IN THE CUSTOM, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

SOUTH ZONAL BENCH AT CHENNAI

M/s. Unitech Enterprises

Vs.

Commissioner of Customs, Chennai

Appeal No. C/288/2009

(Arising out of Order-in-Original No. 9600/2009 dated 26.8.2009 passed by the Commissioner of Customs (Seaport – Import). Chennai)

M/s. Unitech Enterprises — Appellants

Vs.

Commissioner of Customs, Chennai — Respondent

Appearance

Shri N. Viswanathan, Advocate for the Appellants

Shri Parmod Kumar, SDR, for the Respondent

CORAM

Hon'ble Dr. Chattaranjan Satapathy, Technical Member

Hon'ble Shri D.N. Panda, Judicial Member

Date of hearing : 3.2.2012

Date of Pronouncement: 2.3.2012

Final order No. 153/12 date: 2.3.2012

Per Dr. Chittaranjan Satapathy

Heard both sides at length.

BRIEF FACTS OF THE CASE

2. The brief facts of the case as recorded in the Miscellaneous Order No. 252/2010 dated 7.5.2010 are as follows:-

"The appellants in this case have been penalized to the extent of Rs. 13,70,000/- after taking note of the fact that they are habitually involved in violation of rules and regulations warranting a heavy penalty and also that the instant import is the fourth such offence committed by the appellants. The adjudicating Commissioner has also imposed a redemption fine of Rs. 10,25,000/- after confiscating the impugned goods imported by the appellants. He has also rejected the declared value of US $ 59,870 (C&F) and the redetermined the customs value to be US&69,395 (C&F) on the basis of which the assessable value has been arrived at Rs.34,15,893/-. The duty amount payable on the reassessed value is not recorded in the impugned order passed by the adjudicating Commissioner. The adjudicating Commissioner has recorded in the impugned order that the appellants requested for adjudication of the case with issue of show-cause notice and personal hearing. He has also recorded the request of the appellants that the case should be adjudicated by him taking a lenient view as the appellants had not applied for import licence for the reason that the value of the goods was insignificant. The adjudicating Commissioner has also recorded that the appellants had produced neither the manufacturer's invoice nor a Chartered Engineer's certificate from the load port confirming to Board's Circular No. 4/2008-cus. Dated 12.22008, and hence the impugned goods were examined by a local Chartered Engineer and that the value appraised by him was also accepted by the appellants, which is the basis for enhancement of value. The appellants have filed this appeal before the Tribunal challenging the enhancement of value, imposition of redemption fine and imposition of the penalty in respect of the impugned goods."

ARGUMENTS BY BOTH SIDES

3. The learned counsel Shri N. Viswanathan states that the impugned order covers some analog photocopier machines in respect of which the appellants have accepted the order. Hence the appeal is against the impugned order in so far as it relates to 201 units of old/used digital multifunction print and copying machines. He argues that the impugned machines under import are freely importable for the following reason, and hence, confiscation of the same and imposition of fine and penalty cannot be sustained:-

(i) The Bangalore Bench of the Tribunal in the case of M/s. Shivam International and M/s. Sree Maa Enterprises Vs. Commissioner of customs, Cochin in Appeal Nos. c/2477 to 2488/2010 vide order No. 405 to 416/2011 dated 27.6.2011 has held that "order to the extent of confiscation and consequent penalties challenged in respect of old/used digital multifunctional print and copier machines are incorrect". This order of the Bangalore Bench relies on the ratio of judgment of the Hon'ble Supreme court in the case of Xerox India Ltd. Vs. commissioner of customs, Mumbai-2010 (260)ELT161(SC).

(ii) The impugned Goods are classifiable under Customs Tariff sub-heading 8443 31 00 and not under other Tariff Headings Which cover photocopiers.

Hence, the import restriction placed on photocopiers cannot apply in respect of digital multifunction machines under import.

(iii) The import policy is based on classification of goods under HSN and hence same classification for import policy and Customs Tariff purposes has to be applied as held by the Tribunal in the case of Collector of Customs, Bombay Vs. Hargovindas & Co. – 1987 (29) ELT 975.

(iv) The common parlance test cannot be applied, as such test is ruled out by the Hon'ble Supreme Court's decision in the case of Akbar Badruddin Jiwani Vs. Collector of Customs- 1990 (47) ELT161(SC) as statutory definition in Customs Tariff Schedule must prevail over trade parlance. The impugned goods cannot also be brought under the category of digital photocopiers.

(v) The import policy is to protect local industry. There are no manufacturers of the impugned goods in India and the entire requirement is to be met by import, and hence there can be no rustication on import of such goods.

(vi) In the minutes of the 24th Meeting of the Technical Review Committee held on 16.11.2011 in the Ministry of Environment and Forests, it has been recorded in paragraph 5 as follows:-

> "It was also informed that in the EXIM policy, there is no specific mention about multifunction devices. There are separate ITHS codes for multifunction devices and the photocopier machines. While discussing the issue, DIT representative mentioned that the basic function of multifunction devices is for photocopying, as the import of photocopier machines is restricted, therefore import of multifunction devices also need to be placed in the same category in the policy. All the members agreed that DGFT may be requested to include the import of multifunction devices under the restricted list,"

The above paragraph indicates a need to place import of multifunction devices in the restricted category, the implication being that the import of the same is not restricted at present.

(vii) In an affidavit filed before the Madras High Court in writ Appeal No. 1445/2010, the customs authorities themselves have stated that the impugned goods are different from analog photocopier machines in paragraph 8 thereof.

(viii) In the show-cause notice there was no allegation that the impugned goods are e-waste and hence the department cannot now take a stand that these goods are restricted being e-waste as claimed in the appeal filed by the DGFT authorities before the Hon'ble Madras High Court in Writ Appeal No. 1802/2011.

4. The learned counsel further states that in view of specific. Heading for the multifunction devices in the Custom Tariff, its primary function is not relevant. It has to be covered under specific Heading since it is connectible to computer and has multiple functions. As regards enhancement of the value in the impugned order, the learned counsel adopts the ground taken

in the appeal and states that the value has been arbitrary enhanced. He also takes an alternative ground that, in case, the impugned goods are held to be liable for confiscation, the redemption fine and penalty require to be reduced as the same are very high.

5. Shri Parmod Kumar, learned that SDR states that the Department has filed appeal against the cited decision of the Bangalore Bench in the case of Shivam International (supra) in the Hon'ble Kerala High court and the department is also contemplating to file appeal against the Single Member decision of the Chennai Bench in the case of Commissioner of Customs Vs. Rasi Offset Printers and Other in batch of 19 appeals vide Orders No. 989 to 1007/2011 dated 3.8.2010 where she has followed the cited decision of the Bangalore Bench in Shivam International (supra). He, further, states that in the pending appeals before the Hon'ble Madras High Court, the licensing issue of the impugned goods in similar cases have not yet been decided but the DGFT authorities in their writ appeal against order of provisional release on payment of 25% of enhanced value in one case have submitted before the Hon'ble High Court that the impugned goods are in the category of e-waste and that those are not feely importable. He also state that application of import policy restriction and classification for customs duty ate two different matters. He states that while there is no dispute regarding classification in this case under the specific sub-heading 8443 31 00, the impugned goods are to be treated as restricted for import policy purposes being photocopiers. He also states that the printing engine and basic hardware are the same which are used for photocopying purposes.

FINDINGS

6. We have considered submissions from both sides, the case records, the legal provisions and the cited decisions. The issues for decision by us are the following:-

(i) Whether the impugned goods by the appellants declaring the same as "old and used digital multifunction print and copying machines" 201 in number, can be considered to be photocopiers and can be held to be subject to import licensing restrictions, and if so,

(ii) Whether the fine and penalty imposed are excessive, and

(iii) Whether the value determined by the customs authorities for the impugned goods is proper or arbitrary.

7. In this case, earlier in our miscellaneous order dated 7.5.2010 we had taken a prima facie view that the impugned goods were photocopier machines and subject to restriction under DGFT Notification no. 31/2005 dated 19.10.2005. Hence, we had ordered that the appellants were at liberty to clear the impugned goods on payment of duty, fine and penalty, subject to the outcome of the appeal pending before the Tribunal. Against our direction, the appellants had moved a writ petition the Hon'ble Madras High Court. By its order dated 19.7.2010, Hon'ble High Court has directed release of the impugned goods subject to the appellants paying entire duty as per the re-determined value and 50% of the redemption fine.

8. As regards the violation of the import restriction, we find that, the DGFT Notification No. 31/2005 dated 19.10.2005 is categorical and it clearly states that import of secondhand photocopier machines will only be allowed against licence. The same reads as under:-

> "S.O. (E) In exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (No. 22of 1992) read with paragraph 1.3 of the Foreign Trade policy, 2004 -09 as amended from time, the central Government hereby makes the following amended:
>
> 1. The paragraph of para 2.17 will be amended to read as follows:
>
> "Import of secondhand capital goods, including refurbished/ reconditioned spares shall be allowed freely. However, secondhand personal computers / laptops, photocopier machines, air conditioners, diesel generating sets will only be allowed against a licence issued in this behalf."
>
> This issues in public interest."

It is an admitted fact that the appellants do not have the required licence for import of secondhand photocopier machines.

9. We find that aforecited DGFT Notification No.3 1/5 was taken note of by the Hon'ble Supreme Court in the case of Atul Commodities Pvt. Ltd. Vs. Commissioner of Customs-2009 (235) ELT 385 (SC) cited by the learned counsel. In paragraph 21 of the said decision, Hon'ble Supreme Court has held as follows:-

> "one more aspect needs to be mentioned para 2.33 expressly states that import of old and used computers /second–hand computers are restricted.Para 2.33 of the handbook does not restrict photocopying machines import of photocopying machinesare expressly restricted only by notification no. 31date 19-10-2005 this itself indicates that categorization/ re-categorization cannot be done by policy circulars.Such exercise has to be undertaken by specific amendment to the policy vide Section 5of the 1992 Act in this case, Notification on 31 date 19-10-2005 indicates that the Central Government has brought in photocopying machines into the category of second-hand goods vide amendatory Notification, therefore, import of photocopying machines stand restricted only on and after 19.10.2005. In fact, if the argument of the Department is to be accepted, then there was no need to issue Notification no.31 dated 19.10.2005."

It is clear from aforecited decision of the Hon'ble Supreme Court that imports of photocopying machines are expressly restricted by Notification No. 31/2005 dated 19.10.2005, that the Central Government has brought in photocopying machines in to the category of secondhand goods by the amendatory notification and an therefore the import of photocopying machines stand restricted on and after 19.10.2005.

10. It is a fact that the impugned goods are being imported into India in large quantities. This is evident from the large number of appeals decided by different Benches of the Tribunal and number of writ petitions pending in different High Courts.We also find that in each case the number of machine imported is quite high, for example, in this case alone there is import of 201 such machines. So far the disputes were regarding the levels of fines and penalties imposed and in some case there were disputes regarding declaration of lower values. These cases have been dealt by the authorities below and the Tribunal Benches allowing clearance of such goods on payment of fines and penalties. One of us dealing with a group 9 such appeals in the case of Commissioner of Customs, Chennai Vs. Sagar Enterprises – 2011 (264) ELT 101, each involving import of large number of such machines, had observed that fine and penalties imposed earlier have not deterred the imposters from continuing to make such import. In Shivam International (supra) , the Bangalore Bench has dealt with 12 appeals and the Single Member in Chennai Bench in Rasi Offset Printers (supra), has dealt with 19 such appeals. There are 16 more appeals which have been heard by one of us and orders have been reserved. There have been many more cases in the past and many are in the pipeline, which amply illustrate the magnitude of the problem as large numbers of imports of the impugned machines have been made in each case. We also find that in all case decided prior to issue of the cited decision dated 27.6.2011 of the Bangalore Bench in Shivam International (supra) and followed by the Single Member in Chennai Bench in Rasi offset Printer (supra), (for which incidentally hearing was completed and order was reserved on 14.6.2011), all the orders passed by the different Benches of the Tribunal had upheld the import violation and consequent confiscation of the impugned goods. There were only differences in levels of fines and penalties imposed which issue was in fact elaborately discussed by the Tribunal in the case of Sagar Enterprises (supra). None of the High Court have also held to the contrary regarding violation of the import licensing condition and confusability of the impugned goods. In fact, in the present case itself, while disposing of the writ petition, the Hon'ble High Court ordered payment of 50% of the redemption fine which goes to show that not even a prima facie view was entertained that the impugned goods have not violated import licensing condition or were not liable to confiscation. If the High Court had entertained even a prima facie view that the goods are not restricted and therefore not liable to confiscation, it would not have ordered payment of part of the redemption fine. In this back ground, when all the Benches of the Tribunal had upheld confiscation of similar goods but had upheld various levels of fine and penalties, the Bangalore Bench which has passed a contrary order unsettling a settled practice and holding the impugned goods not to be attracting licensing restriction, in our respectful view, it ought to have referred the matter to a Larger Bench as a matter of judicial discipline. Infect, the Bangalore Bench itself has been imposing fines and penalties in such cases earlier.

11. Further, we find that the Bangalore Bench in the case of Shivam International (supra) has wrongly placed reliance on the Hon'ble Supreme Court's decision in the case of Xerox India (supra) in our respectful view. In the cited case, the Hon'ble Supreme Court has decided the issue of

classification of multifunctional machines for the purposes of charging customs duty. This relates to a case of import made during March September to November 199. The dispute was as to whether such machines were classifiable under Tariff Heading 8439.89 as claimed by the Department or under Heading 8471.60 as claimed by the appellants in that case. Hon'ble Supreme Court held that the impugned multifunctional machines in evolved in that case (Xerox 5779, Xerox work Centre XT 100 and Xerox work Centre XD 155 DF) would be classifiable under Heading 8471.60 which was meant for "input or output unit whether or not containing storage units in the same housing". This decision is obviously relevant to the period during which the impugned goods in that case were imported. Subsequently, the Tariff nomenclature has changed and in the present case the impugned goods are being classified under Heading 8443 31 00 for the customs duty purposes in respect of which there in no dispute between the Department and the appellants. The learned counsel has himself stated that in December 2006 the Tariff was amended and the impugned import machines are being classified without any dispute under Heading 8443 31 00 which covers "machines which perform two or more of the function of printing, copying of facsimile transmission capable of connecting to an automatic data processing machine or to a network". As such, the decision of the Hon'ble Supreme Court in the case of Xerox India (supra) is relevant for the period when there was no unique entry for the impugned goods and the classification for customs duty purposes was to be decided between two other competing entries, neither of which completely described the product in question. The ratio of the said decision in no longer relevant to decide the classification of the impugned goods when the new Heading 8443 31 00 completely describes the product and there is no question of choosing one entry over the other. Hence the reliance placed by the Bangalore Bench in the case of Shivam International (supra) is entirely misplaced as the classification of the impugned goods is not in dispute and covered by new Heading 8441 31 00. According to the legal text of the Interpretative Rule1, which forms an integral part of the Customs Tariff Act, 1975, classification is mandated to be determined according to the terms of the Heading in the first instance. In view of the fact that the terms of Heading 8443 31 00 clearly and unambiguously cover the impugned goods, there is no need to look at any of the other interpretative rules or any other criteria evolved in the past to decide upon the classification of the impugned goods. Hence, there is no scope at all to apply the ratio of the Hon'ble Supreme Court's decision in the case of Xerox India (supra), which decided the disputed classification between two competing entries 8471.60 and 8479.89 in the absence of specific Heading for the impugned goods during the earlier period for the imports made in the year 1999.

12. Moreover, as held by the Hon'ble Supreme Court in the case of Atul Commodities (supra), the import of the photocopying machines stand restricted on or after 19.10.2005. Neither in the amending Notification No. 31/2005 dated 19.10.2005 nor in the said judgment of the Hon'ble SupremeCourt, there is any reference to import restriction being limited to photocopying machines falling under any particular Tariff item. The language of the amending notification clearly says that import of capital goods shall be allowed freely, however, secondhand personal

computers/laptops and photocopier machines etc. will only be allowed against the licence issued in this behalf. It is, therefore, very clear that secondhand photocopier machines of all kinds have been placed under the restricted category. The restriction is not with reference to any particular Tariff item. The learned counsel is correct that when import restrictions are imposed with reference to HSN based Tariff items, the scope of the restriction for the licence purposes will be similar to the scope of the Tariff item for the duty purposes. Unfortunately, this argument is of no help in the present case as the Central Government has chosen to place under the restricted category secondhand photocopier machines in general and not photocopier machines classified under any particular Tariff item.

13. We also find that photocopying machines are classified under various Tariff heading. For example, electrostatic photocopying apparatus of one kind fall under the Tariff Heading 8443 39 20, electrostatic photocopying apparatus of another kind fall under 8443 39 30, other photocopying apparatus incorporating an optical system fall under Heading 8443 39 40, other photocopying apparatus of contact type fall under Heading 8443 39 50. Hence we find that photocopying machines do not have any single entry in the Tariff and further, copying machines whether or not combined with printers and facsimile machines are classified elsewhere as also machines which perform two or more of the functions of printing, copying or facsimile transmission as in the present case. In fact, the expression used in the Tariff are “photocopying apparatus”, “copying machines”, “machines which perform the function of copying” etc. whereas in the impugned DGFT Notification No. 31/2005 dated 19.10.2005, the expression used is “photocopier machines”. Hence, there is no warrant to read the expression appearing in the DGFT Notification as conforming to any one particular expression used in the Tariff as expressions are not identical and secondly, no Tariffitem is mentioned in the DGFT notification. Further, we find the ITC HS Classification of Export and Import Items, that the policy against many of these aforementioned items such as multifunction machines, electrostatic photocopying machines, other optical photocopying apparatus, other contact type photocopying apparatus, the policy provision is indicated as freely importable. This is of no significance to the dispute at hand as the ITC HS Classification Schedule is undisputedly applicable to new and original equipment and the specific provision made under paragraph 2.17 of the Import policy through the amending Notification No. 31/2005 dated 19.10.2005 is an over-riding provision which would apply to secondhand photocopier machines in general not being limited to any particular Tariff item. We have, to, therefore, accordingly interpret the expression “photocopier machines” used in context of amendment made to the EXIM policy by Notification No. 31/2005, which has been issued in the public interest to mean all kinds of photocopiers irrespective of its classification.

14. It has been argued on behalf of the appellants that there is a difference between analog photocopiers and digital photocopiers and multifunction printing and copying machines. We do not find any such distinction carved out under the aforecited notification dated 19.10.2005. It, plain and simple, restricts import of secondhand photocopier machines without a licence. It does not refer to any particular kind of photocopier nor it refers to any

specific Tariff Heading or any HSITC Heading. Therefore, the intention of the Government seems to be clear to restrict in public interest import of secondhand photocopier machines of all kinds without a licence. When the restriction is for "photocopier machines' it would take within its ambit both analog photocopier machines and digital photocopier machines. In case of both the machines, the input and the output, (that is, the material to be photocopied and the photocopy produced) are the same. Obviously, each machine adopts a different technology for processing, the latter one adopts a newer technology. In the case analog photocopier machines, the photocopying apparatus incorporates an optical system which projects an optical image of an original document on light sensitive surface which is then printed. In the case of a digital photocopier machine, the original image is scanned for converting the optical image into digital form which is then used to print the image. Even the digital copier incorporates an optical system by which the optical image is created. As such, we do not find any reason way the restriction imposed by the DGFT authorities under Notification no. 31/2005 dated 19.10.2005 should apply to photocopier machines of one kind and not apply to photocopier machines of a different kind. The analog photocopier and digital photocopier are only two different kind of photocopier. They perform the same function namely conversion of the image of the original into a photocopy, using somewhat different technologies. Because of the conversion of the optical image to digital data at the intermediate stage, the digital photocopier can be connected to ADP machines (for printing) and telephone line (for faxing) though its principal use remains photocopying. The following Table captures the similarities and differences between the two kinds of photocopier machines:-

Analog Photocopier	Digital Photocopier Machine
1. The original document is scanned to create an optical image.	1. The original document is scanned is to create an optical image
2. The image is directly projected on the photoreceptor	2. The optical image is converted to digital data which is sent to the printer engine to create the printed image on to the photoreceptor
3. The image is developed on the photoreceptor and copied on the paper	3 The image is developed on the photoreceptor and copied on the paper

15. The impugned machines described as multifunction printing and copying machines are also essentially digital photocopiers which can connected to an automatic data processing machine. The original to be photocopied is optically scanned and the image is digitalized before a copy is produced. Production of the copy of the original is achieved through printing using the digital image. Hence the printing function of the machine sub serves and is essential to produce a photocopy. If the printing function was not available in the machine, the photocopies cannot be produced. No doubt, the same

printing function can be also used for taking a print-out by giving a command from the computer to which the machine should be connected. That is no way makes the printing function totally separate from the photocopying function. While the machine would act as an output device (i.e. printer) when connected to the computer (and it would indeed be a very very costly printer compared to very efficient low cost laser printers available in the market), for the purpose of photocopying and particularly high speed photocopying, the printing function is used as a part of the process of photocopying in the sense that without it, the photocopy will not be produced.

16. We have to take judicial notice of the fact that these multifunction machines are known as photocopier machines found Almost on every street in a city. Though Xerox is particular company, earlier photocopies used to be known as Xerox machines. Similarly, when an office or an establishment today buys a photocopier particularly for larger scale high speed use, they buy a machines such as the impugned machines. In fact, these multifunction machines are on the Government of India's DGS&D rate contract list of the photocopier machines. It may not be out of place to mention that the South Zonal Bench of the Tribunal as well as the JCDR'S office located therein, bothe have processed proposals of purchase of photocopier and the quotations that have been obtainded are that of precisely these kind of machines as the impugned ones and ultimetly such machines have been bought for photocopying purpose. It is interesting that a proposal was put up to the Hon'ble President of the Tribunal by the South Zonal Bench for purchase of high capacity photocopying machine and one of the quotations received was for Canon IR 2230 Model which is similar to the ones under import. Same is the case with the JCDR;S office. These examples illustrate that when quotaiong are received and purchase are made for photocopier machines, one gets machines similar to the impugned machines.

17. As stated earlier import restriction is not in terms of the Customs Tariff Schedule, it is in general temrs and hence the restriction must be understood the way the industry and the users understand the same form the fact that these multifunctional machines are digital photocopies which require the printing function to complete the process of photocopying. All such machines are used mainly for photocopying work in offices and establishment. Our view in this regard is in accordance with the cited decision of the Hon'ble Supreme Court in the case Akbar Badruddin (supra) which holds, in Para, 53, as follows:-

> "It is, of course, well settled that in Taxing Stature the words used are a to be understood in the common parlance or commercial parlance but such a trade understanding or commercial nomenclature can be given only in cases where the word in the Tariff Entry has not been used in a scientific or technical sense and where there is no conflict between the words used in the Tariff Entry and any other Entry Tariff Schedule."

Since the said para 2.17 in the Policy has not used any expression Identical to any Tariff Entry, mush less in a scientific or technical sense, the restriction on old/used photocopier machines has to be understood in the common parlance. The learned counsel raises a point that import policy is to protect the local industry and that since there are no manufactures of the impugned goods in India, the entire requirement is met by import and there can be no restriction to import such goods. In fact import of the photocopier machines as per the policy and the ITC HS Schedule is free for the new equipment including multifunction equipment. The restriction is only in respect of secondhand photocopier machines. The understanding of the DGFT, is also that the multifunction digital machines in question are used as photocopier, photocopying being their primary function and further that these are restricted for import as seen from their Writ Appeal No. 1802/2011 filed before the Hon'ble Madras High court vide Ground (v) therefore which is as follows:-

> "It is submitted that as per Notification No 31/2005, the import of second hand photocopiers machines are restricted and will be allowed against a license issued in this behalf. Therefore digital multifunction machines functioning as photocopier besides other features will be restricted for import. The petitioner had admitted that one of the functions of the multipurpose digital photocopier is photocopy also. The restriction in Para 21.7 does not differentiate between photocopier machines in technology, feature or single/multiple uses. The mortification digital machines are used as a photocopier which is one of their primary functions. The second hand multipose photocopier is also restricted like a photocopier machine."

The above being the official view of the DGFT, the same has to be considered as final and binding as per Para 2.3 of the Policy.

18. The learned counsel has also referred to the minutes of the Technical Review Committee. In fact, the proceeding thereof is very much in favour of the Department. The representative of Information Technologies has categorically mentioned there in that the basic function of multification devices is photocopying. His stand supports the view of the Department and does not advance the case of the appellants in any way. The discussion reflected in the minutes indicates that the representative of DIT has merely suggested for a specific amendment so that the dispute of the kind that has arisen cannot arise in the future. The affidavit of the customs authorities referred to by the learned counsel also does not advance the case of the appellants. It has been merely stated therein that the impugned goods are different from analog photocopier machines which is factual. As indicated above we are of the view that both analog photocopier and digital photocopier whether stand alone or in combination with another device come under the import restriction since the restriction in 2.17 applies to all secondhand photocopier and it does not differentiate between different photocopier on the basic of technology, feature or single / multiple uses.

19. As regards the point raised by the learned counsel that in the show-cause notice there was no case made out for the goods being restricted for import as e-waste, we agree that it is so and the impugned order also does not hold the impugned foods to be e-waste and hence, we are not required to give any finding in this regard.

20. In view of our findings as above, we are of the considered view that the import policy restricting import of secondhand photocopier machines is applicable to all kinds of photocopying machines including analog photocopiers, digital photocopier and multifunction copying and printing machines whose primary function is photocopying and which requires printing for the purpose of completing the photocopy process and producing a photocopy. The expression used in the import policy is not identical to any of the expression in any of the Tariff Headings nor any particular Tariff Heading is mentioned in the import policy restriction and hence the expression "photocopier machines" in the policy is to be interpreted as commonly understood to include all those machines which are used for photocopying. As held by the Hon'ble Supreme Court in Atul Commodities (supra), the import restriction on secondhand photocopying machines apply with effect from 19.10.2005 and accordingly, all the cases decided by different Benches of the Tribunal have held photocopying machines similar to the impugned goods as restricted for import and have upheld confiscation and penalty (though there were differences about the level of fine and penalty. The said order of the Bangalore Bench in the case of Shivam International (supra) is a departure from the earlier orders of the Tribunal without making a reference to the Larger Bench apart from the fact that it wrongly relies on the ratio of the Hon'ble Supreme Court's decision in the case of Xerox India (supra) which dealt with classification dispute for the earlier period and has no application for the present when there is no classification dispute. Hence, the said order of the Tribunal in the case of Shivam International (supra) has been clearly rendered per incurium and the same cannot be taken as a precedent to be followed in our respectful view. We accordingly uphold the confiscation of the impugned secondhand goods imported without a valid licence.

21. As regards the enhancement of the value of the impugned goods by the adjudicating Commissioner from the declared value of US $ 59,870 (C&F) to US $ 69,395 (C&F), the learned counsel has not offered any arguments except referring to the grounds of appeal. Apart from that, the adjudicating Commissioner himself has recorded that the impugned goods were not accompanied by the Chartered Engineer's certificate from the load port and hence the value has been re-determined by ascertaining the value from a local Chartered Engineer. The appellants have also, vide their letter dated 21.8.2009, have accepted the value determined by the customs authorities as per the assessment of the local Chartered Engineer. As such, we uphold the valuation done by the adjudicating Commissioner.

22. As regards the fine and penalty imposed, we find that against the assessed value of Rs. 34,15,893/-,the adjudicating Commissioner has imposed a redemption fine

of Rs. 10,25,000/- and penalty of Rs. 13,70,000/- after recording that the appellants are being repeatedly importing the impugned goods without valid import licences and that this is the forth instance. The fine imposed is only 30% of the value determined by the customs authorities and the same cannot be considered to be excessive and therefore, it calls for no reduction. The question of imposing higher fine and penalty in respect of repeated offenders has been adequately dealt with by the Tribunal in the case of Sagar Enterprises (supra). The relevant extract is reproduced below:

> 11. After hearing both sides and perusal of the case records and the cited case laws, I find that there is only a short question to be decided in respect of these seven appeals. That question is whether the lower appellate authority was justified in reducing the redemption fine and penalty to a lower level of 15% and 5% (total 20% uniformly in all these cases, thereby interfering with the discretionary power exercised by the original authorities. I find that several batches of cases have been decided earlier by the Tribunal Benches at Chennai and Bangalore as evidenced from the orders cited before me. It is quite obvious that despite imposition of fines and penalties on such imports, large scale imports of these goods are taking place at ports of Chennai, Tuticorin and Cochin at undervalued prices and without necessary import licences. It is quite obvious that the low levels of fines and penalties determined by the Tribunal earlier have not proved to be effective to stop such illegal imports which are being made repeatedly contrary to the law of the land.
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> 12 I also find that the cited decision of the Bangalore Bench of the Tribunal in the case of Shri Dilip Ghelani (supra) states in paragraph 9 that "the restrication of fine and penalty to 10% and 5% has also been upheld by the Hon'ble High Court of Madras". This order does not give reference to which order of the Hon'ble Madras High Court has upheld restriction of fine and penalty to the level of 10% and 5% based on which the Bangalore Bench has reduced the fine and penalty to such lower level. In fact, the learned counsel Shri P. Saravanan who cited this decision of the Bangalore Bench was not able to either refer to or submit any decision of the Hon'ble Madras High Court in this regard.
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> 13. The only decision of the Hon'ble Madars High Court which has been shown is that of the cited decision in the case of Sai Copies (supra). The relevant extract of the same is reproduced below:
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> "There is no statutory prescription that the penalty should not be reduced by the appellate authority. Before the Tribunal the importers relied on the earlier order of the Tribunal in the case of Sri Venkatesh Enterprises vs. Commissioner of Custom, Chennai-2005(192) ELT 818, wherein the quantum of redemption fine imposed in lieu of confiscation of second hand

photocopies valued at Rs.17.7 lakhs was restricted to Rs. 2.5 lakhs and the quantum of penalty was restricted to Rs.85000/-. The same was followed in the case of the respondents also by the Tribunal. The fixation of the quantum of redemption is an exercise of discretionary jurisdiction of the authorities under the Custom Act. The court can interfere only in the circumstance in which it was demonstrated before it that the order of the Tribunal is thoroughly arbitrary, whimsical and resulting in miscarriage of justice. As already stated, the Tribunal has consistently imposed the redemption fine at 15 percent and penalty under section 112(a) at 5 percent of the value of the goods which factum has not disputed by the counsel appearing for the Department. In the above said view of the matter, we find no question of law much less a substantial question for entertaining these appeals. Hence the appeals are dismissed.'

14. From the above cited decision of the Hon'ble Madras High Court it is clear that Fixation of the quantum of redemption fine is an exercise of discretionary jurisdiction of the authorities under the Custom Act. It is also clear that the fixation of the quantum of redemption fine and penalty can only be interfered if the same is fixed in an arbitrary whimsical manner resulting in miscarriage of justice. The Hon'ble High Court has also held that there is no statutory prescription that the penalty should not be reduced by the appellate authority and also that in the Departmental appeal against the Tribunal's order in the cited case there was no question of law involved. The cited decision of the Hon'ble Madras High Court nowhere imposes a restriction on the discretion of the Customs authorities not it can be taken to authorize imposition of a low level of fine and penalty even in cases of repeated imports contravening the provision of Import Policy, mis-declaring the value of the goods as found in all these seven cases. As such it appears that the lower appellate authority was not correct in placing reliance on the aforecited decision of the Hon'ble Madras High Court in arbitrarily reducing the fines and penalties to a lower level without taking note of the fact that he was dealing with case of repeated offences and habitual offenders.

15. The higher court have always taken a stricter view in respect of Habitual offenders. For example in the case of Sophisticated Marbles (supra), the Hon'ble Bombay High court had held as follows;-

"The petition is directed against the final order dated 18th December 2003 incorporated at Exhibit-D to the petition. The challenge is at the instance of the petitioners wherein fine and penalty is levied upon for importing without the licenses.

2. Wherever petitioners import marbles without licenses, they pay fine and penalties as may be livable under the provisions of the Custom Act.

3. In the past similar consignments were imported by the petitioners and in spite of levy of fine and penalty the petitioners continued to import marble without any licence. In other words, penalty and fine did not get as deterrent to stop further illegal import. In other words, petitioners continued to indulge in illegal import of marble without license and litigation ensued the form was used to get fine and penalty reduced on technical legal pleas.

This petition is product of such illegal activities of the petitioners. An act constituting import of marble without license has given rise to the present litigation which reached up to the Tribunal. The Tribunal was pleased to allow the release of goods subject to imposition of duty redemption fine and penalty as determined by the adjudicating authority. The Tribunal has specifically observed in the order that it is clear from the facts that they fine imposed earlier did not act as deterrent to stop further illegal imports.

4. It is thus clear that the petitioners who are in the business of marble and have became a habitual importer of goods in spite of the fact that they are very well aware of the law that the importer have to be backed by a valid license. In spite of this, if the petitioners are repeatedly indulging in importing marbles without license , or subsequently obtain license to cover up illegal importer then it would be a duty of writ Court to arrest such tendency prevailing amongst the importer of the goods,. The apex court in the case of Her Shankar and Other v. Deputy Excise & Taxation Commissioner and other[1975 (1) SCC 737] ruled that the writ jurisdiction of High Court under Article 226 of the constitution of India is not intended to facilitate avoidance of legal obligation and top committee breach of law for the time being in force. The extraordinary jurisdiction of High Court under Article 226, which is of a discretionary nature and is to be exercised only to advance the interest of justice, cannot certainly be employed in aid of such persons who have no respect for the certainly be employed in aid of such persons; who have no respect for the law of land and who are deliberately indulging in committing breach thereof, This court would not be justified in invoking writ jurisdiction in favor of such persons. Writ jurisdiction is available t further the cause of regime of law not to abrogate they same. In the facts of this case the consignment confiscated by the Custom authorities cannot be allowed to be released on the license which were sought to be produced by the petitioners. The importers who are importing goods without license and then seek to validate the import by obtaining subsequent license cannot be allowed to take advantage of their own wrong. The petitioners are one of them.

5. The petition in the circumstance is dismissed in time with no order as to costs.

16. In the case of Viabha Exporter (supra) the Bombay High Court noted that the premium on import of imported diamonds in that case was around 3% only that the importer in that case could have made profit of about 3% by the illegal importers without valid license yet the Hon'ble Bombay High Court authorize3d imposition of redemption fine equal to 20% of the value of the imported diamonds with observation that the importers should not find it profitable to make the imports without proper license. The Hon'ble High Court took into account the fact that if the offender is required to pay only the amount which he has saved by not paying the premium for securing a genius license, he will never feel the pinch of being caught. He may commie same wrongs repeatedly as and when he is caught he may pay amount equivalent to the premium only. In the considered opinion of the Hon'ble High Court the redemption fine should be more than such amounts.

17. In the appeals filed by the department it is clearly mentioned that all these cases are repeated offences and that respondent are repeatedly importing second-hand digital photocopies without licenses, undervaluing the same and in one case even the quantity was found to be misdeclared. In respect of appeal No. C/70/2010 and C/71/2010 it has been indicated by the learned SDR that these are the 4th and 6th importer of the same kind by the same importers. As stated earlier, fines and penalties imposed on such importers previously have not deterred the respondent from continuing to make illegal undervalued imports. In facts the fine and penalty at somewhat higher level (together regime from about 30% to about 55%) imposed in these cases are not at all excessive as they respondent have found it still profitable to clear the goods on payments of the fines and penalties levied and have only subsequently filed appeal before the lower appellate authority. Reductions in fine and penalty granted by the said authority has only gone to further increases their profit margin.

18. Under the circumstance, I am of the considered view that the fines and penalties imposed by the original authorities in these case of repeated offences are not unreasonable or arbitrary pr whimsical considering the fact that the authorities under the law have a duty cast upon them to prevent illegal imports and effectively implement the Import Policy validity laid down by the Government and to curb undervaluation and misdeclaration apart from preventing repeated offences. Hence the lower appellate authority is totally unjustified in reducing the fines and penalties in these cases to very low level totaling 20% only. Accordingly, I set aside the impugned orders passed by the lower appellate authority in so far as they relate to lowering if redemption fines and penalties and restore the orders passed by the original authorities. All the seven departmental apples are allowed in the above items.

23. Keeping the above observation of the Tribunal in the case of Sager Enterprise (Supra) in view, while we find no justification for reducing the fine imposed, we are of the view that the ends of justice would be net if the penalty is reduced from Rs. 13, 70,000/- to Rs 6, 85,000/- () Rupees six lakhs eighty five thousand only) which comes to about 20% of the assessed. The appeal is otherwise rejected except for the reduction in the penalty amount as indicates above.

(Pronounced in open court on 02.03.2012)