the adjudicating authority had allowed a total discount of 50% on the retail prices for arriving at the wholesale price in the normal course of computer trade and had deducted US $ 250.00 from the retail price as shown in the supplier's printed price list as the price of the software per set and allowing 50% discount on the prices and the wholesale price of Eagle I, II and III works out to US $ 672.50,872.50 and 1372.50 FOB respectively. As such the total FOB value of these computer parts comes to US $ 67162.50 instead of US $ 46125.00 and the under valuation to the extent of US $ 21039.50 was established. In place of 225 diskettes (blank) appearing at S1. No. 18 of the purchase order duly accepted by the supplier, 75 sets of software programmed packs containing the computer language "ULTRA CARE" "C/M and BASIC" & "Spell-binder" along with the matching software materials meant for mentioned models of computers had been imported.

These diskettes were not mentioned in the import licence and the import of software was strictly prohibited under the Import Trade Control Policy. The appellants' contention that these diskettes could be easily duplicated was not correct, since these could be duplicated, but they required some understanding of the software as well as utility of software. The appellants also contended that these programmed diskettes were sent by mistake and necessary permission for re-export be allowed, as their purchase order was for blank diskettes. It was, however, observed that the diskettes were in exact quantity i.e. they had imported 75 computers and there were 225 diskettes along with their reference manuals, which correlate exactly with the number of computers. The price of 225 pieces of software programmed packs (75 sets) with manuals which had been declared as blank diskettes, comes to US $ 18,750.00 instead of US $ 225 (declared). The contention of the appellants that the computer software prices were so flexible and changing and vary widely from one product to another and that the difference in hardware valuation was only due to the prices of software was not correct. The under valuation to the extent of US $ 18,525.00 was also established. These diskettes were also found not covered by the import licence No. PD 2234803

dated 25-5-1982. The import licence issued by the Joint Chief Controller of Imports and Exports, Delhi, was for end-use: process control systems. The process control systems are for monitoring controls, chemically and physically variable like temperature, pressure, flow and they were mainly used in chemicals and machinery tool plants, thermal plants. The type of the computer under imports was data processing and as indicated in the manual could not be used for chemical process control or monitoring control. The present hardware imported by the appellants could, in no way, be used with a process control without elaborate changes in the hardware itself which would obviously make the equipment more expensive and not proportion with the prices paid or to be used for selling these equipments. List II of the said licence permits the import of parts or floppy disks drive and there are 8 parts mentioned in the licence, whereas the appellants had imported floppy disk drive in two parts. The appellants had also imported floppy disks drive deck and floppy logic board and disk drive shield which were not covered under the import licence. The value of such goods which were not covered by the import licence (excluding software) was US $ 67,162.50. Instead of graphic terminals, it was observed, data terminals had been imported which were not covered by the said import licence. The learned Collector of Customs did not accept the contention of the appellants. He had valued the imported goods to be worth US $ 85,912.50 FOB for the purpose of assessment and held that the goods under import valued at US $ 85,912.50 FOB were not in accordance with the import licence produced by the appellants issued for end-use "process control system". He had ordered the confiscation of the Data Processing Computer parts appraised at US $ 67,162.50 FOB and the software programmed pack with manuals valued at US $ 18,750.00 FOB under Sections lll(d), 111(1) and lll(m) of the Customs Act, 1962. An option was given to redeem the confiscated goods on payment of a redemption fine of Rs. 10,00,000/- (Rupees ten lacs) and in addition to duty leviable and had also imposed a personal penalty of Rs. 2,50,000/- (Rupees two lacs and fifty thousand only).

4. Being aggrieved from the aforesaid order, the appellants have come up in appeal before the Tribunal.

5. Shri V. Sridharan, the learned advocate who has appeared on behalf of the appellants, has moved a miscellaneous application for the admission of additional evidence. Shri A.S. Sundar Rajan, the learned Junior Departmental Representative, does not oppose the admission of additional evidence.

6. After hearing both the sides, request for the admission of the documents as mentioned in the miscellaneous application dated 3rd June, 1988 is allowed.

7. Shri V. Sridharan, the learned advocate, has stated that the following six issues have to be decided:- 8. Shri V. Sridharan, the learned advocate, stated that the customs authorities are not concerned with the end-use criteria for the custom purposes. In support of hisss argument, he has cited a judgment in the case of Audio Vision Electronics v. Collector of Customs, Madras reported in 1987 (31) ELT 796 (Tribunal). Shri Sridharan stated that the appellants were in possession of an industrial licence dated 15th December, 1981 which appears at page 1 of the paper book and the item of manufacture is mentioned as "Process Control System". Thereafter, the appellants had written for the amendment of the industrial licence and the industrial licence was amended subsequently which appears on page 64 of the paper book. Vide letter dated 19th March, 1985 the Ministry of Industry and Company Affairs had amended the industrial licence with retrospective effect viz. 15th December, 1981 i.e. the date of issue of the licence and the item Mini/Micro computer and Microprocessor based systems were included in the licence No.CIL:374(81) dated 15th December, 1981 which appears on page 1 of the paper book. Shri Sridharan, the learned advocate, has referred to the Import Policy and argued that over and above OGL, a supplementary licence was there. He has referred to para 35(1) of AM Policy 1982-83 page 8. Para 5(3) on page 1 relates to actual user industrial licence.

Shri Sridharan has argued that end-use is not the condition of the licence. If at all, there is any violation, it is post import violation and there is no violation of any law under the Customs Act. Directorate General of Technical Development had duly written to the Joint Chief Controller of Imports and Exports vide their letter dated 31st-July.

1985 1st August, 1985 intimating the amendment in the end-use of the import licence as per para 91(3) of ITC Policy 1985-86 with retrospective effect. Shri Sridharan has also referred to a letter dated 29th October, 1985 appearing on page 70 of the paper book written by the Joint Chief Controller of Imports and Exports to the appellants.

Shri Sridharan, the learned advocate, has pleaded that the findings of the adjudicating authority as to end-use are not maintainable.

9. On the issue of valuation of hardware, Shri Sridharan states that the appellants had placed order for blank diskettes, whereas by mistake the appellants had received programmed diskettes, though not ordered by the appellants. There is no evidence on record as to extra remittance.

He has argued that the adoption of the value of the hardware price by the adjudicating authority after deducting from the retail price is not correct in law. The adjudicating authority has deducted the wholesale price of the software from the retail price of the computer system. He has pleaded that for ascertaining the price of the hardware, the retail price of software has to be deducted from the retail price of the computer system and deduction of wholesale price of software from the retail price of the computer system is not correct in law. For coming to the correct valuation, first the adjudicating authority should have arrived at the wholesale price of the computer system and from that the learned adjudicating authority should have deducted the wholesale price of the software. He has referred to the letters dated 3rd April, 1983, 5th April, 1984 and 5th April, 1984 written by the appellants which appear on pages 47, 48 and 49 of the paper book for abandoning the goods. The customs authorities never replied to the same. Shri Sridharan, the learned advocate, has referred to the discount pattern of the suppliers and has referred to the telex which appears on page 13 of the paper book. The net discount available to the appellants was as under:- Shri Sridharan, the learned advocate, stated that the appellants had declared the value at US $ 46,125.00 of the computer parts, whereas the revenue had assessed the same at US $ 85,912.50 and as per the department the value of the software programmed packs (75 sets) with manuals, declared as 225 blank diskettes is US $ 18,750.00. He has

referred to the telex which appears on pages 9 and 13 of the paper book. The revenue has not filed any evidence as to the contemporary price. The appellants did not require software. The redemption fine imposed by the learned adjudicating authority at Rs. 10,00,000/- is consolidated. No levy of redemption fine is called for. Alternatively, he pleaded that if any redemption fine had to be levied, the same should have been levied separately on hardware as well as software and there is also no entry in the import control order for software.

10. For the importation of floppy disk drive, the learned Advocate has referred to the observations of the adjudicating authority in the order-in-original internal page 2 where the Collector himself has admitted that the appellants are entitled to the import of parts of the floppy disk drive. He has further argued that the appellants are entitled to the benefits of notifications 117/80-Cus. and 172/77-Cus.

The benefits of these notifications have not been extended to the appellants. Shri Sridharan, the learned advocate, states that importation of the graphic terminals is also in order. He has pleaded for the setting aside of the redemption fine and penalty.

11. Shri A.S. Sundar Rajan, the learned Junior Departmental Representative, who has appeared on behalf of the respondent, states that there is violation of the ITC regulations by the appellants and the provisions of Section 111 (d) of the Customs Act, 1962. He has argued that there is no allegation as to the valuation for arriving at the net wholesale price after deduction from the retail price and the trade discount, in the grounds of appeal. The appellants had all along accepted the same. There is no distinction in hardware and software. He has referred to page 1 of the paper book filed by him which is the price list of Eagle Computers. Shri Sundar Rajan has argued that the wholesale price has been calculated from the retail sale price after allowing 50% discount correctly by the adjudicating authority and there is no error in the same. He has referred to page 58 of the appellants paper book. Shri Sundar Rajan has pleaded that the calculation of value by the adjudicating authority was correct and there is absolutely no ground for reduction of fine and penalty. He has referred to page 4 of the respondent's paper book which is a cutting from the newspaper "Business World". Shri Sundar Rajan has

argued that for the licence criteria of end-use is very irrelevant and every column of the import licence is important. In support of his argument, he has referred to a judgment of the Supreme Court in the case of Liberty Oil Mills & Others v. U.O.I. reported in AIR 1984 S.C. page 1271 at page 1279 para 6. The same is reproduced below: "Before considering the questions at issue, it will be useful to refer to our Import Policy and to take a cursory look at the various statutory and non-statutory. The import policy of any country, particularly a developing country, has necessarily to be tuned to its general economic policy founded upon its constitutional goals, the requirements of its internal and international trade, its agricultural and industrial development plans, its monetary and financial strategies and last but not the least international political and diplomatic overtones depending on friendship, neutrality or hostility with other countries. There must also be a considerable number of other factors which go into the making of an import policy. Expertise in public and political, national and international economy is necessary before one may emerge in the making or in the criticism of an import policy. Obviously, Courts do not possess the expertise and are consequently incompetent to pass judgment on the appropriateness or the adequacy of a particular import policy. But we may venture to assert with some degree of accuracy that our present import policy is export oriented.

Incentives by way of import licences are given to promote exports.

Paragraph 173 of Chap. 18 of the 'Import Policy' for April 81 to March 82 published by the Government of India, Ministry of Commerce - in the first week of April every year, an annual 'Import and Export Policy' to be in force during the financial year is published - expressly states "the objective of the scheme of registration of Export Houses and the grant of special facilities to them is to strengthen their negotiating capacity in foreign trade and to build up a more enduring relationship between them and their supporting manufacturers". Paragraphs 183 and 184 enumerate the various import facilities available to Export Houses. Paragraph 185(1) allows Export Houses to import OGL (Open General Licence) items against REP (Replenishment) Licences issued in their own names or transferred to them by others. The facility is stated to be available to them for the import of (a) capital goods listed in Appendix II and placed on Open General Licence for Actual Users

and (b) Raw Materials, components, consumables and spares (excluding items covered by Appendix V) which have been placed on Open General Licence for Actual Users. Paragraph 185(1) further stipulates that Capital Goods so imported shall be transferred by them only to such Actual Users as are authorised to purchase them by the concerned Licensing Authority and that raw materials, components and Consumables so imported may be transferred by them to eligible Actual Users.

Imported spares may be sold to any person. Paragraph 185(2) provides that import replenishment licences issued in their own names or transferred to them by others, against which Export Houses wish to take advantage of the facility provided in Para 185, shall be non-transferable. Therefore, the Export Houses wishing to take advantage of the facility are required to get the licences concerned endorsed by the Licensing Authority as under:- "This licence will also be valid for import of OGL items under para 185 of Import Policy, 1981-82, subject to the conditions laid down and shall be nontransferable." "Paragraph 185(3) further stipulates that import of OGL items under these provisions shall be subject to the condition that the shipment of goods shall take place within the validity of the OGL, that is, March 31,1982 or within the validity period of the import licence itself, whichever date is earlier. Paragraph 186(1) broadly entitles Export Houses to Additional Licences up to the value of 15% of the f.o.b. value of select products made in 1981-82 and manufactured by small scale and cottage industries, plus 7 1/2% of the f.o.b. value of other' exports of select products made in the same year. All such Additional Licences shall be nontransferable. Paragraph 186(7) provides that the Additional Licences will also be valid for import of Raw Materials, Components, Consumables and Spares (including items covered by Appendix V) which have been placed on Open General Licence from Actual Users (Industrial). While Spares so imported may be sold to any person, Raw Materials, Components and Consumables may only be sold to eligible Actual Users Paragraph 192 requires every Export Houses to maintain proper accounts of all its exports, imports and disposed of imported detailed information in the prescribed forms." Shri Sundar Rajan has argued that the licence is for process control system. He has referred to the Encyclopaedia by David page 253. The computers imported by the appellants are general purposes and they have got nothing to do with the

process control. Shri Sundar Rajan has argued that the adjudicating authority has not passed any order as to the grant of benefit of the notification. He has referred to Section 23(2) of the Customs Act, 1962. He has pleaded for the dismissal of the appeal and has further pleaded that the fine and penalty imposed by the lower authority may be upheld.12. Shri Sridharan, the learned advocate, has pleaded that the goods imported are parts of computers. If at all, there is any offence, the same is not in respect of the entire consignment. He has pleaded for the acceptance of the appeal.

13. We have heard both the sides and have gone through the facts and circumstances of the case. The first contention of the learned counsel of the appellants was that the importation was not unauthorised and was in conformity with the I.T.C. regulations and the revenue authorities are not concerned with the end-use of the product. The appellants had imported parts of graphic terminals, parts of floppy disk drives and cable etc. In the relevant columns of the bill of entry the appellants had mentioned the import Licence No. PD 2234803 dated 25-5-1982 and PD 2239246 dated 28-6-1983 but had produced only one import licence No. PD 2234803 dated 25th May, 1982 and the import licence produced, inter alia, allows the imports of goods mentioned in list I and list II attached thereto. The appellants had imported data terminals, whereas only graphic terminals had been allowed to be imported under import licence No. PD 2234803 dated 25th May, 1982 and the appellants were further allowed to import parts of floppy disk drive as detailed at (a) and (b) of serial No. 1 of List II attached to the import licence.

However, the appellants had imported floppy disk drive in two parts, namely, floppy disk drive and floppy logic board which do not need any assembling and were ready for use and the import licence as per the respondent was for end-use in process control system and was for monitoring control, chemical and physical variable like temperature, pressure, flow and were mainly used in chemical and machinery tool plants, thermal plants and laboratory situations etc. etc., whereas the type of computers imported by the appellants were for data processing as mentioned in the manuals found in the consignment and could not be used for chemical process controller monitoring control and as such the revenue authorities were of the view that the importation was unauthorised. The appellants had

contended that the end-use of process control system is as per definition given in the import policy for computer system, process control systems, automatic data processing systems, computer systems were all same things and the words were used synonymously and their industrial licence allowed them to manufacture and sell micro processor based systems/data processing systems/ computer and for graphic terminals and data terminals, the appellants had contended that graphic terminals were intelligent terminals, whereas data terminals were normally dumb terminals and the graphic terminal had a micro processor which was capable of processing data and could direct the graphics either on the screen of the terminal or on the printer to which it was attached and as such it was a graphic terminal as allowed under the import licence. Relevant extract from the import policy which appears in the reply to the show cause notice at page 35 of the paper book of the appellants is reproduced below: - "Import Policy - page No. 2-Cal. 2(W) "Computer System" means all types of electronic data processing computers, their peripheral equipment, data collection and data preparation equipment, remote terminals, modems, PROCESS AND PLANT CONTROL SYSTEMS, magnetic tapes and dies backs, tools, test equipment and spares relevant thereto; it includes also all systems an application software to work on existing hardware or that process to be imported." A simple reading of the computer system reproduced above will show that process control systems, automatic data processing systems, computer systems are all the same things and the words are used synonymously.

The appellants' industrial licence appears at pages 1 to 5 of the paper book and the description of the item of manufacture has been mentioned in the licence as process control system. On pages 62 and 63 of the paper book there appears the endorsement on the industrial licence. The Government of India vide letter dated 7th July, 1984 had intimated that in response to the appellants' letter dated 12th April, 1984 that the nomenclature of the item manufactured had been amended with effect from 15th December, 1981 and the description was given mini/micro computer and microprocessor, based systems including process control systems and vide letter No. CIL:374(81)LA-II/Amend/85 dated 19th March, 1985, Ministry of Industry & Company Affairs, had intimated to the appellant that the Government of India had decided to include the item of manufacture viz. mini/microcomputer and microprocessor based systems in the industrial licence No. CIL:374(81) dated 15-

12-1981 with retrospective effect i.e. 15-12-1981 the date of issue of the licence granted to the appellants for the manufacture of process control systems and it was further mentioned in the said letter that "Accordingly, the aforesaid industrial licence shall be deemed to have been amended with effect from 15-12-1981."The Hon'ble Supreme Court of India in the case of State of U.P. and another v. Haji Ismail Noor Mohammad and Co. reported in 1988 (3) Supreme Court Cases 398 in para No. 19 of its order had held the certificate will take effect from the date of application made by the party and not from the date of issue.

Para No. 19 of the said judgment is reproduced below:- "19. It is true, the words "in respect thereof as Lord Greene, M. said are "colourless words", but in Section 4-B, they are in the reference to the certificate, sufficiently, though non-specifically enough to include a certificate obtained later but pertaining to turnover in question. If this is the scheme of Section 4-B it does not exclude from its contemplation the efficacy and sufficiency for its purpose of a certificate issued subsequently, then the rule which compels only its prospective operation might not unreasonably be held to be inconsistent with and ultra vires Section 4-B. We feel, therefore, nothing unreasonable in this construction of Section 4-B. Indeed by the 1978 amendment, this position has been made clear in the rule itself which after the amendment, expressly provides that certificate will take effect from the date of the application made by the dealer and not merely from the date of the issue." In the matter before us, the industrial licence of the appellants is of 1981 and amendment of the same was applied in 1984 and the same has been given the retrospective effect by the concerned Ministry. We have already discussed above the import policy. The products imported by the appellants are synonymous with the other product of the computer. In any case, except software, the goods imported by the appellants are in conformity with the ITC policy. Relevant para has already been reproduced above. It is a settled law that the customs authorities are not concerned with the end-use. Shri Sridharan, the learned advocate had cited the judgment of the Tribunal in the case of Audio Vision Electronics v. Collector of Customs, Madras "6. As regards the third objection of the lower authorities, the appellants have placed drawings of their end-products before us to show that whereas the lower authorities calculated the requirements of RF/IF coils at 7 per gadget, the actual requirement varied from 11 to 21. That apart, we find no restriction in the Open

General Licence as to how much quantity of the permitted items should be imported by an Actual User. In the circumstances, the lower authorities were not justified in interpolating a restriction of their own into the import policy. Imported goods cannot be confiscated on the assumption that the Actual User Importer would most likely sell them in the market. If he does sell them in the market, there are provisions in the Imports and Exports (Control) Act and the Import Control Order to take action against the errant importer. The jurisdiction to do so vests in the Chief Controller of Imports and Exports, it being a post-importation violation, and not with the customs." It is a settled law that so long as the goods imported are in conformity with the ITC regulations, the customs authorities are not concerned with the end use of the product. Accordingly, we are of the view that parts of graphic terminals, parts of floppy disk drives and cable etc. in essence the hardware imported by the appellants is in conformity with the ITC regulations and the findings of the lower authorities need to be set aside in this regard. However, the software viz. 75 software programmed packs containing the computer in "ultra care" "C/M & BASIC" and "Spell-binder" along with the matching software manuals meant for each type of model of computer imported by the appellants was unauthorised. Accordingly, we confirm the findings of the lower authorities in respect of the software imported by the appellants.

14. Now coming to the valuation aspect, we would like to observe that the appellants had imported three types of computers from M/s. Eagle Computers and the value of the same was shown in the bill of entry as Rs. 5,71,022.56 C.I.F. as per supplier's printed price list effect from April, 1983 and the retail price of the complete units of computers models Eagle I, Eagle II and Eagle III as US $ 1595.00, US $ 1995.00 and US $ 2995.00, respectively and as per telex dated 25th April, 1983 from the said suppliers communicating a reduction of US $ 150 from US $ 400, said to have been communicated earlier for non-supply of the software. In other words, US $ 250 was the price per set of software.

It is accepted by both the sides maximum of 40% discount on retail prices is normally offered to the wholesale buyers and the price is known as distributors price and includes after sale service and warranty. This is also corroborated by supplier's telex dated 16th April, 1983 addressed to the importers. The appellants

have also filed another telex dated 18th April, 1983 wherein it has been confirmed by the said suppliers that an additional 10% discount over and above the distributors' discount was also available to the importers for buying computer parts without system warranty. The adjudicating authority in assessing the value has deducted 250 US $ from the retail prices, whereas the appellants' contention is that the value of the software has to be deducted from the retail price less 50% discount equivalent to wholesale price less price of software for coming to the correct price of the hardware stuff. Accordingly, the revenue has arrived at the assessable value after deducting the price of software from the retail price and the figure so arrived has been deducted by 50% for coming to the retail price. We are of the view that for arriving at the correct value the following formula has to be adopted:- Retail price less 50% of the retail price = Wholesale price less value of software = hardware price.

In the reply to the show cause notice which appears on page 34 of the paper book the nett hardware price of Eagle II model with this formula has been worked out at US $ 747.50. Accordingly, we modify the value of the hardware. The appellants in their reply to the show cause notice which appears on page 34 of the paper book mentioned that the correct value of the computer hardware is US $ 57,787.50 and not US $ 67,162.50 based on the wholesale price of software at US $ 250.00 each set. Since we have accepted the formula of valuation propounded by the appellants, we order that the valuation of the hardware should be, made by the adjudicating authority in this manner.

15. Regarding the software, the appellants have not placed any evidence as to its valuation. The appellants' plea that the software can be copied from one set for programming purposes is not acceptable. The customs authorities are concerned with the value at the time of the importation. Accordingly, we confirm the value of the software arrived at by the adjudicating authority at US $ 18,750.00 FOB.16. Now coming to the aspect of fine of Rs. 10,00,000.00 in lieu of confiscation and penalty of Rs. 2,50,000.00, we would like to observe that we have not accepted the invoice value but have calculated the value from the retail price to wholesale price and after deducting the value of the software price, we have arrived at the hardware price. In terms of provisions of Section 14(l)(a) the value of imported

goods shall be deemed to be the price on which such or like goods are ordinarily sold or offered for sale, or offered delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest and the price is the sole consideration for the sale or offer for sale. In the matter before us. price list is the best available evidence on record for ascertaining the value of the goods.

Accordingly, we are adopting the value of the price list. In the foregoing paras we have held that importation of software was unauthorised in respect of ITC Policy and we have held the importation of the hardware in conformity with the Import Trade Control Policy.

17. The difference of the value of the hardware adopted by us and the invoice price is not much.

18. Keeping in view the totality of the facts and circumstances of the case, we reduce the fine in lieu of confiscation to Rs. 4,00,000.00 (Rupees four lacs only).

19. Now coming to the penalty, we would like to observe that in the foregoing paragraphs we have held the importation of hardware as authorised and regarding the importation of software, the appellants had requested for the re-exportation of the software and had also placed on record to the effect that the software which was sent with the hardware was not ordered by the appellants and the appellants were keen for sending them back. There is complete absence of the element of mens rea and the valuation of the hardware has been taken at a higher figure due to difference of opinion. The Hon'ble Supreme Court of India in the case of Hindustan Steel Ltd. v. State of Orissa reported in 1978 ELT J-159 held as under:- "No penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona fide belief that the offender is not liable to act in the manner prescribed by the statute." In view of the above judgment of the Hon'ble Supreme Court, we do not find any justification in the imposition of the penalty. The order as to the imposition of penalty of Rs. 2,50,000.00 is hereby quashed.

20. In the foregoing paras we have held that the importation of the hardware computer/parts was in conformity with the import Trade Control Policy. Accordingly, we direct the adjudicating authority to extend the benefit of notification No. 172/77-Cus., dated 8th August, 1977 as amended by notification No. 34/83-Cus., dated 1st March, 1983 and notification No. 117/80-Cus., dated 9th June, 1980 as amended by notification No. 49/83-Cus., dated 1st March, 1983 only in respect of hardware. The benefit of the notifications is not available to the appellants in respect of the software.

21. In the result, the appeal is allowed partly. The revenue authorities are directed to give consequential effect to this order.