

(2009) 07 CAL CK 0091**Calcutta High Court****Case No:** Writ Petition No. 607 of 2009

Rahul Industrial Enterprises Pvt.
Ltd.

APPELLANT**Vs**

Union of India (UOI)

RESPONDENT**Date of Decision:** July 1, 2009**Acts Referred:**

- Customs Act, 1962 - Section 110A, 111(M), 124, 125, 49

Citation: (2010) 256 ELT 551**Hon'ble Judges:** Indira Banerjee, J**Bench:** Single Bench**Advocate:** Ramesh Chowdhury, for the Appellant; Roy Chowdhury, for the Respondent**Judgement****@JUDGMENTTAG-ORDER**

Indira Banerjee, J.

The Court: In this writ petition, the petitioners have prayed for orders on the respondent authorities to inter alia permit provisional clearance of the consignment imported by the petitioners under the Bill of Entry No. 559059 dated 9th June, 2009, upon furnishing of security and/or execution of bond, in terms of the provisions of the Customs (Provisional Duty Assessment) Regulations 1963, and other consequential orders.

- On 12th June, 2009, the Customs Authorities passed an order of examination of the goods and withheld release thereof.
- Mr. Ramesh Chowdhury appearing on behalf of the petitioner submitted that the goods should be released u/s 110A of the Customs Act upon deposit of penalty, on such terms and conditions as the Commissioner may require.
- Mr. Roy Chowdhury appearing on behalf of the respondent authorities, however, submitted that the petitioner was apparently guilty of mis-declaration of the goods.

Samples taken from the consignment were produced in Court. The two containers were apparently of MP 3 Player with FM Radio, Voice Recorder, Video Photo & Book etc. The goods were, however, declared as computer parts.

5. It is not for this Court to decide whether the goods imported are, in fact, computer parts or digital music players. The printed cartons are apparently of digital music players.

6. Mr. Roy Chowdhury points out that the goods are liable to be confiscated u/s 111(M) of the Customs Act, 1962. u/s 124 of the Customs Act, 1962, it is incumbent upon the Customs Authorities to issue show-cause notice before confiscation of the goods. The owner of the goods has the option u/s 125 to pay such fine as the concerned officer thinks fit, in lieu of confiscation, but the proviso to the aforesaid Section imposes a limit on the fine that might be imposed. The fine is not to exceed the market price of the goods confiscated, as rightly pointed out by Mr. Roy Chowdhury. The market value of the imported goods has to be ascertained.

7. My attention has also been drawn by Mr. Chowdhury to Circular No. 22/2004-Cus., dated 3-3-2004, the relevant paragraph whereof is extracted herein below:

The matter has been examined by the Board. It may be mentioned that in case of classification disputes, by & large, option is given for provisional clearance/assessment, if the inquiries are going to take time. However, the Board desires that a disputed or offending consignment should also not be held up unless its import/clearance is totally prohibited or banned under any law for the time being in force [E.g. PFA, CITES, Weight & Measures Act, etc.] or where prosecution is contemplated. At most, samples should be drawn and consignment should be allowed to be cleared on provisional basis as a matter of right. This will prevent congestion at ports and warehouses. Adequate B.G./security may be taken to safeguard revenue (including possible fine and penalty). In case where it is decided to detain the consignment action should be taken to shift the same to a Customs Warehouse u/s 49 of the Customs Act, 1962 [Board" Circular No. 84/95-Cus, dated 25-7-95 may be referred to -1995 (79) E.L.T. T12

8. Mr. Chowdhury also referred to a judgment of the Central Excise & Service Tax Appellate Tribunal, herein after referred to as the CESTAT in Vicco Laboratories v. Commissioner of Central Excise, Goa & Thane reported in 2007 (218) E.L.T. 129 holding that advertisement and packing material could not be considered for determining the real nature and character of the product for classification. The aforesaid judgment of the Tribunal is, according to Mr. Roy Chowdhury, binding on the respondent authorities.

9. There can, however, be no question of directing release of the goods at this interim stage. Advertisement and packing materials may or may not be considered for determining the real nature and character of the product for classification. A misdescription in the packaging material cannot absolve an importer of any liability.

The matter would, however, have to be adjudicated by the concerned authorities prescribed under the Customs Act in accordance with law. *Prima facie*, it appears to this Court that the petitioners have come with unclean hands. There can be no question of any interim order at this stage.

10. Affidavit-in-opposition be filed within two weeks from date. Affidavit-in-reply thereto, if any, be filed within one week thereafter. Let the matter be listed as "Adjourned Application" under Group-IV on the following working day. It will be open to the respondent authorities to proceed against the petitioner in accordance with law. It will also be open to the petitioner to make an application before the Commissioner of Customs for provisional release of the goods. If any such application is made, the same shall be decided strictly in accordance with law. It is made clear that this Court expresses no opinion on the contentions of Mr. Chowdhury on merits. It is expected that the application shall be disposed of by the Commissioner of Customs expeditiously.

11. All parties are to act on a xerox signed copy of this order on the usual undertaking.