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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 27th January, 2025
Date of Decision:13th February, 2025

\+ **W.P.(C) 9461/2023 and CM APPL. 36114/2023**

M/S AIMS RETAIL SERVICES PRIVATE LIMITED.....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Ms. Bharathi Raju, Sr. Panel Counsel (UOI) with Mr. Rahul Kumar Sharma, GP for R-1/UOI (M: 9868895906)
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4. (M:9958846148)

WITH

\+ **W.P.(C) 10362/2023 and CM APPL. 40159/2023**

M/S KANUSHI ENTERPRISES .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPP for R-1.
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10365/2023 and CM APPL. 40165/2023**

M/S AIMS MIGITAL TECHNOVATIONS PVT. LTD.....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Shushil Kumar Pandey, SPC with Mr. Hemant Kumar Mishra, Adv. for UOI. (M:9873588234)
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10367/2023 and CM APPL. 40170/2023**

M/S OSIYA OVERSEAS LLP .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPP for R-1.
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10379/2023 and CM APPL. 40187/2023**

M/S AIMS RETAIL SERVICES PRIVATE LIMITED.....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Shushil Kumar Pandey, SPC with Mr. Hemant Kr. Mishra, Adv. for UOI.
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10382/2023 and CM APPL. 40193/2023**

M/S NARAYANI OVERSEAS LLP .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPP for R-1.

Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10932/2023 and CM APPLs. 42359/2023, 10239/2024**

M/S KANUSHI ENTERPRISES .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPP for R-1.
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10936/2023 and CM APPLs. 42381/2023, 10126/2024**

M/S OSIYA OVERSEAS LLP .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPP for R-1.
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10947/2023 and CM APPL. 42480/2023**

M/S ASHI CREATION PRIVATE LIMITED .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Ms. Nidhi Raman, CGSC with Mr. Arnav Mittal, Adv. for R-1/UOI
(M: +919891088658)

Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 10975/2023 and CM APPLs. 42537/2023, 10238/2024**

M/S NARAYANI OVERSEAS LLP .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPP for R-1.
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 11030/2023 and CM APPLs. 42793/2023, 10237/2024**

M/S AIMS MIGITAL TECHNOVATIONS PRIVATE LIMITED .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria & Mr. Rohit Gupta, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Shushil Kumar Pandey, SPC with Mr. Hemant Kumar Mishra, Adv. for UOI. (M:9873588234)
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 14407/2024 and CM APPL. 60398/2024**

M/S AIMS RETAIL SERVICES PVT. LTD. .....Petitioner

Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Niraj Kumar, Sr. Central Govt. Counsel with Mr. Chaitanya Kumar & Mr. Dhruv Sharma Advs. for R-1/UOI

(M: 9810020341)
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 14454/2024 and CM APPL. 60599/2024**

M/S AIMS MIGITAL TECHNOVATIONS PVT. LTD.....Petitioner
Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents
Through: Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 1449/2024 and CM APPL. 5996/2024**

M/S ICONNECT INDIA .....Petitioner
Through: Mr. Pradeep Jain, Mr. Sambhav Jain and Mr. Pranav Raj Singh, Advs.
(M: 98991 52568)

versus

UNION OF INDIA & ORS. .....Respondents
Through: Mr. Ajay Jain, SPC with Ms. Bijay Lakshmi & Mr. M.N. Misra Advs. for R-1. (M: 6003122984)
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Mishra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 1499/2024 and CM APPL. 6203/2024**

M/S AVIK TELEVENTURES PVT. LTD. .....Petitioner
Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents
Through: Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 8488/2024 and CM APPL. 34939/2024**

M/S BTPL DISTRIBUTION PVT. LTD. .....Petitioner

Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Manish Kumar, SPP for R-1.
Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 891/2024**

MS NEW EXCELLENT TELEVENTURES LLP .....Petitioner

Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 468/2025 & CM APPL. 2203/2025**

M/S BORA EXIM PVT LTD .....Petitioner

Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

\+ **W.P.(C) 496/2025 & CM APPL. 2319/2025**

M/S BORA EXIM PVT LTD .....Petitioner

Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

WITH

+ **W.P.(C) 516/2025 & CM APPL. 2413/2025**

M/S BORA EXIM PVT LTD .....Petitioner

Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

AND

+ **W.P.(C) 518/2025 & CM APPL. 2425/2025**

M/S BORA EXIM PVT LTD .....Petitioner

Through: Mr. Dayaar Singla and Mr. Rohit Gupta, Advs. (M: 9464004422)

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Aditya Singla, SSC, CBIC, Mr. Ritwik Saha and Mr. Umang Krishna Misra, Advs. for R-2 to R-4.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE DHARMESH SHARMA

JUDGMENT

PRATHIBA M. SINGH, J.

1. This hearing has been done through hybrid mode.

I. Factual Background

2. The present petitions have been filed under Article 226 of the Constitution of India raising a common issue –

> *Whether the act of unlocking mobile phones after they are manufactured would disentitle the Petitioners from claiming duty drawback on export of the said mobile phones under Section 75 of the Customs Act, 1962 (hereinafter "the Act") read with Customs and Central Excise Duties Drawback Rules, 2017 (hereinafter "Duty Drawback Rules")?*

3. These petitions challenge, *inter alia*, the show cause notices (hereinafter "*SCN*") and orders-in-original issued in the respective cases, wherein the Petitioner's claim of duty drawbacks on export of unlocked/activated mobile phones has been rejected. The details of the respective impugned SCN and the orders-in-original issued in these petitions are encapsulated in a tabular form hereinunder for ease of reference:

Sr. No.	**Case No.**	**Details of the Impugned Order**	**Duty Drawback Involved**
I. Cases where SCN has been challenged			
1.	W.P. (C) 9461/2023	SCN dt. 24th May, 2023	Rs. 2,14,09,854/- (already disbursed) Rs. 55,05,150/- (not disbursed)
2.	W.P. (C) 10932/2023	SCN dt.24th March, 2023	Rs. 26,15,232/- (already disbursed) Rs. 11,10,900/- (not disbursed)
3.	W.P. (C) 10936/2023	SCN dt. 16th May, 2023	Rs. 5,03,486/- (already disbursed) Rs. 3,00,995/- (not disbursed)
4.	W.P. (C) 10947/2023	SCN dt.19th June, 2023	Rs. 18,22,979/- (already disbursed) Rs. 2,07,198/- (not disbursed)
5.	W.P. (C) 10975/2023	SCN dt. 11th May, 2023	Rs. 5,44,503/- (already disbursed) Rs. 33,98,486/- (not disbursed)
6.	W.P. (C) 11030/2023	SCN dt 17th May, 2023	Rs. 38,78,148/- (already disbursed) Rs. 36,20,466/- (not disbursed)

7.	W.P. (C) 1449/2024	SCN dt 30th August'23	Rs. 23,85,138/- (already disbursed) Rs. 7,78,695/- (not disbursed)
8.	W.P. (C) 1499/2024	SCN dt 21st June, 2023	Rs. 28,66,909/- (already disbursed) Rs. 10,14,936/- (not disbursed)
9.	W.P. (C) 891/2024	SCN dt 31st August'23	Rs. 21,46,919/- (already disbursed) Rs. 9,47,849/- (not disbursed)
II. Cases where the Orders-in-Original have been challenged			
Sr. No.	**Case No.**	**Details of the Impugned Order**	**Duty Drawback Rejected**
10.	W.P. (C) 10362/2023	(i) Order-in-Original dt.10th March, 2023; (ii) Order-in-Original dt. 26th May, 2023; (iii) Order-in-Original dt.26th June, 2023.	Rs. 55,49,356/-
11.	W.P. (C) 10365/2023	(i) Order-in-Original dt. 11th May, 2023; (ii) Order-in-Original dt. 6th June, 2023; (iii) Order-in-Original dt. 23rd June, 2023.	Rs.1,04,18, 555/-
12.	W.P. (C) 10367/2023	(i) Order-in-Original dt. 23rd February, 2023; (ii) Order-in-Original dt. 24th April, 2023; (iii) Order-in-Original dt. 27th April, 2023; (iv) Order-in-Original dt. 30th May, 2023; (v) Order-in-Original dt. 26th June, 2023.	Rs. 81,49,989/-

13.	W.P. (C) 10379/2023	(i) Order-in-Original dt. 8th June, 2023; (ii) Order-in-Original dt. 23rd June, 2023.	Rs. 1,27,46,945/-
14.	W.P. (C) 10382/2023	(i) Order-in-Original dt. 6th March, 2023; (ii) Order-in-Original dt. 24th April, 2023; (iii) Order-in-Original dt. 26th May, 2023; (iv) Order-in-Original dt. 26th June, 2023.	Rs. 81,94,989/-
15.	W.P. (C) 14407/2024	(i) Order-in-Original dt. 24th January, 2024; (ii) Order-in-Original dt. 6th May, 2024.	Rs. 1,74,72,158/-
16.	W.P. (C) 14454/2024	(i) Order-in-Original dt. 24th January, 2024; (ii) Order-in-Original dt. 27th May, 2024.	Rs. 1,68,33,602/-
17.	W.P. (C) 8488/ 2024	Order-in-Original dt. 30th November, 2023	Rs. 8,00,000/-
18.	W.P. (C) 468/2025	Order-in-Original dt. 31st July, 2023	Rs. 6,32,488/-
19.	W.P. (C) 496/2025	Order-in-Original dt. 23rd June, 2023	Rs. 11,91,626/-
20.	W.P. (C) 516/2025	Order-in-Original dt. 23rd August, 2023	Rs. 6,37,529/-
21.	W.P. (C) 518/2025	Order-in-Original dt.19th June, 2023	Rs. 83,91,492/-

4. In addition to the above impugned SCNs and Order-in-Originals, the Petitioners have also challenged the clarifications dated 25th September, 2020 and 14th December, 2021 (hereinafter collectively "*Clarifications*") issued by the Central Board of Indirect Taxes & Customs (hereinafter "*CBIC*"). By the Clarifications, the Respondents have sought to clarify the position, to the

detriment of the Petitioners by rejecting the draw-backs. Further, in few petitions the Petitioners have challenged the *vires* of Rule 17 of the Duty Drawback Rules on the ground that the same is violative of the Article 14 of the Constitution of India.

I(A). Brief Facts

5. The case of the Petitioners is that they are exporters of mobile phones of different brands and models which they procure either directly from the original equipment manufacturers (hereinafter "*OEMs*") or from distributors, dealers, channel partners, etc. The Petitioners are members of the Mobiles and Electronics Indian Merchants Exporters Association (hereinafter "*MEIMEA*").

6. It is stated that some of the mobile phones purchased by the Petitioners are "locked" by the OEMs *i.e.*, usage of the said mobile phones is restricted to a specific geographical location, also referred to as the "regional lock", which in the present case would be India. The said locked mobile phones are stated to be 'unlocked' or 'activated' by the Petitioners, to allow their use outside India, by various methods.

Unlocking/Activation Method 1

7. One method of unlocking/ activation is by inserting a SIM card and making a call to a foreign number by undertaking the procedure set out below:

i. The mobile handset is first removed from sealed boxes. Since the battery is inbuilt and charged with sufficient power, the phone is switched on.

ii. The mobile handset is then inserted with a SIM Card of the region for which the handset is regionally locked.

iii. Using the said SIM Card, a phone call is made either to another number owned by the exporter or to an automated call centre of the mobile operator.

iv. The handset is then kept on mute mode for five minutes.

v. After five minutes, the call is ended, and the handset permanently and automatically unlocks from the regional lock setting.

vi. The mobile handset is then exported outside India to overseas customers.

Unlocking/Activation Method 2

8. In addition to the above method of unlocking/activating the mobile phones, in recent time, phones are unlocked/activated through another method known as "air-activation" or "over-the-air" ("OTA") activation method. It is the case of the Petitioners that air-activation is a process *vide* which mobile phones are unlocked/activated through a computer system without even unboxing or unsealing of the mobile phones. It is stated that the computer systems/applications utilised for the said "air-activation" are also provided by the OEMs.

9. The Petitioners had exported mobile phones in the relevant periods and claimed duty drawbacks on the same, including on the unlocked/activated mobile phones. However, the Customs Department allowed duty drawbacks to the Petitioners for those devices which were exported without unlocking/activating. The claims *qua* mobile phones which had been unlocked/activated have been rejected by the Customs department, even for mobile phones that were air-activated. The claims of the Petitioners have been rejected on the ground that the process of unlocking/activation, as enumerated above, would result in the same to have been *"taken into use"*, rendering the

said mobile phones ineligible for claiming duty drawbacks in terms of Clause (i) of second proviso to Rule 3 of the Duty Drawback Rules.

10. In this regard, the MEIMEA *vide* letter dated 10th January, 2020 had sought clarifications from the CBIC on the availability of the duty drawbacks on the unlocked/activated mobile phones. In response, the CBIC *vide* clarification dated 25th September, 2020 informed the MEIMEA that the steps undertaken by the merchant exporters to unlock/activate the mobile phones are all post packaging and post manufacturing activities. Accordingly, the said mobile phones have been "*taken into use*" and are ineligible for claiming duty drawbacks. The said clarification is reproduced hereunder:

Clarification dated 25th September, 2020

> *" The undersigned is directed to refer to your letter No. FIEO/EP 4(1)/2020 dated 10.01.2020 seeking clarification in reference to a representation from Mobiles and Electronics Indian Merchant Exporters Association (MEIMEA) regarding availability of Duty Drawback on the export of 'unlocked' mobile handsets by merchant exporters.*
>
> *2. It is noted that the activities undertaken by merchant exporters on mobile handsets/phones like activation and unlocking of mobile phones by inserting in Indian SIM card, placing a call for about 5 minutes, testing of handsets before 'use' export, re-flashing of software for a particular region, etc. are all post manufacturing and post packaging activities. Clause (i) of second proviso to Rule 3 (1) of the Customs and Central Excise Duties Drawback Rules, 2017 provides that so Duty Drawback shall be allowed on export of goods that have been taken into use after manufacture. As the said mobile handsets/phones entered for export have been opened and worked upon for sale in*

destination countries, thereby they are already 'taken into use' and thus not entitled for Duty Drawback."

11. The aforesaid clarification was challenged by the MEIMEA before this Court in ***W.P.(C) 4744/2021*** titled as ***Mobile and Electronics Indian Merchant Exporters Association Trust & Ors. vs. The Joint Secretary (Drawback) & Ors.,*** however, on 19th May, 2021 the said petition was withdrawn by the Petitioner Association therein, with liberty to file fresh petition *qua* individual grievances of the members of the said association. The order dated 19th May, 2021 passed in ***W.P.(C) 4744/2021*** is reproduced hereunder for ease of reference:

"Proceedings have been conducted through video conferencing.

Learned counsel for the petitioners seeks permission to withdraw the writ petition with liberty to file a fresh petition espousing individual grievances, if any, of the Members of the Petitioner Association.

Permission as prayed for is granted. The petition, along with the pending applications, is disposed of as withdrawn with liberty as prayed for."

12. Thereafter, MEIMEA *vide* letter dated 7th September, 2021 sought a fresh clarification from the CBIC *qua* availability of duty drawbacks on the export of unlocked/activated mobile phones. The CBIC *vide* clarification dated 14th December, 2021, informed the MEIMEA that the stand taken in the previous clarification dated 25th September, 2020 was correct and no duty drawback can be claimed by the merchant exporters in the present case. The said clarification dated 7th September, 2021 is reproduced hereunder:

Clarification dated 7th September, 2021

> *" The undersigned is directed to refer to your letter dated 07.09.2021 seeking a new clarification regarding availability of Duty Drawback on the export of 'unlocked' or 'activated' mobile handsets by merchant exporters.*
>
> *2. In the aforementioned regard, it is to inform that the request made has been thoroughly deliberated in detail, including all the related dimensions and possible ramifications. Thereupon, it has been concluded that the earlier stand by Central Board of Indirect Taxes and Customs (CBIC) was correct that no Duty Drawback should be admissible on the export of 'unlocked' or 'activated' phones by the merchant exporters, and that there is no need for change of view in the instant matter."*

13. The MEIMEA on several occasions including *vide* letters dated 30th June, 2022, 11th August, 2022 and 17th August, 2022 sought urgent release of the drawback on mobile phones exported since October, 2020 from the Commissioner of Customs, ACC Exports, New Delhi. However, the MEIMEA did not receive any response from the Customs Department.

14. Thereafter, it is stated that the Customs Department initiated proceedings under the Act against the Petitioners *qua* the claim of duty drawback on unlocked/activated mobile phones exported in the relevant period. SCNs were issued to the Petitioners by the Customs Department. In some cases the said SCNs have been adjudicated and corresponding Order-in-Original have also been passed by the Customs Department rejecting the claim for duty drawback on the exports of unlocked/activated mobile phones

by the Petitioners. The said claims have been rejected by the Customs Department by relying on the Clarifications issued by the CBIC.

15. The Petitioners have assailed the respective SCNs and Order-in-Original passed in each case. Hence, the present petitions.

II. Submissions on behalf of the Petitioners

16. Mr. V. Lakshmikumaran, ld. Counsel appearing on behalf of the Petitioners, at the outset, submits that the Petitioners are merchant exporters of mobile phones. The Petitioners purchase mobile phones from various sources including the OEMs, who themselves are entitled to duty drawback on the exported mobile phones. However, the Petitioners, purchase these mobile phones in small quantities from the OEMs and unlock/activate these phones to enable the customers in certain foreign countries to use the said mobile phones without any hindrance. Thus, unlocked/activated phones are exported in bulk by the Petitioners in response to the orders, which they receive from various foreign countries.

17. The case of the Petitioners is that under Section 75 of the Act, the said process of unlocking/activating the mobile phones would still entitle them to the duty drawbacks on the export of the same. Mr. V Lakshmikumaran, ld. Counsel argues that the difficulty has arisen in view of the Clarifications issued by the CBIC *qua* eligibility of the duty drawbacks on the export of unlocked/activated mobile phones.

18. As per the ld. Counsel for the Petitioners, the key expression to be considered, both in terms of the Clarifications as also the proviso to Rule 3(1) of the Duty Drawback Rules, is if the exported goods "*have been taken into use after manufacture*".

II(A). "Taken into use" and "ready for use" vis-à-vis unlocked/activated mobile phones

19. It is argued by the ld. Counsel for the Petitioners that under the proviso to Rule 3(1) of the Duty Drawback Rules the phrase "*taken into use*" would mean that the goods have been 'actually' taken into use. It is submitted that the intention of the said proviso is to ensure that 'used' goods or 'second-hand' goods are disallowed from availing duty drawbacks. However, in the present case, the process of unlocking/activating the mobile phones does not make the same 'second-hand' or 'used' goods. It is argued, that the said process which is in the form of adjustment or modification to meet the specific market requirements, makes the said mobile phones "*ready for use*".

20. As per the Petitioners, the process of making mobile phones "*ready for use*" is distinct from the same being "*taken into use*". It is argued that, since, the unlocked/activated mobile phones have not been employed for their intended purpose *i.e.*, communication, downloading or using of applications, during the process of unlocking/activation, the same cannot be said to have been "*taken into use*". In support of this argument, the Petitioners have placed reliance on the following examples:

a. **Cars:** Assembly, emissions and safety testing, driving for fuelling and delivery to showroom make cars "ready for use". The car is "*taken into use*" when registered, handed over to the owner and driven for personal or commercial purposes.

b. **Medical devices:** Calibration, software setup, trial runs, and staff training make medical devices "ready for use". The medical devices are "*taken into use*" when deployed for patient diagnostics or treatment.

c. **Aircraft:** Assembly, system checks, test flights, and delivery to airline company make aircrafts "ready for use". The aircrafts are "*taken into use*" when actually used for carrying passengers or cargo service.

Similarly, it is submitted that the software installation, factory quality tests and unlocking for regional compatibility make the mobile phones "*ready for use*". The same are taken into use when the customer connects the said phones to a network and operate it for communication or applications.

21. Accordingly, it is argued by the ld. Counsel for the Petitioners that one-time activity *i.e.*, unlocking/activating of mobile phones cannot lead to the interpretation that the said mobile phones have been "*taken into use after manufacturing*".

II(B). Scope of the term 'manufacture' under Section 75 of the Act read with Duty Drawback Rules

22. It is submitted by Mr. Lakshmikumaran, ld. Counsel that the term "*manufacture*" under Section 75 of the Act has been expanded by the amendment *vide* Finance Act, 1995. The said term has been substituted with the current expression "*manufactured, processed or on which operation has been carried out in India*". The ld. Counsel has laid emphasis on the Clause 61 of the Statement of Objects and Reasons appended to the Finance Bill, 1995, as per which, the said amendment was brought with the intention to extend the duty drawbacks to not only goods manufactured in India but also to the goods processed or subjected to any operation in India.

23. It is submitted that the said expanded definition has also been incorporated in Rule 2(e) of the Duty Drawback Rules.

24. It is submitted by the Petitioners, without prejudice, that the process of unlocking/activating the phone would also fall within the expanded scope of the term "manufacture" under the Act and the Duty Drawback Rules. Accordingly, the Petitioners would be entitled to avail the duty drawbacks on the exported mobile phones which have been unlocked/activated.

II(C). Effect of non-grant of duty drawback to the Petitioners

25. The ld. Counsel for the Petitioners, has relied upon the rationale of granting duty drawbacks to exporters, to submit that such drawbacks are essential to encourage local manufacturing and for competitive enterprises globally. If drawbacks are not given, the exported mobile phones would not be affordable to the intending customers and export orders would itself dry up.

26. It is further submitted by the Petitioners that the Clarifications issued by the CBIC are *ultra vires* the provisions of the Act and the Duty Drawback Rules. Therefore, the challenge to the said Clarifications, as also the SCNs and Order-in-Original issued basis the same, deserves to be allowed and the Petitioners ought to be given the benefit of duty drawbacks on the exported unlocked/activated mobile phones.

III. Per Contra: Submissions on behalf of CBIC

27. Mr. Aditya Singla, ld. Senior Standing Counsel for CBIC, has submitted that the process of locking of mobile phones, also referred as "regional locks", is a feature which is incorporated by OEMs in order to ensure that the phones are not used outside the jurisdiction of territorial region for which they are intended. It is submitted that since the OEMS are supplying the Petitioners locked mobile phones, any operation carried out by the Petitioners such as unlocking/activation would bar the said mobile

phones from being eligible to receive duty drawback under Section 75 of the Act read with the Duty Drawback Rules.

III.(A).Purpose of granting duty drawbacks

28. It is submitted by the ld. Counsel for CBIC that the statutory scheme of the Act *qua* grant of duty drawbacks is designed to incentivize domestic manufacturers and value addition rather than mere promotion of exports. The duty drawback scheme canvased from the relevant provisions of the Act and the Duty Drawback Rules would show that there is a conscious differentiation between merchant exporters and manufacturing exporters. This differentiation, as per the ld. Counsel, is to promote value addition activities in the form of processing, assembling or manufacturing.

29. Considering the purpose of the duty drawback scheme, it is argued by the ld. Counsel, that the Petitioners are neither manufacturers nor are they adding any value to the final product and thus, they cannot claim duty drawbacks under the present statutory regime.

III.(B).Unlocking/activation of mobile phones is not part of manufacturing process

30. It is his submission that the process of unlocking/activation of the mobile phones would require the phones to be unboxed and powered up, insertion of sim cards and making a call to the export destination. The said process is substantially detached from the entire process of manufacturing or processing of the said mobile phones. The ld. Counsel for the CBIC has placed reliance on the decision of the Supreme Court in the case of ***Commissioner of Central Excise, Chennai II Commissionerate v. Tarpaulin International, 2010 (9) SCC 103,*** to argue that unlocking/activation of the mobile phones would also not amount to

"processing" as the same entails a transformation that leads to creation of a new or distinct entity.

31. It is argued that the process of unlocking/activation of the mobile phones is merely a functional adjustment that fails to modify the fundamental attributes of the product.

32. It is the case of the CBIC that the unlocking/activation process would result in the mobile phones having been "*taken into use*" in terms of the proviso to Rule 3 of the Duty Drawback Rules and therefore, the Petitioners are not eligible to claim drawbacks.

III.(C).Unlocked/activated mobile phones have been "taken into use"

33. It is submitted by Mr. Singhla, ld. Counsel, that once the relevant goods have been operated, either as per the process employed by the Petitioners or in any other manner, the same shall amount to use of the said goods. In support of this submission the ld. Counsel has relied upon the decision of the Karnataka High Court in ***M/s. Millipore (India) Private Limited, Banglore v. Union of India & Ors., 1999 SCC OnLine Kar 221*** wherein the High Court was interpreting the term "use" under Section 74 of the Act.

34. Further, it is submitted that the process of inserting a sim card and making a call from the mobile phones would amount to actual use of the said phones, *albeit* limited in nature, for the purpose for which the same were imported or manufactured. It is argued by relying on the decision of the Bombay High Court in ***M/s. Daimler Chrysler India Pvt. Ltd. v. Union of India, 2003 SCC OnLine Bom 901*** that operating of a device for the purpose for which it is imported would amount to its "use".

35. The ld. Counsel submits that even if the Court was of the view that the process of unlocking/activation of the mobile phone does not qualify as use for the purpose for which it was imported or manufactured, then as per the decision of the Supreme Court in ***Director of Entry Tax v. Mahindra and Mahindra, (2003) 11 SCC 749***, even the act of switching the phone on would amount to the same being "taken into use".

36. The distinction between products being "taken into use" and "ready for use", as argued by the Petitioners, is artificial in nature as per the CBIC. The ld. Counsel has distinguished the examples relied upon by the Petitioners in support of the contention *qua* "ready for use", on the ground that the steps such as assembly, calibration and trial runs are part of the manufacturing process of the device/machinery, since in the absence of the same the said device/machinery would not have the essential characteristics of being a finished product.

III.(D).Limited scope of judicial scrutiny

37. It is the submission of ld. Counsel for CBIC that the that the term "*taken into use*" having been used in a taxation statue has to be construed strictly. Moreover the scope of judicial scrutiny according to Mr. Singla, ld. Counsel in matters of economic policy is within the realm of the Government and the Court ought not to interfere with the same easily. He submits that the Petitioners, through their association *i.e.*, MEIMEA, had written letters to the CBIC and the CBIC has clearly clarified that the process of unlocking/activation would constitute "*taken into use*" under proviso to Rule 3(1) of the Duty Drawback Rules and therefore, drawbacks cannot be given to the Petitioners. Under such circumstances, it is the view of CBIC that the Petitioners are not entitled to duty drawbacks.

IV. Rejoinder Submissions

38. In rejoinder, Mr. Lakshmikumaran, ld. Counsel for the Petitioners highlighted the fact that none of the OEMs have any objections to the drawbacks being given to the Petitioners. In fact, he relies upon a letter written by M/s. Samsung India Electronics Pvt. Ltd. to the Deputy Commissioner of Customs, ACC Export, New Delhi wherein it is clearly stated that Samsung has no objection to unlocking/activation of the phone by sim unlocking. It is also submitted by Samsung therein that they do not have any control over the same and they do not believe that the said unlocking/activation process amounts to infringement of any Intellectual Property Right or is contrary to the fair trade practice. Similar letter has also been written by M/s. United Telelinks (Bangalore) Limited, which is a manufacture of 'KARBONN' branded mobile phones, which has also stated that the process of unlocking/activation is an integral process for making any such device marketable outside India.

39. It is thus submitted that when OEMs themselves have no objection and the Government has not in any manner prohibited exports of unlocked/activated mobile phones, the non-grant of drawbacks, when the conditions under Section 75 of the Act and the Duty Drawbacks Rules are satisfied, cannot be sustained.

40. Finally, ld. Counsel seeks to distinguish between the two judgments cited by ld. Counsel for the CBIC *i.e.*, ***Millipore (India) (supra)*** and ***Daimler Chrysler (supra),*** on the ground that in both of these cases the Courts were interpreting the term "use" under Section 74 and not of 75 of the Act. It is submitted that Section 74 merely deals with goods which are imported into

India for re-export. Thus, the said cases cannot be relied upon to interpret Section 75 of the Act.

41. In fact, in Section 74(1) and 74(2) of the Act, the distinction has been maintained between goods which are imported and exported without being used on the one hand and goods which are imported and used or whose values are depreciated before export of the same. Even in the latter case, the drawback that is given is of a lesser value, but it is not rejected forthright.

42. Lastly, ld. Counsel also submits that irrespective of whether the Petitioners are treated as manufactures or non-manufactures, the Petitioners would be entitled to drawback on the basis of 'all industry rate'.

V. Analysis & Findings

43. Heard the parties. The Court has also perused the written submissions submitted on behalf of the parties.

44. At the outset, it is noted that during the course of hearing, the Petitioners have not pressed on the challenge to the *vires* of Rule 17 of the Duty Drawback Rules. Hence, the Court need not venture to decide the same.

V.(A).Statutory Regime of the Act qua Duty Drawbacks

45. Exports are integral to the strength of any economy. The health of any economy is measured on various indices - exports being one of them. The present case involves an important component of exports *i.e.*, availment of duty drawbacks for exporters.

46. Duty drawbacks are part of the statutory regime under the Act and the same is governed by Chapter 10 of the Act. Section 74 and Section 75 of the Act deal with different situations under which exporters may claim duty drawbacks. Under Section 74 of the Act, duty drawbacks are allowable on re-export of duty payable goods imported into India. As per the said section, if

any product is imported into India and is, thereafter exported up to 90% of the customs duty can be claimed as drawback subject to various conditions as set out therein. Under Section 74(2) of the Act if the exported goods '*have been used'* after the importation, then the duration of the said use and the depreciation in value would be considered by the Government for fixing the rate of drawback eligible on the said good. Accordingly, the legislative intent under Section 74(2) of the Act is that even in case of imported products which may have been partly utilized, drawbacks are granted *albeit* at a reduced rate.

47. Under Section 75 of the Act, in the case of materials which are imported for use in manufacturing of goods in India, which are then exported, if manufacturing, processing or any operation is carried out in respect of the said material, drawbacks can be claimed as per the prescribed rates. The drawback is not calculated in an arithmetic manner but is broadly prescribed taking into consideration the practices in the respective trade/industry. The percentages of drawbacks are usually prescribed by the Government. For the sake of ready reference, Section 75(1) of the Act is extracted below:

> *"**75. Drawback on imported materials used in the manufacture of goods which are exported**.— (1) Where it appears to the Central Government that in respect of goods of any class or description **manufactured, processed or on which any operation has been carried out in India**, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under clause (a) of section 84 and in respect of which an order permitting clearance for exportation has been made by the proper*

officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2):

Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall except under such circumstances or such conditions as the Central Government may, by rule, specify, be deemed never to have been allowed and the Central Government may, by rules made under sub-

section (2), specify the procedure for the recovery or adjustment of the amount of such drawback."

48. In the present petitions, there is no dispute as to the rate of drawback applicable to locked/activated mobile phones exported by the Petitioners. It is also not in dispute that if not for the process of unlocking, the Petitioners would be entitled to drawbacks. The only issue which is contested by the Customs Department is that the Petitioners are not entitled to duty drawback on the export of unlocked/activated mobile phones as the process of unlocking/activating the said mobile phones would be hit by the proviso to Rule 3(1) of Duty Drawback Rules. Rule 3(1) of the Duty Drawback Rules reads as under:

*"**3. Drawback.**—(1) Subject to the provisions of—*
(a) the Customs Act, 1962 and the rules made thereunder;
(b) the Central Excise Act, 1944 and the rules made thereunder; and
(c) these rules, a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government:

Provided that where any goods are produced or manufactured from imported materials or excisable materials, on some of which only the duty chargeable thereon has been paid and not on the rest, or only a part of the duty chargeable has been paid; or the duty paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 and the rules made thereunder, or of the Central Excise Act, 1944 and the rules made thereunder, the drawback

> *admissible on the said goods shall be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained:*
>
> *Provided further that no drawback shall be allowed—*
> *(i) if the said goods, except tea chests used as packing material for export of blended tea, have been* ***taken into use*** *after manufacture;"*

49. Considering the submissions of the parties and the aforesaid provisions, it is evident that the interpretation of the expression "*taken into use*" in the proviso to Rule 3 of Duty Drawback Rules is the core of the contest in the present petitions. Accordingly, whether the process of unlocking/activation of the mobile phones, as employed by the Petitioners, constitutes "*taken into use*" would be the question determinable.

50. The concept of duty drawbacks has been well explained by Supreme Court in ***Liberty India v. CIT, 2009 (241) ELT 326 (SC),*** wherein the Court observed as under:

> *"17. The next question is - what is duty drawback? Section 75 of the Customs Act, 1962 and Section 37 of the Central Excise Act, 1944 empower Government of India to provide for repayment of customs and excise duty paid by an assessee. The refund is of the average amount of duty paid on materials, of any particular class or description of goods used in the manufacture of export goods of specified class. The Rules do not envisage a refund of an amount arithmetically equal to customs duty or central excise duty actually paid by an individual importer-cum-manufacturer. Sub-section (2) of Section 75 of the Customs Act requires the amount of drawback to*

> *be determined on a consideration of all the circumstances prevalent in a particular trade and also based on the facts situation relevant in respect of each of various classes of goods imported. Basically, the source of duty drawback receipt lies in Section 75 of the Customs Act and Section 37 of the Central Excise Act."*

51. The purpose of duty drawbacks is to ensure that the customs duty paid by the importers or excise/GST paid by local manufacturers on a particular good is not loaded on to the said good/product when exported, making such products uncompetitive in the international market. The burden of these duties/taxes collected by the Government are eased in respect of the exporters, so that adequate relief is provided to them to compete in international markets with foreign exporters. In addition, easing of the said burden allows encouragement for exports which enables earning of foreign exchange for the country.

52. At this stage, it is relevant to consider the legislative history of the relevant provisions of the Act governing the point in question. Prior to 1995 drawbacks availed under Section 75(1) of the Act were limited to goods that were manufactured in India and then exported to the respective destinations. This was due to the fact that the term used in Section 75(1) of the Act was only "manufacture" of goods to be exported. However, with effect from 26th May, 1995 the expression "manufacture" has been amended to read as *"manufacture or processing of such goods or carrying out any operation on such goods"*. This amendment was brought about by the Finance Act of 1995 which also amended the term '*manufacture'* as provided under Section

75(2)(c) of the Act. The amended term '*manufacture'* as provided under Section 75(2)(c) of the Act reads as under:

> *"75. […]*
> *(2) The Central Government may make rules for the purpose of carrying out the provisions of sub-section (1) and in particular, such rules may provide –*
>
> *[…]*
>
> *(c) for requiring* ***the manufacturer or the person carrying out any process or other operation*** *to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to enable such authorised officer to inspect the processes of* ***manufacture, process or any other operation carried out*** *and to verify by actual check or otherwise the statements made in support of the claim for drawback.*
>
> *[…]"*

53. The Statement of Objects and Reasons of the Finance Bill, 1995 sets out the rationale behind amending the meaning of *manufacture* in Section 75 of the Act as under:

> *"Clause 61 seeks to amend section 75 of the Customs Act so as* ***to allow drawback not only on goods manufactured in India but also on goods processed or subjected to any operation in India****. This clause also proposes to insert new sub-section (3) with a view to enabling the grant of drawback with retrospective effect in specified cases."*

54. In addition, the Rule 2(e) of the Duty Drawback Rules defines the term manufacture as under:

> *""manufacture" includes processing of or any other operation carried out on goods, and the term manufacturer shall be construed accordingly; "*

55. A conjoint reading of Section 75 of the Act, as amended, along with the Duty Drawback Rules introduced from time to time would show that the purpose of the said provisions is to encourage not mere complete manufacturing but even steps such as processing, assembling, refining, or any other value addition to the product.

56. The Petitioners in these cases may not be the importers of the material used for the manufacturing of the mobile phones, however, they are the exporters of fully manufactured mobile phones and are eligible for drawbacks. The Petitioners procure orders for exports, purchase the phones from the OEMs and export them to the destination countries. In some cases, the Petitioners, depending upon the final destination of the product, may even undertake unlocking/activation of the said mobile phones.

57. It is not in dispute that the OEMs themselves are entitled to duty drawbacks on the export of mobile phones and which they are availing.

58. In this context, the question is whether the Petitioners can be deprived of the said drawbacks in terms of the Proviso to Rule 3 of the Duty Drawbacks Rules. In order to decide this issue, the process of unlocking/activation of the mobile phones needs to be understood.

V.(B). Unlocking/Activation of Mobile Phones:

59. Some mobile phones which are manufactured in different countries may have inbuilt technological restrictions that may prevent them from being

used in certain other countries. This is also known as *"regional locking"*. It allows OEMs or the telecom service providers to restrict the use of mobile phones to the same country where the said phones have been manufactured. In certain countries telecom service providers also promote certain branded mobile phones and offer corresponding data or mobile purchase plans to their customers, which include the price of the mobile phone as well. However, these are issues that are not to be gone into the present case. The OEMs themselves have no objection in the unlocking/activation of the mobile phones to make the same useable in different markets. In fact the Petitioners have placed on record letters from two different OEMs, wherein the said OEMs have expressly stated that they do not believe that the unlocking/activation of mobile phones is either a trade practice which is barred or the said process leads to any violation of any Intellectual Property right of the said OEMs.[1] The said letters are extracted here under for ease of reference:

> ***Letter dated 1st May, 2019 by M/s Samsung India Pvt. Ltd.***
>
> *"Respected Sir,*
> *This is in relation to the letter received from your good-office bearing file No. VIII/ 12/ ACE/ SHED/ Status/ 147/ 19, wherein opinion/ legal comments have been required by our good-office, basis intelligence gathered by Custom authorities regarding unscrupulous exportation of various models of Samsung brand mobile phones being as follows:*
>
> - *Seals of certain mobile phone boxes were tampered either to remove complimentary*

[1] Communications addressed by M/s. Samsung India Private Limited dated 1st May, 2019, as also by M/s. United Telelinks (Bangalore) Limited (OEM for mobile phones sold under the brand name "Karbonn") dated 8th July, 2023.

accessory or to make any other modification/ alteration.

- *Mobile phones are being exported as SIM unlocked by way of using Indian SIM for a period of minimum 5 minutes*

Given the above background, we would like to inform your good-office that the above-mentioned exports are not being made by Samsung India Electronics India Private Limited ('SIEPL/ the Company') and accordingly the Company has no nexus/ control over such exports. Further, in our view, the above-mentioned instance do not amount to infringement of any intellectual Property Right ('IPR')/ trademark law or any other fair-trade practice.
As such, it is requested from good-self to direct the requirement of opinion/ legal comments to the assessee making such exports."

Letter dated 8th July, 2023 by M/s United Telelinks (Bangalore) Ltd.

"We understand that Kisha Telelinks Pvt Ltd ('company') is engaged in the business of trade and export of branded mobile handsets out of India upon receipt of orders / requirements from overseas customers. In this process, the Company procures our brand mobile handsets (sealed boxes containing the mobile handset, mobile handset accessories' warranty card, quick start guide, etc.) either from us or our distributors, dealers or channel partners based in India. Some of these mobile handsets are 'locked' by us to restrict its usage to a specific geographical location or mobile carriers (operators). This 'lock' limits the use of the device to SIM cards of network operator it is locked to, or overall operators within a specific region. Consequently, these locked mobile handsets cannot be used outside India without undertaking the process of

unlocking of the mobile handsets. The steps involved in the process of unlocking are narrated below:

- *Removing the mobile handset from sealed boxes and switching on the same. Battery of the phone is inbuilt and sufficiently charged for this purpose.*
- *The mobile handset will need a SIM card of the region for which the handset is regionally locked.*
- *using the said SIM card, a phone call needs to be made to either another number or to an automated call centre of the mobile operator. The mobile handset is needs to be connected over this call for about five minutes.*
- *After five minutes of this call, the mobile handsets are permanently and automatically unlocked from the regional lock setting.*

The process of unlocking is a one time / limited activity and is essential to render the mobile handsets usable, functional and therefore, marketable outside India. Given the intent behind the unlocking process, it may be construed as an extension of the manufacturing process itself. In other words, this activity is done within the manufacturing process as an extra layer of 'software lock' over the handset, and simply removing this, does not in any way make the handset as used, as its only removing the extra layer like a wrapper.

Further, this unlocking process only results in 'registration' of the mobile handsets using SIM issued by Indian service provider and for all the other technical purposes, subject mobile handsets are identical with the handsets manufactured in an unlocked condition itself. It is relevant to state here that unlocking causes removal of certain software restriction in the handsets and such removal cannot be treated as having used for either technical or commercial parlance, merely because a particular way of unlocking process was resorted to.

> *You may also note that we manufacture mobile handsets in unlocked condition as well as in locked condition – for instance, we manufacture certain mobile handsets for 'Reliance - Jio network' only, restricting its use with their network only. Having said the above, such locked mobile handsets when unlocked are at par with other mobile handsets manufactured in an unlocked condition for all the technical and commercial purposes.*
>
> *In view of the above, we confirm that the said process of unlocking is an integral process to make the mobile handsets operational and marketable outside India. It should therefore be construed as an extension of the manufacturing process owing to the inbuilt limitation surrounding its usage qua a geography or network, as the case may be. Such one-time / limited activity of unlocking essentially makes the mobile handsets 'ready to use', marketable and saleable and in no way renders them as 'taken into use'.*
>
> *Hope the above explanation/clarification surrounding the process of unlocking will convey our clear views / stance on the subject."*

60. Mobile telephony and the practices adopted by telecom service providers is a complex aspect of telecommunication. However, from a perusal of the record in these cases, it is clear that unlocking of mobile phones is not seriously objected to by any OEM and in fact the same is a common prevalent practice. It is also pointed out that there are several videos publicly available on online platforms which guide customers to unlock/activate their mobile phones.

61. The process of unlocking/activating the mobile phones has also evolved from time to time. Such process initially involved insertion of SIM cards and making a call to the network of the destination country. In recent

times it could also be done through 'air-activation' without opening of the packaging or the phone. In the air-activation insertion of a SIM card would also not be necessary. The process of unlocking may further evolve from time to time with technological advancement. However, the question is whether the unlocking/ activation of the mobile phone, through insertion of sim card or through 'air-activation' or any other process, constitutes *'taken into use'* in terms of the proviso to Rule 3 of Duty Drawback Rules.

V.(C). Interpretation of "taken into use" vis-à-vis unlocking/activation of the mobile phones

62. Mobile phones that are manufactured and marketed in today's day and age have multiple features and applications. With the convergence of technology, mobile phones are not mere communication devices, but are also, *inter alia*, sources of entertainment and business. Mobile phones are also used for accessing banking services, word processing, making presentations, reading PDFs, conducting e-commerce, for posting on online platforms, watching television, listening to music, for uploading and viewing of videos etc. The innumerable number of applications of *Apps* as they are usually referred to, that can be downloaded on a mobile phone would also enable such devices to monitor user's health, call emergency services, enable connecting with friends and family through different applications etc. Today's mobile phones, commonly referred to as "Smart-Phones", have multi-dimensional and multifarious usages which are, in fact, incapable of being listed in one place.

63. The mere possible range of usage of a mobile phone would show that the scope of such "use" is vast and undefinable. The expression "*taken into use*" has to be interpreted in this context.

64. The second dimension is that the phrase "*taken into use*" would be capable of varying interpretations depending on the product in question. The said phrase cannot be understood to have identical/universal meaning for all products. The phrase "*taken into use*" is, thus, a dynamic concept and its meaning would depend upon the nature of use and could vary from product to product and industry to industry.

65. The Customs Department has relied on a number of decisions to interpret this term. In ***M/s. Millipore (India) Private Limited, Bangalore v. Union of India and Others, 1999 SCC OnLine Kar 221,*** the Karnataka High Court was concerned with the question as to whether a particular equipment which has been exhibited, demonstrated and, thereafter, re-exported, would be eligible for duty drawback under Section 74 of the Act. The High Court of Karnataka observed as under:

> *"3. The short point to be decided is as to whether demonstration and exhibition of the machinery/equipment amounts to use of the goods.*
>
> *4. The Assistant Collector of Customs found that the instruments were used during exhibition for demonstration. A contention was raised that the items were not commercially used. It was found that the demonstration tantamounts to usage as the equipments imported are required to be operated and appropriately regarded as used. No evidence was put forth to prove that the instruments were not operated during the course of exhibition. Against the order of the Assistant Collector dated 30-1-1991, an appeal was preferred with the Collector of Customs and Central Excise (Appeals) which was dismissed on 28-11-1991. The Appellate Authority found that the demonstration in an exhibition involves use of the goods as without the use of the goods, demonstration is not possible. The revision*

preferred before the Government of India was also rejected on 24-8-1992, wherein it was held that, when once the goods were out of customs charge, it is neither practical nor possible for the customs authorities to know the exact nature and extent of use to which such goods are put. Use for demonstration was also considered as a use.

5. ***There is a difference between display and demonstration. It is not the case of the petitioner that the machineries imported were kept intact and were not operated. No evidence to this effect was submitted. Once the machinery is operated, may be for a shorter time for demonstration or exhibition to show its performance etc., the machinery is used****. If a machinery is put to use in exhibition, for sometime, then, it does not remain as a new machinery. Even the machineries which are brought for exhibition, after display, normally they are sold at lesser price. There is always depreciation of the machinery.* *The finding which has been recorded that the machineries were operated is not challenged.* ***Once there is operation of a machinery, it amounts to its use and as such, the refund could be claimed only under Section 74(2) of the Customs Act and not under Section 74(1).*** *The decision which has been relied on by the learned Counsel for the petitioner has no application, because, in that case, the machineries were not put to any use at all, and distinctions were drawn between the provisions of Sections 74 and 75 of the Customs Act. Section 75 of the Customs Act refers to the use in the manufacture of goods. There is no such contemplation under Section 74 and therefore, the use for exhibition would be covered under the term used under Section 74(2). The refund has rightly been granted. No case for interference is made out."*

66. In the above decision the Karnataka High Court noted that there is a difference between *display* and *demonstration*. In the said case since the machineries were operated, *albeit,* for a short time for demonstration and, therefore, did not remain a new machinery. The Karnataka High Court being conscious of the distinction between Section 74 and Section 75 of the Act held that, in the facts of that case, refund would only be available under Section 74 (2) of the Act.

67. The next case relied upon by the Customs Department is ***Daimler Chrysler India Pvt. Ltd. v. Union of India, 2003 SCC OnLine Bom 901***, wherein a fully built car was imported from South Africa for the purpose of study and development of component parts of the car. As part of the study and research, the imported car was driven from Pune to Mumbai for more than 242 Kms. The Bombay High Court was considering the question whether or not the use of fully built imported car, during the course of study and research, amounts to *'use'* of a car after importation thereof into India as contemplated under section 74(2) of the Act. The relevant paragraphs of the judgement of Bombay High Court are as under:

> *"19. Now, let us examine whether the petitioners are justified in their contention that under section 74(2) of the Act 'use' contemplated is commercial use of the imported goods prior to its export.* ***In other words, is it necessary for the purposes of section 74(2) that the goods must be used prior to its export for the purpose for which it was intended****. Can it be said that in absence of such included user the goods were not used or that there was no use within the meaning of section 74(2) of the Act. In order to answer these questions, undisputed facts noticed are: The petitioners were desirous of manufacturing car spare parts to avoid depending on imported components. In order to carry out study and*

research in that behalf with a view to develop technique of manufacturing spare parts in India, the import of car was made from South Africa in December 1995. While conducting study, the car was driven within the factory premises, it was further driven from Pune to Mumbai for the purposes of export. The car had thus clocked a milage of 232 Km. The word 'use' is not defined in the Act. It must, therefore, carry its ordinary meaning subject to such modification the context requires.

20. ***Let us examine the ordinary meaning of the word 'use'. In Shorter Oxford Dictionary the word 'use' as a verb has been given a large number of meanings, the most appropriate of which so far as we are concerned, is "to make use" Black's Law Dictionary has defined the word 'use' as a Verb, to mean "to make use of to convert into one's service, to avail one's self of, to employ." It will, therefore, be noticed that the word 'use' carries a very wide meaning. Thus, applying the dictionary meaning, one has to reach to the conclusion whether the use of the car was made after its import, for the purpose for which it was imported****. It was utilised for the purpose of study for which import was permitted or allowed.*** *Having acted upon the import policy of the Government of India; having taken advantage of importability not involving foreign remittance, having used the goods/Car for research for which it was imported, can it be said that car was not used for the purpose for which import was made. The answer, in our opinion should be in the negative.*

[...]

25. Turning to the facts of the present case, ***on the legal canvas quoted hereinabove, one has to take into account the purpose for which the import of car was made and the scheme under which it was imported.*** *The import of the car in question was in made under the*

policy of the Government of India, which permitted free importability of the goods for certain categories of imports not involving foreign exchange remittances. In the case at hand, car was imported under clause 98(xii) quoted supra, which permitted import of the prototypes and samples by the actual users, industrial or research and development institutions as per the terms of the policy framed in this behalf. After importation of car it was actually used as a specimen for conducting research to imitate spare parts thereof, with a view to develop its manufacture in India. The car was driven within factory premises for the said purpose. ***In our opinion, on the factual matrix of this case, which is not in dispute, the car was used for the purpose for which it was imported, taking advantage of free importability permitted by the export policy of the country. Use of the car for the purpose of research can also be said to be use for commercial purpose****. As a matter of fact, petitioners, in our opinion, are estopped from canvassing any contrary contention. The impugned order though did not take this view, which Revenue could, persuade us to support the ultimate conclusion reached the impugned order may be for the different reasons recorded herein. The impugned order thus can be sustained for the reasons recorded herein, in addition to the reason given by the authorities below."*

68. Thus, the Division Bench of the Bombay High Court held in ***Daimler (supra)*** that the car had been used for the purpose for which it had been imported and, therefore, it was put to 'use' under Section 74(2) of the Act. It is noted that the Bombay High Court was considering the interpretation of the term 'use' under Section 74 of the Act and not under Section 75 of the Act. Nevertheless, as per the Bombay High Court, the term 'use' has to be construed keeping in mind the ordinary meaning of the said term, the purpose

for which the relevant good was imported as also the scheme under which the said good was imported.

69. Further, the Customs Department has drawn the attention of the Court to the decision of the Supreme Court in ***Director of Entry Tax v. Mahindra and Mahindra, (2003) 11 SCC 749***, wherein the Supreme Court was considering the Taxes on Entry of Goods into Calcutta Metropolitan Area Act, 1972 (hereinafter "*1972 Act*"), which levied tax on entry of specified goods into the Calcutta Metropolitan Area "*for consumption, use or sale therein …*". The Respondents therein had brought certain machinery within the Calcutta Metropolitan Area for the purposes of display in an exhibition. The working of the said machinery was also demonstrated during the course of the said exhibition. The Supreme Court was seized with the question whether the act of demonstration of a machinery would amount to "use" of the same in terms of the 1972 Act. The said decision of the Supreme Court is reproduced for ease of reference:

> *"1. The* ***Taxes on Entry of Goods into Calcutta Metropolitan Area Act, 1972*** *imposes a levy on the entry of specified goods into the Calcutta Metropolitan Area "for consumption, use or sale therein …". Section 19 of the Act provides for refund of the tax where the prescribed authority is satisfied that any specified goods upon which the tax had been paid had been exported or conveyed out of the Calcutta Metropolitan Area within a period of six months from the date of their entry therein "without being consumed, used or sold therein". Rule 14(4) deals with the exemption from the levy of the tax of goods brought into the Calcutta Metropolitan Area for the purposes of exhibitions organised by local authorities or organisations approved by the State Government, if the conditions therein stated are satisfied.*

2. The respondents proposed to bring within the Calcutta Metropolitan Area a Heidelberg Four-Colour Sheetfed Offset Press, Model MOV, for the purposes of exhibition. They applied for exemption from payment of the tax under Rule 14(4). The application was rejected. The tax was then paid. The said machine was exhibited and, in the words of the affidavit filed on behalf of the respondents in this Court: "Those who were interested in these machines wanted demonstration. It was demonstrated." The respondents then wanted to remove the said machine from the Calcutta Metropolitan Area within six months of its entry therein and applied for a refund of the tax paid thereon under the provisions of Section 19. The application ultimately came to be heard by the West Bengal Taxation Tribunal. By the order that is impugned in this appeal by special leave, the application was allowed. The Tribunal took the view that, for the purposes of Sections 6 and 19, a demonstration for promoting business interests but without charging any fees for such demonstration could not be treated as "use".

3. The conclusion of the Tribunal has been assailed on behalf of the appellants on two grounds but, having regard to the view that we take, it is necessary to refer only to one ground, namely, that the said machine had been used within the Calcutta Metropolitan Area and that, therefore, the refund under Section 19 was not available. Learned counsel for the respondents submitted that the said machine had not been utilised for the purpose for which it was intended and that, therefore, there was no use within the meaning of Section 19.

4. We are unable to accept the submission on behalf of the respondents. ***This is not a case where a machine had only been displayed. As the affidavit on behalf of***

> ***the respondents makes clear, a demonstration of the said machine was sought and it was given. In other words, the machine was started up and its working was shown. It was, therefore, used and it is of no consequence that the use was not for the purpose for which it was made.*** *Its use being established, the provisions of Section 19 do not permit the refund. That the demonstration was free of charge does not make any difference to this position.*
>
> *5. Accordingly, the appeals are allowed and the judgment and order under appeal is set aside.*
>
> *6. No order as to costs."*

70. The Supreme Court, in the facts of the case, held that there is difference between display and demonstration. Since, the said machine was started and its working was shown, the Supreme Court was of the view that the same would amount to 'use' of the said machine. Thus, refund as sought by the exporter therein was not granted.

71. The Customs Department has attempted to emphasise the observation of the Supreme Court that it is of no consequence that the use of the said machine was not for the purpose for which it was made. Accordingly, the Customs Department has argued that irrespective of the purpose for which the Petitioners have operated the exported mobile phones, the moment the said mobile phones have been switched on and any function thereto has been utilised, the same would constitute 'use' under the proviso to Rule 3(1) of the Duty Drawback Rules. This argument cannot be sustained, in the opinion of this Court, as the decision of the Supreme Court in ***Mahindra (supra)*** does not support the stand of the Customs Department. It is settled law that interpretation by the Courts of words and expressions under one statute cannot

be relied upon as a guide for interpreting words and expressions in another statute unless both the statutes are *pari materia* legislations or it is expressly provided for in the statute under consideration. In this regard, the Supreme Court in ***Jagatram Ahuja v. CGT*, (2000) 8 SCC 249** has observed as under:

> ***"23.*** *We find that Kantilal Trikamlal case [(1976) 4 SCC 643 : 1977 SCC (Tax) 90 : (1976) 105 ITR 92] supports the view taken in Getty Chettiar case [(1971) 2 SCC 741 : (1971) 82 ITR 599]. Added to this, Section 2(15) of the Estate Duty Act, defining "property" came up for consideration in Kantilal Trikamlal case [(1976) 4 SCC 643 : 1977 SCC (Tax) 90 : (1976) 105 ITR 92] . We may state here itself that* ***the words and expressions defined in one statute as judicially interpreted do not afford a guide to construction of the same words or expressions in another statute unless both the statutes are pari materia legislations or it is specifically so provided in one statute to give the same meaning to the words as defined in the other statute****. The aim and object of the two legislations, namely, the Gift Tax Act and the Estate Duty Act are not similar."*

72. An analysis of all the decisions discussed above, would show that in each of the cases, the product-in-question has been utilized – either for demonstration, research, exhibition, etc., in a manner so as to diminish its value. The same had utilized the capabilities of the product and did not add any additional feature or value to the product. Thus, the said decisions are in sharp contrast to the facts of the present case wherein the unlocking/activation of a mobile phone makes the product more accessible and more useful considering the purpose for which it has been manufactured *i.e.*, facilitation of communication and optimum utilization of all the features of a mobile phone.

73. Further, in the present case, it is seen that apart from switching on, insertion of sim card and making a call for 5 minutes, no other feature of the mobile phone is utilised for the purpose of unlocking/activating the said mobile phone. In addition, it is noted that in cases of 'air-activation' the aforesaid steps are also eliminated and the entire process is conducted without even unboxing or unsealing of the mobile phones. A mobile phone is capable of multifarious uses and applications. None of the said features or capabilities of the phone are being utilised during the process of unlocking. The unlocking/activation of the mobile phone enables the same to be used in a particular geographical territory, in this case territories outside India, and nothing more. If the mobile phone is not unlocked/activated and it is used in a different territory than the country where it was unlocked/activated, the consumer would not find it possible to use the said phone properly in the jurisdiction. Calls made by the customer would then become chargeable as international calls. Moreover, none of the apps can be used based on the territory where the customer is located. Such issues would make the product totally ineffective, expensive and non-functional.

74. Further, it would be pragmatic to assume that for a consumer the process of unlocking/activation of mobile phones would result in value addition over a locked/non-activated mobile phone. Thereby, allowing the unrestricted use of the said mobile phones. The process of unlocking/activation of the mobile phones, by any method, would not result in depreciation in the value of the said phones.

75. A manufacturer, in order to test the mobile phone before finally packing the product may have checked the same by activating it in a particular network in the same country of manufacture. If the phone is used in the same country

where it has been manufactured, then there would be no difficulty. Whenever the customer travels abroad on a different carrier or network, international charges are collected and if the mobile phone is locked to a particular region or network then the customer would have to find alternatives to operate the said mobile phone or purchase proper plans to use the phone in a foreign territory. However, if the product is to be exported to a foreign country and enabled for usage in the local network through service providers in the said country and the phone has been not been unlocked/activated in the country of its manufacturing, then the same may prove to be an expensive proposition for the consumer in the said foreign country. Thus, before exporting a product, unlocking/activating the phone to enable it to be used in the destination country would in the opinion of this Court be mere *Configuration* of the phone for the concerned territory and nothing more.

76. The prevalence of multiple networks, multiple service providers across the world has also to be viewed in the context of standardisation of mobile phone technologies where a phone manufactured in one country can be used in another country seamlessly. Considering the thousands of uses that a mobile phone can be put to, mere unlocking cannot constitute *use* by the Petitioners. The development of standards in the field of telecommunication which enables usage of mobile phones across countries may be rendered ineffective if such configuration is held to the detriment of the OEM or the traders/exporters. With the growth of mobile phone manufacturing/ assembling in India more and more exports would take place and the mere fact that the said products are configured for use in foreign countries cannot deprive the Petitioners from duty drawbacks under the prevalent law discussed hereinabove. Drawbacks are benefits which are given to exporters

and in the case of any ambiguity such benefits should go in favour of the exporters and not the other way round. The unlocking/activation of the mobile phone merely makes the mobile phone more usable in the destination country and the same would therefore not constitute "*taken into use*" under proviso to Rule 3 of Duty Drawback Rules.

77. In the present batch of petitions in some of the cases, the Petitioners have challenged the respective SCNs. In some cases Order-in-Original which have been passed in respective cases have been challenged.

78. The Petitioners had sought clarifications from the CBIC *qua* the eligibility of duty drawbacks on export of unlocked/activated mobile phones. In response, the CBIC had issued the two clarifications dated 25th September, 2020 and 14th December, 2021. These two clarifications in effect took away the benefit available to the Petitioners under Section 75 read with the Duty Drawback Rules.

79. In the opinion of this Court, the unlocking/activating of the mobile phones as per the procedures adopted by the Petitioners herein is mere '*Configuration'* of the product to make it usable and does not constitute "*taken into use*" under proviso to Rule 3 of the Duty Drawback Rules. The Clarifications go beyond Section 75 of the Act and the Duty Drawback Rules since the interpretation sought to be given by CBIC is that unlocking/activation of mobile phones constitutes "*taken into use*". The said interpretation which is contained in the Clarifications is not sustainable. Accordingly, the Clarifications issued by the CBIC are quashed.

80. The respective impugned SCNs and the Orders-in-Original passed by the Respondents, relying on the Clarifications, which take a contrary position to the findings of this Court, are also quashed.

81. The Court has, however, not examined each of the cases as to whether duty drawbacks are liable to be granted or not to the Petitioner therein. The individual cases shall be processed by the Customs Department for drawbacks in accordance with law.

82. It is made clear that if the drawbacks are processed and granted to the respective Petitioners for the relevant period as per law, within a period of three months, no interest would be liable to be paid under Section 75A of the Act. If, however, the same is not effected within a period of three months, upon the expiry of three months interest would be liable to be paid by the Customs Department on the eligible duty drawbacks to the respective Petitioner in accordance with law.

83. The non-grant of interest for the previous period is in view of the fact that there was ambiguity as to the legal position in respect of eligibility of unlocked/activate mobile phones for grant of duty drawbacks.

84. These petitions are allowed in above terms. All pending applications, if any, are also disposed of.

PRATHIBA M. SINGH
JUDGE

DHARMESH SHARMA
JUDGE

FEBRUARY 13, 2025
dj/ms