

	<p style="text-align: center;"> सीमा शुल्क के प्रधान आयुक्त का कार्यालय सीमा शुल्क सदन, मुंद्रा, कच्छ, गुजरात OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS CUSTOMS HOUSE, MUNDRA, KUTCH, GUJARAT Phone: 02838-271426/271428 FAX :02838-271425, Email-group4-mundra@gov.in </p>	 सत्यमेव जयते

A. File No.	:	CUS/SIIB/SCN/13/2023-Gr 5-6
B. Order-in-Original No.	:	MCH/ADC/AKM/263/2024-25
C. Date of order	:	20.01.2025
C. Passed by	:	Amit Kumar Mishra, Additional Commissioner of Customs, Customs House, AP & SEZ, Mundra.
F. Noticee(s) / Party / Importer	:	M/s. Smart Impex Solutions
G. DIN	:	20250171MO000000E2D1

1. यह अपील आदेश संबंधित को निःशुल्क प्रदान किया जाता है।

This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129A(1) के अंतर्गत प्रपत्र सीए3-में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-

Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

“सीमा शुल्क आयुक्त) अपील (, चौथी मंजिल, हुडको बिल्डिंग, ईश्वर भुवन रोड, नवरंगपुरा, अहमदाबाद 380009”

“The Commissioner of Customs (Appeals), Mundra, 4TH Floor, Hudco Building, Ishwar Bhuvan Road, Navrangpura, Ahmedabad-380009.”

3. उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।

Appeal shall be filed within three months from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/-रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए -

Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by -

5. उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 5/- रूपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची- 1, न्यायालय शुल्क अधिनियम, 1870 के मदसं-6 के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।

The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.

6. अपील ज्ञापन के साथ ऊटी/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये। Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. अपील प्रस्तुत करते समय, सीमाशुल्क (अपील) नियम, 1982 और सीमा शुल्क अधिनियम, 1962 के सभी मामलों में पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and the Customs Act, 1962 should be adhered to in all respects.

8. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (Appeals) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Brief Facts of the Case:

M/s. Smart Impex Solutions (IEC No. BEKpj6657R), 103/88, Behind Jainex Parivahan, Village-Bhangrola, Sector-14, IMT Manesar, Gurugram, Haryana-122505 (hereinafter referred as 'Importer') filed Bill of Entry No. 6893089 dated 15.07.2023 with the help of M/s. Aura Clearance Service (hereinafter referred as 'CB'). The goods were described as 'Digital Multifunctional Device (VAKA BR 700)' having total assessable value of Rs.27,10,807/- under the CTH 84433100 in their Bill of Entry.

2. Based upon NCTC alert, Bill of Entry No. 6893089 dated 15.07.2023 filed by M/s. Smart Impex Solutions, with the help of CB, was put on hold for examination of the goods. The examination of the goods was carried out at Saurashtra CFS on 28.07.2023 and observed that the goods were stuffed in Container No. GESU5758240. Total 46 units/nos. were found which were same as declared in Bill of Entry. No concealment was observed during examination. However, *prima facie* some cleaning and scratch marks were observed on the goods which indicated that the goods might be old/used in nature. To ascertain the same, the goods were again examined vide Panchnama dated 01.08.2023 in presence of Shri Ram Bhagat Authorized representative of M/s. Smart Impex Solutions and Govt. approved Chartered Engineer Shri Tushar Zankat.

3. Investigation:

3 . 1 During the examination, goods were inspected by Chartered Engineer Shri Tushar Zankat, who vide its report dated 09.08.2023 reported that the manufacturer of the items imported was declared as 'VAKA' and Model BR700. He found these items with some used marks and opined that excellent refurbishment services were provided to these items prior to its shipment. Based upon the observations, he concluded that the items were old, used and recently refurbished. Further, as per **Para-2.31 of Foreign Trade Policy, 2023 read with DGFT Notification No. 05/2015-2020 dated 07.05.2019, Electronics and Information Technology Goods (Requirement of compulsory Registration) Order, 2021**, all electronics and IT Goods (new as well as second hand, whether or not refurbished, repaired or reconditioned) notified under the Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2021 are **restricted for import and require authorization** Import of such goods without valid authorization and without mandatory BIS certification as well as labelling is therefore, prohibited.

3.2 During the investigation, CHA-M/s. Aura Clearance Service, submitted the copy of Bill of Entry, Invoice, packing list, Bill of Lading, BIS Certificate and Sale and purchase agreement. On perusal of the documents, it was observed that in the BIS Certificate, Manufacturing Unit is Vaka Manufacturing address at FZ-LLC S01-06 SHED No. 01 AL HAMRA INDUSTRIAL ZONE-FZ RAK, UNITED ARAB EMIRATES DUBAI, and **Models->VAKA BR 100, VAKA BR 106, VAKA BR 106, VAKA BF 115, VAKA BR 700].**

3 . 3 Meanwhile/s. Smart Impex Solutions, vide letter dated 31.07.2023 requested for shifting the cargo into domestic container so as to avoid heavy detention charges which was granted to them on the same date. A Summon was issued to the Importer on 16.08.2023 to appear on 28.08.2023. However, to further facilitate the Importer, they were informed to come even before the scheduled date with prior approval of the Officer. The Importer vide its letter dated 23.08.2023 requested for adjournment. A Summon was issued again on 25.08.2023 to the Importer to appear on 04.09.2023. Shri Pawan Kumar, authorized by the

Importer appeared on 04.09.2023 for recording a Statement.

3 . 4 A Statement of Shri Pawan Kumar was recorded on 04.09.2023 under Section 108 of the Customs Act, 1962. Shri Pawan Kumar in his Statement inter alia stated that he is working as Business Development Manager; that his qualification is B.Tech and he is looking after the sales and **rental of zerox/photocopier machines** which is acquired through local purchase and import; that the Importer firm is engaged in the business of sales, service and rentals of Multifunctional Photocopier/Zerox Machines; that the importer firm was in need of some Digital Multifunctional Device for their business; that they found that the Supplier M/s. Atlantic International Trading FZ LLC, UAE is selling these products; that an agreement with the supplier was made to supply the said goods and accordingly the goods were supplied by the Supplier; that he peruse the BE and Bill of Lading, Invoice and Packing List of M/s. Atlantic International Trading FZ LLC and said that the documents are correct and goods were properly described in the documents and **payment had also been made for the new goods** that he knows that if these goods are new, import is allowed and **used goods of these items are considered as 'Restricted' for importation**; that he peruse the **Report of Chartered Engineer and agreed with the report of Chartered Engineer that goods are old and refurbished**; that this was happened due to not sending the proper goods by their supplier as per their purchase order; that they have paid the amount for the new goods however imported goods were treated as used and old goods however, they would like to rely upon some case laws as mentioned hereunder:-

- i. Supreme Court of India in SLA(C) No. 7565/2021 in case of Delhi Photocopies has granted stay over the confiscation of these goods and ordered to provisionally release on the same terms that have been indicated in all the other cases.
- ii. High Court of Madras in MP No. 24911 of 2022 and WMP Nos. 23849 & 23850 of 2022 in case of M/s. BE Office Automation Product Pvt. Ltd., Jammu directing to release the goods on payment of enhanced duty.

4. Relevant legal provisions:

The relevant provisions of law pertaining to import of goods in general, the policy & rules relating to imports, the liability of the goods to confiscation and the persons concerned to penalty for illegal importation under provisions of Customs Act, 1962 and the other laws for the time being in force are summarized as under:

4 . 1 Notification No. 05/2015-2020 Dated 07the May 2019 issued by the DGFT Import policy for Electronics and IT Goods under Schedule - I (Import Policy) of ITC (HS), 2017.

S.O.(E): In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends Note No 2(c) under the General Notes Regarding Import Policy and inserts Policy Condition No 2 under Chapter 84 and as Policy Condition No. 5 under Chapter 85 of ITC (HS) 2017 as under:

4 . 1 Notification No. 05/2015-2020 Dated 07the May 2019 issued by the DGFT Import policy for Electronics and IT Goods under Schedule - I (Import Policy) of ITC (HS), 2017.

S.O.(E): In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends Note No 2(c) under the General Notes Regarding Import Policy and inserts Policy Condition No 2 under Chapter 84 and as Policy Condition No. 5 under Chapter 85 of ITC (HS) 2017 as under:

Existing General Note No 2(c)	Amended General Note No.2 (c)
(c) Import policy for electronics and IT Goods:	(c) Import policy for Electronics and IT Goods:

<p><i>The import of Notified Goods under the "Electronics and Information Technology Goods (requirement of Compulsory Registration) Order, 2012, as amended from time to time, will be allowed subject to registration with the Bureau of Indian Standards (BIS), or on specific exemption letter from Ministry of Electronics and Information Technology (MeitY) for a particular consignment, as per provisions of Gazette Notification SO No. 3022 dated 11.09.2013. Accordingly, import of unregistered/ non- compliant notified products as in CRO, 2012, as amended is "prohibited".</i></p> <p><i>Import consignments without valid registration with BIS shall be re-exported by the importer failing which Customs shall deform the goods and dispose them as scrap under intimation to MeitY.</i></p>	<p><i>The import of Goods (new as well as second hand, whether or not refurbished, repaired or reconditioned) notified under the "Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012, as amended from time to time, is prohibited unless they are registered with the Bureau of Indian Standards (BIS) and comply to the 'Labelling Requirements' published by BIS, as amended from time to time', or on specific exemption letter from Ministry of Electronics and Information Technology (MeitY) for a particular consignment, as per provisions of Gazette Notification SO No. 3022 dated 11.09.2013.</i></p> <p><i>The importer shall re-export such prohibited Goods reaching Customs Ports else the Customs Authorities shall deform the goods beyond use and dispose of the goods as scrap under intimation to MeitY.</i></p>
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Policy Condition: As under Chapter 84 and 85 of ITC (HS)2017:

The import of Goods (new as well as second hand, whether or not refurbished, repaired or reconditioned) notified under the "Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012, as amended from time to time, is prohibited unless they are registered with the Bureau of Indian Standards (BIS) and comply to the 'Labelling Requirements' published by BIS, as amended from time to time', or on specific exemption letter from Ministry of Electronics and Information Technology (MeitY) for a particular consignment, as per provisions of Gazette Notification SO No. 3022 dated 11.09.2013.

The importer shall re-export such prohibited Goods reaching Customs Ports else the Customs Authorities shall deform the goods beyond use and dispose of the goods as scrap under intimation to MeitY.

4.2 Further, Para 2.31(II) of Foreign Trade Policy, 2023 is reads as under -

Sl. No.	Categories of Second-Hand Goods	Import Policy	Conditions, if any
I. Second-Hand Capital Goods			
I(a)	<ul style="list-style-type: none"> i. Desktop Computers; ii. Refurbished / re-conditioned spares of re-furbished parts of Personal Computers/ Laptops; iii. Air Conditioners; iv. Diesel generating sets 	Restricted	Importable against Authorisation
I(b)	All electronics and IT Goods notified under the Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time	Restricted	<ul style="list-style-type: none"> i. Importable against an authorization subject to conditions laid down under Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time.

			ii. Import of unregistered/non-compliant notified products as in CRO, 2012 as amended from time to time is "Prohibited"
I(c)	Refurbished / re-conditioned spares of Capital Goods	Free	Subject to production of Chartered Engineer certificate to the effect that such spares have at least 80% residual life of original spare
I(d)	All other second-hand capital goods {other than (a) (b) & (c) above}	Free	
II	Second Hand Goods other than capital goods	Restricted	Importable against Authorisation
III	Second Hand Goods imported for the purpose of repair/refurbishing / reconditioning or re-engineering	Free	Subject to condition that waste generated during the repair / refurbishing of imported items is treated as per domestic Laws/ Rules/ Orders/ Regulations/ technical specifications/ Environmental / safety and health norms and the imported item is re-exported back as per the Customs Notification.

4.3 Capital goods defined under Foreign Trade Policy is reproduced asunder:

"Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological up- gradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.

4.4 Section 2(25):

"Imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

Section 2(33):

"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;

4.5 Section 46 of the Customs Act, 1962:

Entry of goods on importation. - (1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting [electronically] to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner:

Provided further that] if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1) before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home

consumption or warehousing:

Provided that a bill of entry may be presented within thirty days of the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

Provided further that where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.]

(4) The importer while presenting a bill of entry shall 6[* * *] make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

4.6 Section 111 of the Customs Act, 1962.

Confiscation of improperly imported goods,

The following goods brought from a place outside India shall be liable to confiscation:

*(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, **contrary to any prohibition imposed by or under this Act or any other law for the time being in force;***

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;

4.7 Section 112 of the Customs Act, 1962

Penalty for improper importation of goods, etc.

Any person, —

- a. *who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or*
- b. *who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,*
 - i. *in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;*
 - ii. *in the case of dutiable goods, other than prohibited goods, to a penalty [not exceeding the duty sought to be evaded on such goods or five thousand rupees], whichever is the greater;*
 - iii. *in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;]*
 - iv. *in the case of goods falling both under clauses (i) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and*

the value thereof or five thousand rupees], whichever is the highest;]

v. *In the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]*

5. *Outcome of the Investigation:*

- i. The goods viz. 'Digital Multifunctional Device' imported by the Importer are found used and refurbished in view of the Chartered Engineer's Report; Importer is also agreed with the Chartered Engineer's Report. Importer have deliberately not mentioned the description of goods as 'old and used Refurbished Digital Multifunctional Device' and made willful misstatement, while filling the bill of entry. Provisions of Section 46 (4) of the Customs Act, 1962, warrants the importer to make and subscribe to a declaration as to the truth of the contents of Bill of Entry and the provisions of Section 46 (4A), inter-alia, warrants the importer, who presents the Bill of Entry, to ensure the accuracy and completeness of the information given in the Bill of Entry. Therefore, this act of misdeclaration of description with an intent to wrongfully evade policy restrictions has contravened the provisions of Section 46 (4) and Section 46 (4A) of the Customs, Act 1962.
- ii. such used and refurbished goods comes under the category of **second-hand goods** and has been mentioned as 'Restricted' under Para-2.31 of the Foreign Trade Policy, 2023;
- iii. such restricted second-hand goods can be imported on Authorization only as defined under para 2.31 of the Foreign Trade Policy, 2023 and the Importer failed to submit any Authorization in respect of the said Import and thus the said import is considered as unauthorized import which makes the said imported goods liable for confiscation under Section 111(d) and 111(m) of the Customs Act, 1962;
- iv. the importer has rendered themselves liable for penalty under Section 112 of the Customs Act, 1962 for contravention of the provisions of law as discussed above;

6. Therefore, M/s. Smart Impex Solutions, 103/88, Behind Jainex Parivahan, Village-Bhangrola, Sector-14, IMT Manesar, Gurugram, Haryana- 122505 were hereby called upon to Show Cause Notice within thirty days from the date of receipt of this notice to the Addl. Commissioner of Customs, First Floor, Port User Building, Custom House, Mundra, Kachchh, Gujarat-370421 as to why

- i. the said goods viz. 'Digital Multifunctional Device', valued at Rs.27,10,807/-, imported by them, which are found used and refurbished should not be considered as 'un-authorized' second hand goods and 'Restricted Goods' as defined under Para-2.31 of the Foreign Trade Policy, 2023 as they failed to produce any authorization in this respect from the competent authority;
- ii. such un-authorized, restricted goods should not be confiscated under Section 111(d) and 111(m) read with Section 2(25) and Section 46 of the Customs Act, 1962;
- iii. they should not be penalized for importing such restricted, unauthorized goods under Section 112(a)(i) of the Customs Act, 1962 for contravention of the provisions of law as discussed above;

7 . The case was earlier adjudicated vide O-I-O No. MCH/ADC/AK/248/2023-24 dated 05.02.2024, wherein noticee filed appeal in terms of Section 128 of the Customs Act, 1962. The learned Commissioner (Appeals) has allowed the appeal by way of remand to the adjudicating

authority who shall cause detailed examination of goods as per CBIC Circular 07/2020-Cus. Dated 05.02.2024 and pass the speaking order afresh after following principles of natural justice.

8. Records of Personal Hearing:

Shri B L Yadav, consultant appeared for personal hearing through virtual mode on 18.10.2024, he has requested for re-examination of goods according to Circular 07/2020-Cus. Dated 05.02.2024 and as per remand Order-In-Appeal issued by Commissioner (Appeal). He has also requested for some time to submit written submission. Re-examination of goods was carried out at Saurashtra CFS, Mundra on 28.11.2024 in presence of Shri Mehul Gadhvi authorized representative of the importer, Shri Ajayrajsinh Jhala, Empanelled Chartered Engineer and representative of Saurashtra CFS, Mundra. After examination, Shri B L Yadav, consultant appeared for Personal Hearing scheduled on 26.12.2024 through virtual mode and oral submissions were made by him on behalf of the notice. In addition, written submissions were also made by Importer vide their letter dated 28.12.2024.

9. Written Submissions of the Importer

The importer vide their letters dated 21.10.2024 and 28.12.2024 filed their written submission. A brief of the submission of the importer is reproduced as under:

- i. The learned Commissioner (Appeals) have upheld the confiscation of the impugned goods on the ground of mis-declaration and restriction under FTP.
- ii. It is humbly submitted that the goods be re-examined by the Chartered Engineer for the purpose of valuation etc. as held by the learned Commissioner (Appeals) and the learned Commissioner (Appeals) remanded the case for fresh adjudication.
- iii. The learned Commissioner (Appeals) have not denied the provisional release of the impugned goods and the release of the impugned goods on payment of fine as per law. In the catena of decisions of the higher authorities MFDs have been held to be liable for release on payment of duty, fine and penalty and the higher authorities held that the identical goods have been provisionally released in various decisions as the matter whether the goods are prohibited or not as per Meity Notification dated 01.04.2020 and dated 18.03.2021 are under consideration of higher authorities (the Hon'ble Supreme Court and various High Courts).
- iv. For clearance of these old and used goods the importer relies upon some case laws as mentioned as follows. (i) Supreme Court of India in SLA(C) No. 7565/2021 in case of Delhi Photocopies has granted stay over the confiscation of these goods and ordered to provisionally release on the same terms that have been indicated in all the other cases. (ii) High Court of Madras in MP No. 24911 of 2022 and WMP Nos. 23849 & 23850 of 2022 in case of M/s. BE Office Automation Product Pvt. Ltd., Jammu directing to release the goods on payment of enhanced duty.
- v. The Hon'ble Supreme Court of India in SLA(C) No. 7565/2021 in case of Delhi Photocopies has granted stay over the confiscation of these goods and ordered to provisionally release on the same terms that have been indicated in all the other cases. (ii) High Court of Madras in WP No. 29673 of 2023 in case of M/s. Simple Machines directed to release the goods by way of provisional release on payment of enhanced duty
- vi. The learned Chartered Engineer failed to certify the actual/depreciated value of the impugned goods. Charging of the GST on the value of new goods is wrong and that the GST is to be assessed on the actual/depreciated value of the impugned goods.
- vii. It is well settled that the impugned MFDs are not manufactured in India and thus the

same has been allowed to be imported in old and used condition subject for the above said restriction of authorization from DGFT. The Noticee has applied to DGFT for issue of authorization but the DGFT has not responded as yet. The copy of letter written to DGFT is submitted enclosed. Further, the matter of non-issue of authorization was brought to the Notice of the Hon'ble Supreme Court also in the case of Atul Automation (supra) reported as Commissioner of Customs Vs. M/s. Atul Automation Pvt. Ltd. reported in 2019 (365) E.L.T. 465 Supreme Court wherein also the old and used MFDs were imported without authorization and the import of said goods was restricted requiring authorization from DGFT. The same position is in the present case. Hon'ble Supreme Court in that case directed the Customs to release the goods provisionally leaving it to the DGFT whether to confiscate the goods or not.

- viii. Even otherwise, even if there is any violation of the policy, it is well settled that action for violation of any of the provisions of the Foreign Trade Policy is to be taken by the DGFT and not by the Customs department. In case the customs is of the opinion that there is violation of any of the provisions of the Foreign Trade Policy, the Customs department is required to refer the matter to DGFT before taking any action. There is nothing on record to show that any reference in this regard was made by Customs to DGFT and that the opinion of DGFT was sought.
- ix. The impugned goods are not liable to confiscation on the ground of violation of Para 2.31 of the Foreign Trade Policy. BIS certificate is required for the import of the impugned goods, multifunction photocopier/printer under the provisions of Electronics and IT (requirement for compulsory registration) Order, 2012. The manufacturer and suppliers of the impugned goods have got themselves registered under BIS in respect of the impugned goods. Hence, the impugned goods are not prohibited goods. The appellant relied on the 2021 (9) TMI 770 - CESTAT CHENNAI- COMMISSIONER OF CUSTOM CHENNAI VERSUS M/S. SP ASSOCIATES, SRK OVERSEAS, DELHI PHOTOCOPIERS, COPIERS, CITY OFFICE EQUIPMENTS, ATUL AUTOMATION PVT. LTD. AND SKYLARK C MACHINES.
- x. The learned Additional Commissioner in the impugned Order-in-Original dated 02.02.2004/05.02.2004 wrongly relied on the order in the case of Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Ors: (1970) 2 SCC 728 it was held that the words 'any prohibition' mean 'every prohibition' and that restriction is also a type of prohibition' In S.B. International Ltd. And Ors. v. Asstt. Director General of Foreign Trade and Ors.: (1996) 2 SCC 439, it was held that the license being a condition precedent for importing restricted goods, any violation of this condition would render the goods as prohibited goods. More recently, the Supreme Court of India in UNION OF INDIA & ORS V M/S. RAJGROW IMPEX LLP & ORS [Civil Appeal NO 2219/2021@ SLP (C) No 1037 of 2021] held that any goods imported in contravention of a license is Prohibited and are to be absolutely confiscated, with the only relaxation being re- export of goods after payment of redemption fine and penalty. In case of judgement of Supreme Court of India in UNION OF INDIA & ORS. V M/S. RAJGROW MPEX LLP & ORS [Civil Appeal 2219 of 2021 @ SLP (C) No 1037 of 2021].
- xi. Even if the goods were liable to confiscation an option to redeem the same for home consumption on payment of fine is required to be given as the impugned goods are not prohibited goods
- xii. Even if presumed that the said goods are prohibited, the learned Additional Commissioner has the discretion to give or not give an option for redemption of goods but after giving an option to redeem the impugned goods on payment of fine. He had no authority to impose conditions for redemption. Reliance was placed on the following case laws- a.) 1994(72)

ELT 724(Tribunal) b.) 2001(138) ELT 724(Tribunal) As per settled case laws the impugned goods are liable to be redeemed for home consumption on payment of fine of 10% and penalty of 5%.

- xiii. The Hon'ble Tribunal in the case of B.E. Office Automation Products Pvt. Ltd. v.CC (Prayv Amritsar vide Final Order No. C/A/477- 188/2012-CU[DB] dated 25.06.2012 reduced redemption fine to 10% and penalty to 5%. It is well settled that judicial discipline should be followed by all the judicial and quasi-judicial authorities and that the decisions of the higher authorities are binding on the subordinate authorities. For the view that the order of the higher authorities are binding, the Noticee relies on the following case laws. a.) Union of India v. Kamlakshi Finance Corporation Ltd.- 1991 (55) ELT 433 (SC).
- xiv. Further in case of 2022 (2) TMI 367 - CESTAT CHANDIGARH- BE OFFICE AUTOMATION PRODUCTS PVT LTD VERSUS C.C. ICD PATPARGAON was held that the impugned goods-old and used MFDs are not prohibited and ordered to release the goods for home consumption on payment of fine and penalty.
- xv. The Hon'ble Tribunal in the case of Value Marks Traders Pvt. Ltd. v. Commr of Customs - 2019 (369) E.L.T. 721 (Tri. - Chennai) held that as there is no absolute ban on import of MFDs, there is no reason as to why option should not be given for redemption of the same on payment of fine.
- xvi. In the Final Order 21020/2019 DATED 19.11.2019 by the Hon'ble CESTAT in the case of Pypyte Techserve Pvt. Ltd. V. Commissioner of Customs reported in 2019 (11) TMI 906 CESTAT BANGALORE old and used MFDs were allowed to be cleared for home consumption on payment of redemption fine of 10%, duty and penalty.
- xvii. The Hon'ble Supreme Court in the case of Delhi Photocopiers (SLA 7565/2021) stayed the confiscation of the goods imported after amendment of CRO on 18.03.2021 and ordered to release the said goods provisionally. The importer vide their letter dated 07.11.2023 submitted their request letter for provisional release of the imported goods. The importer submitted that they had applied for the DGFT license. In the absence of the DGFT License. The importer relying on the Supreme Court of India's ruling in Civil Appeal No. 1057 of 2019 titled as Commissioner of Customs versus M/s. Atul Automations Pvt. Ltd. Also, relied on SLP No. 7565/2021 in the case of M/s. Delhi Photocopiers vs. The Commissioner of Customs (Gr.5) Chennai-II & Ors wherein the Apex Court allowed for provisional release of impugned goods as of the importer in similar circumstances as of the importer's.
- xviii. In view of the above it is prayed that the impugned goods may please be allowed to be released on payment of redemption fine and penalty or for the time being released provisionally and detention and demurrage charges be waived.

DICUSSION AND FINDINGS

10. I have carefully gone through the Show Cause Notice dated 13.10.2023, defence replies filed by the noticees oral submissions made during the course of personal hearings as well as available records of the case, I find that principles of natural justice as provided in Section 122A of the Customs Act, 1962 have been complied with and therefore, I proceed to decide the case on the basis of documentary evidences available on records.

11. I find that importer i.e. M/s Smart Impex Solutions filed B/E No. 6893089 dated 15.07.2023 for clearance of 'Digital Multifunctional Device (VAKA BR 700)' through their Customs Broker, M/s. Aura Clearance Service. Total declared assessable value of the goods is Rs. 27,10,807/-.

12. Chartered Engineer i.e. Shri Tushar Zankat, CE REG. No. AM187438-4 has given CE report Ref. CE/TZ/MUN/AUG-017/2023-24 dated 09.08.2023 wherein, he mentioned that goods are old, used and recently refurbished.

13. Re-examination of goods was carried out at Saurashtra CFS, Mundra on 28.11.2024 in presence of Shri Mehul Gadhwani authorized representative of the importer, Shri Ajayrajsinh Jhala, Empanelled Chartered Engineer and representative of Saurashtra CFS, mundra. Shri Ajayrajsinh Jhala, Empanelled Chartered Engineer, thoroughly inspected the machines. After physical and visual examination of the goods informed that goods appear to be refurbished. Shri Ajayrajsinh Jhala further vide his report dated 19.12.2024 reported that: The goods are Old and Used, Refurbishments, Cleanings & bought back to excellent condition very near to the New Machine. Based on wear-tear, generation of technology and present condition and status of goods, the total current estimated average C&F value assessed by CE of Identical/Similar goods in the market, in his considered opinion, the values furnished appears to be (Average Approx.) 32,200 USD. Assessable value of goods as per CE report, after adding insurance, comes out to be Rs. 27, 10,807/-.

14. In view of above, I find that the importer has mis-declared the description of goods of the imported goods. Importer has not mentioned the goods as 'Old & Used Refurbished Digital Multifunctional Device'. Therefore, the goods are liable for confiscation under section 111(m) of the Customs Act, 1962.

15. Before deciding the issues, it is appropriate to discuss the relevant legal provisions, Para 2.31(II) of Foreign Trade Policy, 2023 regarding import of second hand goods which is produced here as under:

Para 2.31(II) of Foreign Trade Policy, 2023:

Sl. No.	Categories of Second-Hand Goods	Import Policy	Conditions, if any
I. Second-Hand Capital Goods			
I(a)	i. Desktop Computers; ii. Refurbished / re-conditioned spares of re-furbished parts of Personal Computers/ Laptops; iii. Air Conditioners; iv. Diesel generating sets	Restricted	<i>Importable against Authorisation</i>
I(b)	<i>All electronics and IT Goods notified under the Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time</i>	Restricted	i. <i>Importable against an authorization subject to conditions laid down under Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time.</i> ii. <i>Import of unregistered/non-compliant notified products as in</i>

			<i>CRO, 2012 as amended from time to time is "Prohibited"</i>
I(c)	<i>Refurbished / re-conditioned spares of Capital Goods</i>	<i>Free</i>	<i>Subject to production of Chartered Engineer certificate to the effect that such spares have at least 80% residual life of original spare</i>
I(d)	<i>All other second-hand capital goods {other than (a) (b) & (c) above}</i>	<i>Free</i>	
II	<i>Second Hand Goods other than capital goods</i>	<i>Restricted</i>	<i>Importable against Authorisation</i>
III	<i>Second Hand Goods imported for the purpose of repair/refurbishing / reconditioning or re-engineering</i>	<i>Free</i>	<i>Subject to condition that waste generated during the repair/refurbishing of imported items is treated as per domestic Laws/ Rules/ Orders/ Regulations/ technical specifications/ Environmental / safety and health norms and the imported item is re-exported back as per the Customs Notification.</i>

I find that the imported goods are 'old and used Refurbished Digital Multifunctional Device' and as per para 2.31 of Foreign Trade Policy, goods require authorization from DGFT. Importer at the time of recording the statement on 04.09.2023 stated that used items are considered as 'Restricted' for importation and he perused and agreed with the report of Chartered Engineer that goods are old and refurbished and also stated that their supplier has not sent the proper goods as per their purchase order. Importer neither during the course of investigation nor during the course of adjudication have submitted authorization license for import of Old and Refurbished Digital Multifunctional Device. I find it of utmost importance to mention that there is a rationale, logic and principle behind imposition of a restriction. Obviously, there is no leeway in observance of the conditions made necessary for import of such restricted items which have to be complied scrupulously. I note it with concern that in the case before me, importer has failed to overcome the barrier imposed by Government in the form of an authorization from DGFT. I find that it is not in dispute that the importer is not in possession of the necessary authorization from DGFT. Further, it is also not in dispute that goods are Old & Used which is certified by Chartered Engineer and also accepted by importer.

16. In view of above, I find that the importation of impugned goods is restricted as per import policy issued by DGFT. Section 3(3) of Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as FT (D&R) Act, 1992) states that all goods which are prohibited, restricted or regulated (subject to exception, if any) for import or export, by an order issued under Section 3(2) of FT (D&R) Act, 1992 shall be deemed to be prohibited under Section 11 of the Customs Act, 1962. Thus, if goods are restricted or regulated for import or export, they are prohibited goods even if there is no complete prohibition and in the instant case the imported goods are restricted as per import policy and imported without any licence issued by DGFT, thus, are "prohibited goods". The impugned goods are restricted goods for import which have been imported without fulfilling the conditions for import become prohibited goods in terms of section 2(33) of Customs Act, 1962.

17. I also find that in various judgments by higher judicial forums it has been held conclusively that if any import is 'Restricted' contingent on fulfilment of a condition or obtaining of a license, then in the absence of such a license or unfulfillment of the condition precedent, the import becomes Prohibited. In the case of **Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Ors: (1970) 2 SCC 728** it was held that the words 'any prohibition' mean 'every prohibition' and that restriction is also a type of prohibition. In **S.B. International Ltd. And Ors. v. Asstt. Director General of Foreign Trade and Ors.: (1996) 2 SCC 439**, it was held that the licence being a condition precedent for importing restricted goods, any violation of this condition would render the goods as prohibited goods. More recently, the Supreme Court of India in **UNION OF INDIA & ORS. V M/S. RAJGROW IMP LLP & ORS [Civil Appeal NO 2219 of 2021 @ SLP (C) No 1037 of 2021]** held that any goods

imported in contravention of a license is Prohibited and are to be absolutely confiscated, with the only relaxation being re-export of goods after payment of redemption fine and penalty.

18.1 In case of judgement of Supreme Court of India in UNION OF INDIA & ORS. V M/ RAJGROW MPEX LLP & ORS [Civil Appeal NO 2219 of 2021 @ SLP (C) No 1037 of 2021] was held that:

"67.1..... While answering the question, this Court held that any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions. This Court further underscored that "any prohibition" means every prohibition; and restriction is also a type of prohibition. This Court, *inter alia*, said, -

11.... While elaborating his argument the learned Counsel invited our attention to the fact that while Section 111(d) of the Act uses the word "prohibition". Section 3 of the Imports and Exports (Control) Act,1947, takes in not merely prohibition of imports and exports, it also includes "restrictions or otherwise controlling" all imports and exports. According to him restrictions cannot be considered as prohibition more particularly under the Imports and Exports (Control) Act, 1947, as that statute deals with "restrictions or otherwise controlling" separately from prohibitions. We are not impressed with this argument. What Clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that Section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words, all types of prohibitions. Restriction is one type of prohibition...."

67.3 While considering the import of the definition of "prohibited goods" in Section 2(33) and of Section 11 of the Customs Act, this Court referred to the following exposition in the case of Om Prakash Bhatia (supra): -

"10. From the aforesaid definition, it can be stated that: (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods...."

67.4.1. In the case of **Atul Automations** (supra), the goods imported without authorisation were found to be not 'prohibited' but 'restricted' items for import and

the orders for their release with payment of fine in lieu of confiscation were approved. However, a close look at the factual aspects puts it beyond the pale of doubt that therein, **this Court has neither laid down the law that in every case of import without authorisation, the goods are to be treated as restricted and not prohibited nor that the goods so imported without authorization are always to be released on payment of redemption fine.**

Section 111 (d) says that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions "prohibiting", "restricting" or "otherwise controlling," we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words, all types of prohibitions, restriction is one type of prohibition.

18.2 I find that It is cleared that the goods in question are improperly imported and fall in the category of 'prohibited goods', the provisions contained in Chapter XIV of the Customs Act, 1962 come into operation and the subject goods are liable to confiscation apart from other consequences - A bare reading of the provision of *Section 125(1) of the Customs Act, 1962* makes it evident that a clear distinction is made between 'prohibited goods' and 'other goods'. It has rightly been pointed out, the latter part of Section 125 obligates the release of confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of this provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this provision that if the Adjudicating Authority does not choose to give such an option, the result would be of absolute confiscation. As discussed above, the imported goods would appropriately constitute to be "prohibited goods", there remains no issue for permitting the release of goods provisionally as requested by the importer. Further, in the facts and circumstances of the case, I don't find it appropriate to exercise discretion under section 125 of the Customs Act, 1962 to give the importer an option to redeem the goods on payment of redemption fine.

18.3 I find that said importer has failed to ensure compliance with respect of the restriction imposed through the Import Policy. Further, any prohibition referred to under section 111(d) of the Customs Act, 1962 applies to every type of prohibition. That prohibition may be complete or partial. It is very settle law that any restriction on import or export is to an extent a "Prohibition" and therefore the expression "any Prohibition" in Section 111(d) of the Customs Act, 1962 includes restriction. Restriction is one type of prohibition if policy condition is not fulfilled/complied. In the instant case, the goods do not fulfil the condition for their import as they violate the condition imposed by Import Policy as discussed above. Therefore, I find that the acts and omissions of the importer have rendered the said goods liable for confiscation under section 111(d) of the Customs Act, 1962. Hence, I conclude that importer has failed to ensure compliance with the restriction or prohibition under rules, law and Customs Act, 1962 and failed to discharge obligation cast upon them and therefore, I find that importer has rendered themselves liable for penal action under Section 112(a)(i) of the Customs Act, 1962.

18.4 As discussed above, I find that any goods imported in contravention of a license are prohibited and are to be absolutely confiscated. As the subject goods have been found to be

"prohibited" and liable for confiscation, I am justified in declining the request of the importer for provisional release of goods.

19. Hence, in view of the above discussion, I pass the following order.

Order

- i. I hold the impugned goods are liable for confiscation under Section 111 (d) & 111(m) of the Customs Act, 1962 of value Rs. 27,10,807/- . However, I give an option to the importer to re-export the same on payment of redemption fine of Rs. 2,50,000/. (Rupees Two Lakhs Fifty Thousand Only) under Section 125 of the Customs Act, 1962 in lieu of confiscation. The re-export to be made within a period of 120 days from the date of receipt of this order. However, if the importer does not submit any documents/ willingness to send back/ re-export the impugned goods within 120 days from receipt of this order, the said impugned goods would be liable for absolute confiscation and further action as per the instructions and guidelines contained in CBIC disposal Manual, 2019.
- ii. I also impose a penalty of Rs. 2,00,000 (Rupees Two Lakhs Only) on the importer under Section 112 (a) (i) of the Customs Act, 1962.
- iii. This order is passed without prejudice to the any other action which may be contemplated against the importer or any other person in terms of any provision of the Customs Act, 1962 and/or any other law for the time being in force.

20. This order is passed without prejudice to the any other action which may be contemplated against the importer or any other person in terms of any provision of the Customs Act, 1962 and/or any other law for the time being in force.

21. Show Cause Notice No. CUS/SIIB/SCN/13/2023-Gr 5-6-O/o Pr Commr- Cus-Mundra dated 13.10.2023 is hereby disposed off.

Signed by
Amit Kumar Mishra

Date: 20/01/2025 15:54:43
ADDITIONAL COMMISSIONER

ADC/JC-II-O/o Pr Commissioner-Customs-Mundra

To,
M/s. Smart Impex Solutions,
103/88, Behind Jainex Parivahan, Village-Bhangrola, Sector-
14, IMT Manesar, Gurugram, Haryana-122505.

Copy to:

1. The Deputy Commissioner of Customs (RRA Cell/TRC), Custom House, Mundra.
2. The Deputy Commissioner of Customs (EDI), Custom House, Mundra.
3. Guard file.