

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

CUSTOMS APPEAL NO. 52218 OF 2019

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-I/IMP/NCH/2/38/2019-20 dated 06.06.2019 passed by the Commissioner of Customs (Appeals), New Delhi)

M/s Nikon India Pvt. Ltd.

Plot No. 71, Sector – 32, Institutional Area
Gurgaon – 122 001, Haryana

.... Appellant

VERSUS

**Commissioner of Customs (Imports)
New Customs House, New Delhi**

...Respondent

APPEARANCE:

Shri Lakshmikumaran, Shri Ashwani Bhatiya, Ms. Jyoti Pal and Shri Rachit Jain,
Advocates for the Appellant

Shri Ajay Jain, Special Counsel and Shri Rakesh Kumar, Authorized Representatives
of the Department

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 10.02.2022
Date of Decision: 08.03.2022**

INTERM ORDER NO. 04/2022

JUSTICE DILIP GUPTA:

M/s. Nikon India Private Limited¹ is aggrieved by the order dated 06.06.2019 passed by the Commissioner of Customs (Appeals)² by which the appeal that was filed to assail the order dated 13.05.2016 passed by the Assistant Commissioner of Customs, Group-VA³ has been dismissed. The Assistant Commissioner held that NIKON brand "digital still image video cameras" imported by the appellant are not

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1. the appellant
 2. the Commissioner (Appeals)
 3. the Assistant Commissioner

entitled to Basic Customs Duty⁴ exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012.

2. The appellant is engaged in the import and trade of various electronic products, including **digital still image video cameras**. According to the appellant, these cameras have the primary feature to capture still image photographs under different modes (flash mode, night mode, portrait mode, etc.) and, therefore, classified as “digital cameras” under Customs Tariff Item⁵ 8525 80 20 and not as “video camera recorders” under CTI 8525 80 30. The appellant further claims that as a secondary feature, these cameras imported by the appellant during the relevant period are also capable of recording videos of resolution equal to or higher than 800 x 600 pixels with 23 or more frames per second for a maximum period of 29 minutes 59 seconds in a single sequence. It is also the claim of the appellant that these cameras were shipped out of factory with firmware embedded in it. Firmware is provided by the manufacturer i.e. Nikon Corporation, Japan and it restricts the video length of such cameras in a single sequence to 29 minutes 59 seconds.

3. The issue involved in this appeal is whether these cameras imported by the appellant are eligible for exemption from BCD under serial no. 13 of the notification dated 01.03.2005, as amended by notification dated 17.03.2012.

4. It would be necessary for appreciating the issue, to first understand what factors led to the issuance of these two notifications. Information Technology Agreement⁶ is an agreement that was enforced by the World Trade Organization and concluded in the

4. BCD
5. CTI
6. ITA

Ministerial Declaration on Trade in Information Technology Products in 1996. The aim of the said treaty was to lower all taxes and tariffs on information technology products by the signatories to zero. The 'digital still image video cameras' are also mentioned in the list of products covered under the ITA. Various countries that are signatories to the ITA, therefore, undertook to reduce import tariff rates for the digital still image video cameras to NIL. Being a signatory to the said agreement, India also undertook to allow the imports of various electronic goods, including 'digital still image video cameras' classifiable under Customs Tariff Heading⁷ 8525 at nil rate of duty.

5. To fulfill its obligations under the ITA, the Ministry of Finance of the Government of India issued BCD exemption under notification dated 01.03.2005. The exemption to 'digital still image video cameras' was provided under serial no. 13 of the notification dated 01.03.2005 and the relevant portion of this notification is reproduced below:

"Exemption to specified goods of Chapters 84 & 85 (ITA Bound expositions).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts following goods of the description specified in column (3) of the Table below and falling within the heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from the whole of the duty of customs leviable thereon under the said First Schedule, namely: -

S.No.	Heading, Sub-Heading or Tariff Item	Description of Goods
(1)	(2)	(3)
13.	8525 40 00	Digital still image video cameras.

6. Thereafter, w.e.f. 01.01.2007, the notification dated 01.03.2005 was aligned with the Harmonised System of Nomenclature⁸ amendments and the tariff entry for 'digital still image video cameras' was changed to CTI 8525 80 20, but the description remained the same.

7. A Circular dated 10.09.2007 was also issued clarifying the difference between 'digital still image video cameras' and 'video camera recorders'. It clarifies that the term 'digital still image video cameras' covers only digital cameras that have the capability of taking still images but this would also include digital cameras that take moving images for a limited period of time though they are primarily still image cameras. Such cameras would fall, it was clarified, under CTI 8525 80 20 but digital cameras that can take both still images and moving images like camcorder or video recorder falling under CTI 8525 80 30 shall not be covered under CTI 8525 80 20.

8. Thereafter, the notification dated 01.03.2005 was amended by notification dated 17.03.2012 and an 'Explanation' was inserted. The relevant portion of the notification is reproduced below:

S.No.	Heading, Sub-Heading or Tariff Item	Description of Goods
(1)	(2)	(3)
13.	8525 80 20	Digital still image video cameras. Explanation.- For the purposes of this entry, "digital still image video camera" means a digital camera not capable of recording video with minimum resolution of 800 x 600 pixels, at minimum 23 frames per second, for at least 30 minutes in a single sequence using the maximum storage (including expanded) capacity.

9. With effect from 01.03.2015, the notification dated 01.03.2015 was further amended to read as follows:

S. No.	Chapter or Heading, Sub-Heading or Tariff Item	Description of Goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
428A.	8525 80 20	Digital Still Image Video Cameras capable of recording video with minimum resolution of 800 x 600 pixels, at minimum 23 frames per second, for at least 30 minutes in a single sequence using the maximum storage (including expanded) capacity	Nil	-	-

10. The aforesaid notification dated 01.03.2005 was further amended by notification dated 30.04.2015 and the same is reproduced below:

S. No.	Chapter or Heading, Sub-Heading or Tariff Item	Description of Goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
428A.	8525 80 20	Digital Still Image Video Cameras	Nil	-	-

11. It would thus be seen that 'Explanation' was inserted from 17.03.2012 to 30.04.2015 only. Prior to 17.03.2012 and post 30.04.2015, the exemption from BCD was granted to 'digital still image video cameras' without the Explanation.

12. It transpires from the records that earlier, a show cause notice dated 09.08.2014 was issued to the appellant by the Additional Director General in the Directorate of Revenue Intelligence proposing to deny the benefit of exemption granted by the notification to digital still image video cameras imported by the appellant during the period 2012 till 2014. An order dated 28.10.2016 was passed confirming the proposal made in the show cause notice and the appeal filed by the

appellant before the Tribunal was dismissed by the Tribunal by a common order dated 19.12.2017 covering five appeals. The appellant also filed an appeal before the Supreme Court. In fact, there were five appeals before the Supreme Court, namely, Civil Appeal No.1827 of 2018, Civil Appeal No. 1875 of 2018, Civil Appeal No. 1832 of 2018, Civil Appeal No. 3213 of 2018 and Civil Appeal No. 5967 of 2018. Out of these five appeals, four appeals were allowed by the Supreme Court on 09.03.2021 for the reason that the Directorate of Revenue Intelligence Officers did not have the jurisdiction to issue the show cause notices. The remaining appeal, being Civil Appeal No. 5967 of 2018 filed by Sony India Private Limited, was de-tagged since the issue of jurisdiction of the Officers of the Directorate of Revenue Intelligence was not involved in this appeal and this appeal is pending before the Supreme Court.

13. The present appeal relates to a common speaking order dated 13.05.2016 passed by the Assistant Commissioner on the 629 Bills of Entry filed by the appellant during the period February 2015 to March 2015. The benefit of the exemption granted by notification dated 01.03.2005, as subsequently amended on 17.03.2012, was denied to the appellant. The appeal filed by the appellant before the Commissioner (Appeals) to challenge the said order passed by the Assistant Commissioner was dismissed by order dated 06.06.2019.

14. The Commissioner (Appeals) noted that the camera imported by the appellant could record videos at a resolution of more than 800 x 600 pixels at more than 23 frames per second but it could not record a video for more than 29 minutes and 59 seconds in a sequence. Thus, if the camera could not record a video for more than 29 minutes and 59

seconds, it would not be a video camera recorder and would be a 'digital still image video camera'. Still the Commissioner (Appeals) denied the exemption from BCD to the appellant for the reason that though the camera was capable of recording video in a single sequence for less than 30 minutes but this restriction was imposed by the firmware software, which restriction was merely an artificial restriction that could be removed subsequently. The Commissioner (Appeals) further held the capacity of storage was also an important factor to determine how much video could be recorded and the utilization of maximum storage capacity was directly linked to the period of recording. Thus, the capacity storage should exhaust when the optimum level recording period is achieved and no more videos can further be recorded.

15. The relevant portions of the order dated 06.06.2019 passed by the Commissioner (Appeals) is reproduced below:

"5.4 *** A plain reading of Notification clearly establish that all the above three conditions are required to be fulfilled for a digital camera to qualify as 'Digital Still Image Video Camera'. *******

5.5 ***** The Appellant had accepted the fact that this feature of recording video in a single sequence for 29 minutes 59 seconds is introduced in the impugned goods by way of restriction provided by the firmware.

Hence, it is clear that the impugned goods were capable of recording video in a single sequence for 30 minutes or more but restriction of recording videos less than 30 minutes was imposed by a software 'firmware'. The Appellant had also contended that as long as the user cannot record a video clip of 30 minutes or more in a single sequence, the impugned goods shall be covered by the exemption Notification. However, no evidence has been put forth by the Appellant in support of their contention that the user, by any means, cannot overcome to the restriction

imposed by the said software or to nullifying the firmware for availing the facility of recording for a period of 30 minutes or more. This situation has wisely been examined by the Adjudicating Authority in para 4.8.10 by an example of Nikon where by simple instructions the users were advised how to remove the video recording limitations. I fully agree with the conclusion drawn by the Adjudicating Authority that the firmware restriction on the time length of video recording is an artificial restriction put by the digital camera manufacturers. Investigation revealed that after recording for more than 30 minutes there remains ample space for recording even on using even a 8 GB memory card. **When there is inbuilt facility in the impugned goods to record video for 30 minute or more, which has been temporarily barred by some software, I do not find force in the contention of the Appellant.**

5.6 ***** I find that the capacity of storage is one of the biggest determinants of how much video can be recorded. The larger the storage capacity, the more video you can record. Once the storage capacity is full, the user has the option to stop recording or record over the oldest video recordings (overwrite setting). **The utilization of maximum storage capacity is directly linked to the period of recording. Once the optimum level of period of recording is achieved it gives understanding that the capacity of storage of such recording has been exhausted.** Vice versa if the storage capacity is exhausted no more videos can be recorded. Hence both the things are related in direct proportion.

5.8 **Hon'ble CESTAT, Principal Bench, New Delhi in Final Order** No. 58446-58450/2017 **date-19.12.2017** in the matter of M/s Sony India Pvt. Ltd., M/s Canon India Pvt. Ltd., Ms Nikon India Pvt. Ltd. & Others, **wherein the identical issue of the benefit of exemption of Basic Customs duty to Digital Still image Video Cameras under Notification** No. 25/2005- Cus., as amended on 17.03.2012, held, inter alia, that:

5.9 **Therefore, the impugned Order is legally correct** in holding that the impugned Digital Still Image Video Cameras' imported by the Appellant are not entitled to BCD exemption as per Notification No. 25/2005-Cus., as amended. Therefore, re-

assessment by the Department by denying the exemption benefit is in accordance with the said Notification.”

(emphasis supplied)

16. This appeal has been filed to assail the order dated 06.06.2019 passed by the Commissioner (Appeals).

17. Shri V. Lakshmikumaran, learned counsel appearing for the appellant submitted that the earlier order dated 19.12.2017 passed by the Tribunal in the previous round of litigation cannot be relied upon since it was set aside in the appeal filed against the said decision of the Tribunal by the Supreme Court in **Canon India Private Limited vs. Commissioner of Customs**⁹. Even otherwise, the appellant was entitled to exemption from BCD under the amended notification dated 01.03.2005 and in this connection, learned counsel pointed out that even if one of the three conditions contained in the Explanation that make the camera ineligible for availing the exemption is not satisfied, the camera would be a digital still image video camera eligible for exemption from BCD under the notification. Learned counsel also pointed out that the Commissioner (Appeals) committed an illegality in concluding that the time limit of 29 minutes and 59 seconds was an artificial restriction imposed in the camera by the firmware software. Learned counsel also submitted that the Commissioner (Appeals) committed an error in holding that the camera should exhaust all its maximum storage capacity at the end of the clip length.

18. Shri Ajay Jain, learned special counsel appearing for the Department with Shri Rakesh Kumar, learned authorized representative of the Department, however, supported the impugned order. In this connection, learned special counsel pointed out that all

9. 2021 (3) TMI 384 – Supreme Court

the three conditions have to be read together for deciding the eligibility for exemption and there is no good reason as to why they should be met cumulatively for a camera to be ineligible for exemption. Learned special counsel also pointed out that the reasons given by the Tribunal in the earlier proceedings for denying the exemption benefit still hold good and in any case as the third condition relating to video recording for less than 30 minutes is not satisfied and the fact that the maximum storage capacity is not exhausted in video recording of 29 minutes and 59 seconds, the cameras imported by the appellant would not be eligible for exemption from BCD under the notification.

19. The submissions advanced by the learned counsel for the appellant and the learned special counsel for the Department have been considered.

20. Broadly, two issues arise for consideration namely:

(i) Preliminary Issue: Whether the order dated 19.12.2017 passed by the Tribunal, as a part of previous round of litigation, can be relied for the purpose of merits in this Appeal;

(ii) Issue on merits:

Whether the appellant is eligible to avail benefit of BCD exemption under notification dated 01.03.2005, as amended by notification dated 17.03.2012?

Preliminary Issue

21. In the earlier round of proceedings, the Tribunal dismissed all the five appeals by order dated 19.12.2017 and the relevant portion is reproduced below:

“19. There is no dispute in respect of conditions (i) to (ii) above. Both these conditions are satisfied by cameras imported by the appellants. The point of dispute is regarding the third condition capability to record video for as long as 30 minutes in a single sequence using the maximum storage (including expanded capacity). The submission of the appellants is that the DSC imported are not capable of recording video at a resolution equal to /greater than 800 x 600 pixels at a speed, equal to / greater than 23 frames per second, for a period greater than 30 minutes in a single sequence. DRI, during investigation, found that all the digital still video cameras imported had firmware implanted within them to restrict the duration of a single sequence to less than 30 minutes.

22. The imported digital cameras taking into consideration the memory capacity at the time of import, were found to have the capability of recording video in a single sequence of more than 30 minutes. However, during investigation, it was found that such capabilities have been restricted through firmware to a single sequence of less than 30 minutes. Hence, the fact of matter is that the imported digital cameras, can run a single sequence of only less than 30 minutes whereas the cameras have the capability to have a single sequence of much more than 30 minutes. **If the arguments of the appellant are to be accepted, then the notification benefit is to be extended to all those digital still image video cameras, in which a single sequence recording is of less than 30 minutes. Such an interpretation will make the stipulation in the explanation to the Notification about the maximum storage (including expanded) capacity as redundant.** It is obligatory to read and satisfy all the conditions of the notification without rendering any part therein as redundant. Since in the present case, the imported digital cameras are capable of recording video with minimum resolution and minimum recording speed for more than 30 minutes in a single sequence; using maximum storage capacity, such cameras will not be entitled to the benefit of notification. It is well settled that a person who claims exemption or concession, has to establish that he is entitled to that exemption or that concession. **In the present case, as discussed above, the impugned goods do not fulfill all the conditions specified in the notification and hence it is an inevitable that the benefit of notification is denied to these goods.**

24. Appellants have argued that regarding the Education and Secondary and Higher Education Cess denial of exemption from payment of Cess is incorrect. It may be mentioned that Exemption Notification NO. 69/2004-Cus dated 9.7.2004 and 28/2007 dated 01.03.07 exemption from Education Cess and Senior and Higher Secondary Education Cess for Digital Still image video cameras falling under Tariff Item 8525 8020. It is seen that these exemptions were continued even for the period under dispute. It was not amended simultaneously with Notification No. 25/2005 which was amended on 17.3.2012 when explanation was inserted. So we are of the view that same exemption was continued as far as Cess is concerned, for the disputed period. Hence, Education Cess and Senior and Higher Secondary Education Cess cannot be demanded for the disputed period."

(emphasis supplied)

22. Five appeals were filed before the Supreme Court, out of which four appeals were allowed solely for the reason that the Directorate of Revenue Intelligence Officers did not have the jurisdiction to issue the show cause notices. The relevant portion of the judgment rendered by the Supreme Court in **Canon India** is reproduced below:

"23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set-aside and the ensuing demands are also set aside.

...

31. In the result, these appeals are allowed. The common order dated 19.12.2017 passed by the CESTAT, New Delhi in Customs Appeal Nos. 50098, 50099, 50100 and 50280/2017 is set aside. Consequently, the impugned demand notices issued against all the three appellants herein are also set aside."

23. The fifth appeal was de-tagged as the issue relating to jurisdiction of the Department of Revenue Intelligence did not arise for consideration in this appeal. This Civil Appeal No. 5967 of 2018 filed by Sony India Private Limited is still pending before the Supreme Court.

24. It is not possible to accept the contention of learned counsel for the appellant that since the earlier decision rendered by the Tribunal on 19.12.2017 has been set aside by the Supreme Court in four appeals, the reasons given in the said decision of the Tribunal have to be ignored while deciding this appeal. In this connection, reliance can be placed on the decision of the Supreme Court in **S. Shanmugavel Nadar vs. State of Tamil Nadu and Another**¹⁰. The Supreme Court explained in detail what part of the order would actually merge in the order of the Supreme Court when an appeal is dismissed by the Supreme Court. It would, therefore, be apt to refer to this decision of the Supreme Court in **Nadar** at length. The constitutional validity of the Madras City Tenants Protection (Amendment) Act, 1994 (Act No. 2 of 1996) was assailed in several writ petitions before the Madras High Court. When the matter came up for hearing before a Division Bench of the High Court, reliance was placed by the respondents on an earlier Division Bench decision of the Madras High Court in **M. Vardaraja Pillai vs. Salem Municipal Council**¹¹, wherein the constitutional validity of the Madras City Tenants Protection (Amendment) Act, 1960 (Act No. 13 of 1960) was assailed. This Division Bench had upheld the validity of Act No. 13 of 1960 but against this decision, appeals by special leave were filed before the Supreme Court. The Supreme Court dismissed the appeals by an order dated September 10, 1986 and it is reproduced below :-

"The Constitutional validity of Act 13 of 1960 amending the Madras City Tenants' Protection Act, 1921 is under challenge in these appeals. The State of Tamil Nadu was not made a party before the Trial Court. However, the State was impleaded as a supplemental respondent in appeal

10. (2002) Supp 8 SCC 361

11. 85 Law Weekly 760

as per orders of the High Court. When the appellants lost the appeal, they sought leave to appeals to this Court. The State of Tamil Nadu was not made a party in the said leave petition. In the S.L.P. before this Court also the State of Tamil Nadu was not made a party. **A challenge to the constitutional validity of the Act cannot be considered or determined, in the absence of the concerned State. The learned counsel now prays for time to implead the State of Tamil Nadu. This appeal is of the year 1973. In our view it is neither necessary nor proper to allow this prayer at this distance of time. No other point survives in these appeals. Therefore, we dismiss these appeals, but without any order as to costs."**

(emphasis supplied)

25. The Division Bench of the High Court hearing the challenge to the constitutional validity of Act No. 2 of 1996 entertained doubts on the view taken by the earlier Division Bench of the High Court in **Pillai** and, therefore, referred the matter to a Full Bench of the High Court. When the Full Bench of the High Court took up the hearing of the writ petitions, the aforesaid order of the Supreme Court dated September 10, 1986 was brought to its notice. The Full Bench held that since the appeal against the decision of the Division Bench in **Pillai** was dismissed by the Supreme Court, the decision of the High Court merged in the order of the Supreme Court and so the Full Bench could not examine the correctness of the law laid down by the Division Bench in **Pillai**.

26. It is against the aforesaid decision of the Full Bench that appeals were filed by Special Leave before the Supreme Court. The Supreme Court noted that the earlier order dated September 10, 1986 of the Supreme Court did not go into the question of constitutional validity of Act No. 13 of 1960 nor did the Supreme Court apply its mind to the correctness or otherwise of the view taken by the High Court in **Pillai**.

The Supreme Court also noted that the appeals had been dismissed as not properly constituted and hence incompetent as the State of Tamil Nadu, which was a necessary party, had not been impleaded. The appeals were, therefore, disposed of without adjudication on merits. The Supreme Court then explained in detail the doctrine of merger and observed that the earlier order dated September 10, 1986 of the Supreme Court can be said to be a declaration of law only on two points, namely that in a petition involving an issue concerning the constitutional validity of any State Legislation, the State is a necessary party and in its absence the issue cannot be gone into and that a belated prayer for impleading a necessary party may be declined. The Supreme Court also observed that by no stretch of imagination can it be said that the reasoning or the law contained in the decision of the Division Bench of the Madras High Court in **Pillai** stood merged in the order of the Supreme Court in a sense so as to amount to a declaration of law under article 141 of the Constitution by the Supreme Court or that the order of the Supreme Court had affirmed the statement of law contained in the decision of the High Court. The Supreme Court, therefore, held that upon the dismissal of the appeals on September 10, 1986, the operative part of the order of the Division Bench stood merged in the decision of the Supreme Court, but the remaining part of the order of the Division Bench of the High Court cannot be said to have merged in the order of the Supreme Court nor did the Supreme Court make any declaration of law within the meaning of article 141 of the Constitution, either expressly or by the necessary implication. The Supreme Court further made it clear that since neither the merits of the order of the High Court nor the reasons

recorded therein nor the law laid down therein had been gone into in the earlier order, the statement of law contained in the Division Bench judgment of the High Court in **Pillai** would continue to remain the decision of the High Court, binding as a precedent on subsequent Benches of coordinate or lesser strength but open to reconsideration by any Bench of the same High Court with a coram of judges more than two. The Supreme Court, it needs to be noted, also observed that the Full Bench of the High Court was not hearing a prayer for **review** of the order passed by the Division Bench in **Pillai**. Thus, a clear distinction had been drawn by the Supreme Court in cases when a Larger Bench is hearing a reference and when it is hearing a review petition after the dismissal of an Appeal by the Supreme Court. A review petition would not be maintainable before the High Court after the dismissal of the Appeal by the Supreme Court, but the decision can be reconsidered by a Larger Bench of the High Court if the Supreme Court had not adjudicated on the merits of the order of the High Court. The Supreme Court, therefore, set aside the order of the Full Bench of the High Court and restored the appeal before the Full Bench to be heard and decided in accordance with law. The relevant portion of the judgment of the Supreme Court is reproduced below :-

“10. **Firstly, the doctrine of merger.** Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, **as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part, i.e. the mandate or decree issued by the Court which may have been expressed in positive or negative forum.** For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons

different from the one assigned by the subordinate forum what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction. **However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum.**

11. **Secondly, the doctrine of merger has a limited application.** In *State of U.P. v. Mohammad Nooh*, AIR (1958) SC 86 the Constitution Bench by its majority speaking through S.R. Das, CJ so expressed itself. **"while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal there from or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree"**. A three-Judge Bench in *State of Madras v. Madurai Mills Co. Ltd.*, AIR (1967) SC 681 held, "the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two order irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. (emphasis supplied). Recently a three-Judge Bench of this Court had an occasion to deal with doctrine of merger in *Kunhayammed and Ors. v. State of Kerala and Anr.*, [2000] 6 SCC 359 and this Court reiterated that the doctrine of merger is not of universal or unlimited application; the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid, shall have to be kept in view, (emphasis supplied). **In this view of the law, it cannot be said that the decision of this Court dated 10.9.1986 had the effect of resulting in merger into the order of this Court as regard the statement of law or the reasons recorded by the Division**

Bench of the High Court in its impugned order. The contents of the order of this Court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor they could have been gone into.

12. **Thirdly**, as we have already indicated, in the present round of litigation, the decision in Varadaraja Pillai's case was cited only as a precedent and not as res judicata. **The issue ought to have been examined by the Full Bench in the light of Article 141 of the Constitution and not by applying the doctrine of merger. Article 141** speaks of declaration of law by the Supreme Court. **For a declaration of law there should be a speech, i.e., a speaking order.** In *Krishen Kumar v. Union of India and Ors.*, [1990] 4 SCC 207, this Court has held that the doctrine of precedents, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. In *State of U.P. and Anr. v. Synthetics and Chemicals U.P. and Anr.*, [1991] 4 SCC 139, R.M. Sahai, J. (vide para 41) dealt with the issue in the light of the rule of sub-silentio. The question posed was: can the decision of an Appellate Court be treated as a binding decision of the Appellate Court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule of sub-silentio, is an exception to the rule of precedents. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." A court is not bound by an earlier decision if it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. A decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues, cannot be deemed to be a law declared, to have a binding effect as is contemplated by Article 141. His Lordship quoted the observation from *B. Shama Rao v. The Union Territory of Pondicherry*, [1967] 2 SCR 650 "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". His Lordship tendered an advice of wisdom -"restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

M/s. Rup Diamonds and Ors. v. Union of India and Ors., AIR (1989) SC 674 is an authority for the proposition that apart altogether from the merits of the grounds for rejection, the mere rejection by a superior forum, resulting in refusal of exercise of its jurisdiction which was invoked, could not by itself be construed as the imprimatur of the superior forum on the correctness of the decisions sought to be appealed against. In Supreme Court Employees Welfare Association v. Union of India and Ors. AIR (1990) SC 334 this Court observed that a summary dismissal, without laying down any law, is not a declaration of law envisaged by Article 141 of the Constitution. **When reasons are given, the decision of the Supreme Court becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. When no reason are given, a dismissal simpliciter is not a declaration of law by the Supreme Court under Article 141 of the Constitution.** In Indian Oil Corporation Ltd. v. State of Bihar and Ors., AIR (1986) SC 1780 this Court observed that the questions which can be said to have been decided by this Court expressly, implicitly or even constructively, cannot be re-opened in subsequent proceedings; but neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court bar the trial of identical issue in separate proceedings merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication.

14. It follows from a review of several decisions of this Court that it is the speech, express or necessarily implied, which only is the declaration of law by this Court within the meaning of Article 141 of the Constitution.

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16. **In the present case, the order dated 10.9.1986 passed by this Court can be said to be declaration of law limited only to two points - (i) that in a petition putting in issue the constitutional validity of any State Legislation the State is a necessary party and in its absence the issue cannot be gone into, and (ii) that a**

belated prayer for impleading a necessary party may be declined by this Court exercising its jurisdiction under Article 136 of the Constitution if the granting of the prayer is considered by the Court neither necessary nor proper to allow at the given distance of time. **By no stretch of imagination can it be said that the reasoning or view of the law contained in the decision of the Division of the High Court in M. Varadaraja Pillai 's case had stood merged in the order of this court dated 10.9.1986 in such sense as to amount to declaration of law under Article 141 by this Court or that the order of this Court had affirmed the statement of law contained in the decision of High Court.**

17. We are clearly of the opinion that in spite of the dismissal of the appeals on 10.9.1986 by this Court on the ground of non-joinder of necessary party, though the operative part of the order of the Division Bench stood merged in the decision of this Court, the remaining part of the order of Division Bench of the High Court cannot be said to have merged in the order of this Court dated 10.9.1986 nor did the order of this Court make any declaration of law within the meaning of Article 141 of the Constitution either expressly or by necessary implication. The statement of law as contained in the Division Bench decision of the High Court in M. Varadaraja Pillai's case would therefore continue to remain the decision of the High Court, binding as a precedent on subsequent benches of coordinate or lesser strength but open to reconsideration by any bench of the same High Court with a coram of judges more than two.

18. The Full Bench was not dealing with a prayer for review of the earlier decision of the Division Bench in M. Varadaraja Pillai's case and for setting it aside. Had it been so, a different question would have arisen, namely, whether another Division Bench or a Full Bench had jurisdiction or competence to review an earlier Division Bench decision of that particular Court and whether it could be treated as affirmed, for whatsoever reasons, by the Supreme Court on a plea that in view of the decision having been dealt with by the Supreme Court the decision of the High Court was no longer available to be reviewed. We need not here go into the question, whether it

was a case of review, or whether the review application should have been filed in the High Court or Supreme Court. Such a question is not arising before us.

19. **Under Article 141 of the Constitution, it is the law declared by the Supreme Court, which is binding on all Courts within the territory of India. Inasmuch as no law was declared by this Court, the Full Bench was not precluded from going into the question of law arising for decision before it and in that context entering into and examining the correctness or otherwise of the law stated by the Division Bench in M. Varadaraja Pillai's case and either affirming or overruling the view of law taken therein leaving the operative part untouched so as to remain binding on parties thereto.**

20. Inasmuch as in the impugned judgment, the Full Bench has not adjudicated upon the issues for decision before it, we do not deem it proper to enter into the merits of the controversy for the first time in exercise of the jurisdiction of this Court under Article 136 of the Constitution. We must have the benefit of the opinion of the Full Bench of the High Court as to the vires of the State legislation involved."

21. For the foregoing reasons, the appeals are allowed. The impugned judgment of the High Court is set aside. All the appeals shall stand restored before the Full Bench of the High Court and shall be heard and decided in accordance with law.

(emphasis supplied)

27. The aforesaid decision of the Supreme Court in **Nadar** was followed by the Supreme Court in **Collector of Central Excise vs. Technoweld Industries**¹² and the relevant paragraph is reproduced below :-

"5. Reliance was placed upon the authority of this Court in the case of S. Shanmugavel Nadar vs. State of T.N. It was submitted that all the civil appeals had been dismissed by non-speaking orders. It was submitted that it is open to this Court to consider whether or not the impugned decisions of the Tribunal are correct. There can be no dispute with this

12. (2003) 11 SCC 798

proposition. We have, therefore, heard the learned counsel at length.”

28. What was decided by the Supreme Court in **Canon India** was that the Directorate of Revenue Intelligence Officers did not have the jurisdiction to issue the show cause notices. The Supreme Court did not examine the order of the Tribunal on merits. Learned counsel for the appellant is, therefore, in view of the aforesaid decision of the Supreme Court in **Nadar** that was followed in **Technoweld Industries** not justified in submitting that the reasoning given in earlier decision of the Tribunal for denying the benefit of exemption from BCD to the appellant has been wiped out because of the decision of the Supreme Court in **Canon India**. In fact, Civil Appeal No. 5967 of 2017 filed by **Sony India** is still pending disposal in which the correctness of the order passed by the Tribunal will be examined.

Applicability of notification dated 01.03.2005, as amended by notification dated 17.03.2012

29. As noticed above, it was on the basis of the ITA enforced by the World Trade Organization and the commitment given by India that India undertook the obligation to allow the imports of various electronic goods, including ‘digital still image video cameras’ at nil rate of duty. Accordingly, a notification dated 01.03.2005 was issued providing for BCD exemption to ‘digital still image video cameras’ under CTI 8525 40 00 and later in 2007 to CTI 8525 80 20 so as to align it with HSN. The Circular dated 10.09.2007 also clarified the difference between a ‘digital still image video camera’ and a ‘video camera recorder’. A ‘digital still image video camera’, it was provided, would cover only digital cameras that have the capability of capturing still images but this camera would also include a digital camera that

takes videos for a limited time, though this camera would primarily be a still image camera. Such cameras would fall under CTI 8525 80 20. The Circular also clarifies that digital cameras that can take both still images and moving images like camcorder or video recorders falling under CTI 8525 80 30, would not be covered by this entry. Thus, a clear distinction was drawn between a digital camera that is primarily meant for capturing still images but can also take moving images for a limited period of time and a camera which captures still images as also moving images without limitation of time.

30. There is no dispute regarding the period prior to 17.03.2012 as the description under CTI 8525 80 20 was 'digital still image video cameras'. The dispute arose when with effect from 17.03.2012 an Explanation was added to the description of goods under CTI 8525 80 20. This 'Explanation', for the purpose of convenience, is again reproduced below:

"Explanation.- For the purposes of this entry, "digital still image video camera" means a digital camera not capable of recording video with minimum resolution of 800 x 600 pixels, at minimum 23 frames per second, for at least 30 minutes in a single sequence using the maximum storage (including expanded) capacity."

31. It needs to be noted that w.e.f. 30.04.2015 the aforesaid 'Explanation' was deleted and the description of the cameras, as was prior to 17.03.2012, was maintained as 'digital still image video cameras'.

32. The aforesaid 'Explanation' can best be understood by attempting to examine what types of digital cameras will not be covered by the said Explanation. As noticed above, there are two types of digital cameras. One is a digital camera which primarily takes still images but is also capable of taking moving images for a limited period

of time. The other is a digital camera which primarily takes moving images without any limitation of time but is also capable of taking still images. The 'Explanation' seeks to exclude the latter type of digital cameras from exemption from BCD and includes the former type of digital cameras. Thus, digital cameras that will be ineligible for availing the exemption from BCD are those digital camera that are:

- (i) capable of recoding video at a resolution equal to or greater than 800 x 600 pixels;
- (ii) capable of recording video at a speed equal to or greater than 23 frames per second; and
- (iii) capable of recoding video in a single sequence for period greater than 30 minutes by using the maximum storage (including expanded) capacity.

33. What is important to notice is that even if one of the aforesaid three conditions is not met, the digital camera will be eligible for exemption from BCD under the notification, as it will not be a 'video camera recorder'.

34. The conditions stipulated in the notification dated 01.03.2005, as amended on 17.03.2012 have been borrowed from the European Union Explanatory Notes and the above understanding of the 'Explanation' is in conformity with the European Union Explanatory Notes which are reproduced below:

8525 80 30	<p>Digital Cameras</p> <p>Digital Cameras of this subheading are always capable of still-image recording, whether on an internal storage medium or on interchangeable media.</p> <p>Most of the cameras of this subheading have the design of a traditional photographic camera and do not have a foldable view finder.</p> <p>The cameras may also have video-capture capability to record sequence of video.</p> <p>Cameras remain classified in this subheading unless they are capable, using maximum storage capacity of recording in a quality of 800 X 600 pixel (or higher) at 23 frames per second (or higher) at least 30 minutes in a single sequence of video.</p>
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	Compared to the video camera recorders of subheading 8525 80 91 and 8525 80 99 many digital cameras (when functioning video cameras) do not offer an optical zoom function during video recording. Unaffected by the storage capacity some cameras automatically terminate the recording of video after a certain period of time.
8525 80 91 and 8525 80 99	<p>Video Camera recorders</p> <p>Video camera recorders of these subheadings are always capable of recording sequences of video, whether on an internal storage medium or on interchangeable media.</p> <p>In general the digital video camera recorders of these subheadings have the design which differs from digital cameras of subheading 8525 80 30. They often have a foldable viewfinder and are frequently presented together with a remote control. They always offer an optical zoom function during video recording.</p> <p>These digital video camera recorders may also have still image recording capability.</p> <p>Digital Cameras are excluded from these subheadings if they are not capable using the maximum storage capacity of recording in a quality of 800 X 600 pixels (or higher) at 23 frames per second (or higher) at least 30 minutes in a single sequence of video.</p>

35. The European Union Tariff describes a 'digital camera' under 8525 80 30 as capable of still image recording but with video-capture capability also to record sequences of video unaffected by the storage capacity but they automatically terminate the recording of video after a certain period of time. On the other hand, video camera recorders under 8525 80 91 are always capable of recording sequences of videos but they may also have still image recording capability. It also specifically mentions that digital cameras are excluded from this subheading if they are not capable using the maximum storage capacity of recording in a quality of 800 X 600 pixels (or higher) at 23 frames per second (or higher) at least 30 minutes in a single sequence of video. This means that digital cameras specified in 8525 80 30 are excluded.

36. It is, therefore, clear that what is contained in the 'Explanation' to CTI 8525 80 20 is what is excluded from 'video camera recorders' as contained in the aforesaid European Union Explanatory Notes for 8525

80 91. Thus, it is safe to assume that the 'Explanation' in CTI 8525 80 20 basically seeks to exclude 'video camera recorders'.

37. The fact that all the three conditions contained in the 'Explanation' have to be satisfied for a digital camera to be ineligible for the benefit available under the exemption notification is clear from the communication dated 14.09.2012 sent by the Assistant Commissioner of Customs to the Deputy Commissioner of Customs (refund) and the said letter is reproduced below:

"To,
The Deputy Commissioner of Customs (Refund)
Import and General Commissionerate,
New Custom House,
New Delhi

Sir,

Sub: Application for refund of Customs Duty under Section 27 of the Customs Act, 1962 – reg

1. Please refer to your office letter C. No. VIII(1)20/Ref/1568/2012/19551 dated 17.08.2012 on the above mentioned subject.

2. As per Serial No. 13 of Notification No. 025/2005-Cus dated 01.03.2005 as amended by Notification No. 15/2012-Cus dated 17.03.2012 Basic Customs Duty on Import of Digital Still Image video camera classifiable under CTH 85258020 is NIL for the purposes of this entry. "Digital Still Image Video Camera" means a digital camera not capable of recording video with minimum resolution of 800 X 600 pixels, at minimum 23 frames per second, for at least 30 minutes in a single sequence using the maximum storage (including expanded) capacity.

While implementing the above said notification, a doubt has arisen whether the above said notification is applicable only in those cases where all the above mentioned three conditions i.e. minimum resolution of 800X600 pixels, at minimum 23 frames per second and for at least 30 minutes in a single sequence using the maximum storage (including expanded capacity) are fulfilled cumulatively or even in those cases where any one of the three conditions is met independent of each other. Owing to this some of consignment were held up at Delhi Air Cargo and the importers has paid duty under protest.

In this regard it is pertinent to state that as per the verbal communication held with Shri Yogendra Garg, Director TRU this office has taken the view that all the three conditions should be met before imposing 10% basic customs duty. In accordance with the said view this office is clearing the goods at 0% BCD if all the three conditions are not met. (copy of the letter dated 25.04.2012) to Additional Commissioner of Customs CCCU(DZ) enclosed).

3. Vide the above said letter it has also been stated that the importer has filed the claim without getting the Bills of

Entry re-assessed or going to appeals. The refund claim of the party cannot be processed by this branch without re-assessment of the Bills of Entry. It is to bring to your kind notice that all the assessment related to said Bills of Entry was final and hence cannot be re-assessed by the group at this stage as the judgment of the Hon'ble Supreme Court of India in the case of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd.

In view of above fact the issue may be decided by the Refund Section on merits.

Yours Faithfully

Sd/-

ASSISTANT ,COMMISSIONER OF CUSTOMS
GROUP – VA

Copy to: M/s Sony India Pvt. Ltd., A-31, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi-110044"

38. After referring to the 'Explanation', the letter proceeds to state that a doubt had arisen as to whether all the three conditions are required to be fulfilled cumulatively for applicability of the notification or even in those cases where any one of the three conditions is met. The letter states that the Director TRU intimated that all the three conditions should be met for a camera to be called a 'video camera recorder' for the purpose of imposing 10% BCD. Thus, as all the three conditions were not satisfied cumulatively, the goods were being cleared by the officers at 0% BCD.

39. Even in the previous proceedings relating to the appellant, the department had taken a stand that all the three conditions mentioned in the 'Explanation' to the notification dated 01.03.2005, as amended by 17.03.2012, should be satisfied before imposing 10% BCD. In this connection, paragraphs 7.1 and 7.2 of the earlier show cause notice dated 19.08.2014 issued to the appellant are reproduced below:

7.1 xxxxxxxxx

As is evident from the above, what is exempt under the above exemption entry is Digital still image video cameras as defined in the above explanation. For a "Digital Still Image Video Camera" to qualify for the above exemption from payment of

Basic Customs Duty as per the aforesaid exemption, it should fall within the meaning of "Digital Still Image Video Camera" as explained vide the explanation inserted vide Notification No. 15/2012-Customs dated 17.03.2012. The explanation so inserted imposes certain conditions in the form of three limitations to qualify for exemption granted to "Digital Still Image Video Camera" falling under Customs tariff item 8525 80 20, which in relation to capability of recording video are: -

- (i) with minimum resolution of 800 x 600 pixels,
- (ii) at minimum 23 frames per second,
- (iii) for at least 30 minutes in a single sequence using the maximum storage (including) expanded capacity.

A plain reading of the above explanation indicates that the exemption is not available to cameras which satisfy the aforesaid specified conditions read together i.e. it should not have the capability to record video (i) at a minimum resolution of 800 x 600 pixels, (ii) at minimum 23 frames per second, (iii) for at least 30 minutes in a single sequence using the maximum storage (including) expanded capacity.

7.2 The first two conditions are satisfied by most of the imported cameras, as they are able to function at these specifications i.e. they are able to record video at a resolution higher than 800 x 600 pixels and at more than 23 frames per second. What is relevant for fulfilling this condition is that the digital camera should not be capable of recording video at or above these specifications, and all the cameras listed in table no. 6 (below) satisfy these requirements. As regards maximum storage (including expanded) capacity, it is mentioned that 53 cameras imported by M/s Nikon support 128 GB maximum expanded storage capacity, while 14 cameras supports 64 GB, 3 cameras support 32 GB and 2 cameras (Sl. Nos. 42 & 43) have only inbuilt memory of 7.3 GB (Table No. 6 below). **The issue here is basically regarding the third condition as all the 72 cameras listed in Table No. 6 have the capability to record video at resolution exceeding 800X600 pixels as well as capacity to record at more than 23 frames per second. The third condition prescribes a restriction of time limit of 30 minutes for recording a sequence using maximum storage (including expanded) capacity of the camera.**

A harmonious reading of the third condition indicates that to avail the exemption, the recording time of "at least 30

minutes in a single sequence" is not to be read in isolation but alongwith the expression and the requirement that follow it i.e. "using the maximum storage (including expanded) capacity". It is relevant to mention that the expression used in the notification is neither "using storage capacity" nor "using storage (including expanded) capacity", but the notification has used "using maximum storage (including expanded) capacity". Thus, the wordings of the notification are very clear and leaves no doubts whatsoever that the maximum storage (including expanded) capacity is to be utilized /exhausted for determining the sequence length of the video recording, and if the sequence length so determined is more than 30 minutes, then the camera is not eligible for exemption. In other words, for availability of exemption, camera should be such that if recording is done using the maximum storage (including expanded) capacity, then the sequence length of the video recording should be less than 30 minutes. Thus, the clear intention behind the introduction of the restrictive explanation is that the time limit on video recording should come from the maximum storage (including expanded) capacity and not from any other factor.

(emphasis supplied)

40. Reference can also be made to the order dated 28.10.2016 passed by the Assistant Commissioner while adjudicating the aforesaid show cause notice and the relevant paragraph no's. 17.2.8 and 17.2.9 are reproduced below:

"17.2.8 Now coming back to the facts of the present case that certain types of cameras were exempt on conditions as enumerated in the explanation:

As per the explanation given in the said Notification, digital still image video camera means a digital camera not capable of recording video:

- (i) With resolution of 800x600 pixels or more;
- (ii) At 23 frames or more per second; and
- (iii) for at least 30 minutes in a single sequence using the maximum storage (including) expanded capacity.

17.2.9 There is no dispute in respect of conditions one and two above; both these conditions are satisfied by the Cameras imported by the noticees. The point of dispute is regarding the

third condition viz. capability to record video for at least 30 minutes in a single sequence using the maximum storage (including expanded) capacity.”

41. Reference can also be made to the order 19.12.2017 passed by the Tribunal in the appeal that had been filed to challenge the aforesaid order dated 28.10.2016 and the relevant portion of the order of the Tribunal is contained in paragraph 23, which has been reproduced above. The Tribunal observed that the three conditions are required to be satisfied though it ultimately held that the restriction of video recording for less than 29 minutes and 59 seconds was an artificial restriction imposed by a firmware and so the camera could record video for 30 minutes or more.

42. The order dated 06.06.2019 passed by the Commissioner (Appeals) also holds that the all three conditions are required to be fulfilled.

43. It is seen that the digital still image video cameras imported by the appellant have the feature to click still images and record video of resolutions equal to or higher than 800 x 600 pixels with 23 or more frames per second, but they can record videos only for a maximum period of 29 minutes and 59 seconds in a single sequence. Thus, they do not fulfill the third condition that requires that the length of a video in a single sequence shall be for a period greater than 30 minutes. If this be so, the cameras imported by the appellant would not fulfill all the three conditions and, therefore, would be eligible for BCD exemption under the notification 01.03.2005, as amended on 17.03.2012.

44. As stated above, the Commissioner (Appeals) examined at length the third condition contained in the notification and held that

the cameras imported by the appellant satisfied the third condition also and so would be a video recorder and not a still image video camera.

45. It would, therefore, be necessary to examine the third condition under the 'Explanation' to notification. It has three characteristics and the same are:

- (i) 30 minutes or more
- (ii) In a single sequence
- (iii) Using the maximum storage (including expanded) capacity

46. Each one of them would be dealt separately.

30 minutes or more

47. This characteristic provides that the recording time in a single sequence must be less than 30 minutes in order to avail the benefit of the notification. In other words, the notification intends to exclude video cameras capable of recording lengthy video from its ambit. The cameras imported by the appellant can record videos for maximum 29 minutes and 59 seconds in a single sequence and the recording automatically stops thereafter. Though, it can be urged that after every 29 minutes 59 seconds, a user can press the button to again record the video but this is not the purpose of introducing the characteristic of 30 minutes or more. A 'digital still image video camera' is not suitable for long periods of video recordings. This characteristic has been introduced for the purpose of excluding 'video cameras' and for including only 'digital still image video cameras'.

In a Single Sequence

48. There is always a possibility of multiple sequences and that is the reason why the Explanation in the notification dated 01.03.2005,

uses the phrase 'in a single sequence'. The European Union Explanatory Notes under the heading '**digital camera**' also provides that 'the cameras may also have video-capture capability to record **sequences of video**'. The European Union Explanatory Notes also clarify that there can be multiple sequences of video and hence, the conscious use of the phrase '**in a single sequence**' in the notification dated 01.03.2005 must be given full effect.

49. The Department contends that the time limit of less than 30 minutes has been artificially inserted on video recording in a single sequence by means of breaking the clip to less than 30 minutes by a 'firmware' and the camera has ample recording time left even after recording for more than 30 minutes using even 8GB memory card.

Firmware

50. In the digital still image video cameras imported by the appellant, the processing of imaging data is done as per the instructions contained in the software of the camera named as 'firmware'. Firmware is the proprietary software which works as the operating system – cum – software for the camera. The functions of the firmware can be, and not limited to, as follows:

- i. Color correction;
- ii. Over/under exposure;
- iii. Blurring;
- iv. Red eye reduction; and
- v. Limiting the video recording length to a maximum of 29 minutes and 59 seconds in a single sequence.

51. The firmware is stored in the non-volatile memory of the digital still image video cameras and cannot be modified by any user. A firmware is intrinsic to the functioning of a digital device as it contains the basic set of programming code which enables a user to interact

with the hardware of the device. The firmware is separate from a software application which can be loaded onto an electronic device for enhancement of its functions. Infact, firmware is the basic set of programming code without which the interface between the user and the device would not be possible. Hence, the firmware is essentially stored in the non-accessible memory of an electronic device so that the same cannot be tampered by the user. The user of the device, in no case, has access to the code saved as firmware on the camera. The hardware of the camera is incapable of functioning without the firmware.

52. The understanding of the term 'firmware' can also be understood from the show cause notice dated 19.08.2014 issued in the previous proceeding and paragraph 2.4 of this show cause notice is reproduced below:

"2.4 The processing of the image data is done as per instructions contained in the firmware of the camera. FIRMWARE is the proprietary software loaded on a camera by manufacturer which works like an operating system-cum-software for the cameras. Typically the firmware would contain instructions for color correction, over/under exposure, blurring, red eye reduction, etc. **Firmware is the combination of persistent memory and program code and data stored in it. Typical examples of devices containing firmware are embedded systems (such as traffic lights, consumer appliances, and digital watches), computers, computer peripherals, mobile phones, and digital cameras. The firmware contained in these devices provides the control program for the device. Firmware is held in non-volatile memory devices such as ROM, EPROM, or flash memory.**"

(emphasis supplied)

53. It would also be pertinent to refer to the judgment of the Supreme Court in **Commissioner of Central Excise, Pondicherry**

vs. **Acer India Ltd.**¹³, wherein the following observations have been made in respect of firmware:

"20. In the said dictionary, "Firmware" has been defined at pages 281-282 as under:

"Software kept in semipermanent memory. Firmware is used in conjunction with hardware and software. It also shares the characteristics of both. Firmware is usually stored on PROMS (Programmable Read only Memory) or EPROMs (Electrical PROMS). Firmware contains software which is so constantly called upon by a computer or phone system that it is "burned" into a chip, thereby becoming firmware. The computer program is written into the PROM electrically at higher than usual voltage, causing the bits to "retain" the pattern as it is "burned in". Firmware is nonvolatile. It will not be "forgotten" when the power is shut off. Handheld calculators contain firmware with the instructions for doing their various mathematical operations. Firmware programs can be altered. An EPROM is typically erased using intense ultraviolet light."

24. In the computers there exists a flash memory chip in the motherboard. The software that is essential to the starting of the computer which is the Basic Input Output Software is etched on to this memory chip. This Basic Input Output Software which is etched or burnt into the Electrically Erasable Programmable Read Only Memory (EEPROM) is called firmware. The firmware provides for interactions with the microprocessor to enable it to access the operating software contained in the hard disc.

25. As the general practice in the computer industry, the value of the firmware etched on to the EEPROM is always included in the assessable value of the computers."

54. In this view of the matter, the Commissioner (Appeals) was not justified in holding that firmware is an artificial restriction that can subsequently be altered. The order dated 13.05.2016 passed by the Assistant Commissioner specifically refers to a website where a hacker

13. 2004 (172) E.L.T. 289 (SC)

is providing instructions to be followed for removing the video length restriction. This activity is not authorized by the appellant or the manufacturer. Such an activity by a hacker is an illegal activity and the appellant cannot be made responsible for the same. If a person in an unauthorized manner tampers with or modifies the cameras, classification / exemption at the time of import cannot be impacted by the same. The goods have to be assessed in the form and condition in which they are imported. In the instant case, the imported cameras at the time of importation were not capable of recording video for more than 29 minutes 59 seconds in a single sequence.

55. In this connection reliance can be placed on the judgment of the Supreme Court in **Vareil Weaves vs. Union of India**¹⁴ and the relevant observations as follows:

“3. Learned Counsel for the appellants submitted that there was no warrant for levying countervailing duty upon imported goods at a stage they would reach subsequent to their import after undergoing a process. They had to be subjected to duty in the state in which they were when imported. Reference was made to the judgment of a Single Judge of the Bombay High Court in *Krislon Texturiser Pvt. Ltd. v. Union of India*, 1989 (44) E.L.T. 448 [S.P. Bharucha, J.], which was followed by a Division Bench of the High Court of Gujarat in Special Civil Application No. 1165 of 1983, *Vareli Exports Pvt. Ltd and Another v. Union of India and Others* where it was so held.

4. Learned counsel for the respondent fairly stated that the view taken in these judgments was unassailable.

5. The circular upon the basis of which the duty was levied having been issued in Delhi, the Delhi High Court had jurisdiction to entertain and try the appellants' writ petition.

6. Countervailing duty must be levied on goods in the state in which they are when they are imported. Section 3 of the Customs Tariff Act so mandates. The POY imported

14. 1996 (83) ELT 255

by the appellants fell in the slot of 100 deniers and above but not above 750 deniers. It was, therefore, liable to that rate of countervailing duty as was provided for in the said clause (iv) of the exemption notification. There was no warrant for the levy of countervailing duty as provided for in the said clause (iii) upon the basis that, subsequent to the process of texturising the POY that was imported would have the denierage therein stated."

Using the maximum storage (including expanded) capacity

56. The words contained in the notification do not suggest that the recording of video in a single sequence is to be contingent on the exhaustion of the entire memory (including expanded memory) of the camera. The third condition on using maximum memory is an anti-abuse provision to ensure that unscrupulous importers do not enhance the memory capacity of the imported goods post clearance and provide video recording capabilities in a single clip of 30 minutes or more. The Commissioner (Appeals) has failed to differentiate between **'using'** maximum storage capacity and **'utilizing/exhausting'** the maximum storage capacity. In fact, the reason given by the Commissioner (Appeals) results in addition of another condition in the Explanation requiring a camera to exhaust its maximum storage capacity while determining the maximum clip length. If the intent was to extend the benefit of the exemption notification to those cameras whose recording capabilities get exhausted in less than 30 minutes due to lack of memory, the use of the phrase "in a single sequence" would not be necessary and will lose its significance.

57. This apart, it would not be reasonable to read the phrase 'exhausting the maximum storage capacity' for determining the eligibility of imported cameras because today almost all the cameras available in the market support expanded memory up to 60 GB, 128

GB, etc. Thus, it would impossible to find a camera which utilizes or exhausts its maximum expanded capacity for the purpose of recording a single sequence of video for less than 30 minutes. Further, if a camera manufacturer develops a camera whose memory is exhausted while recording a single clip of video for less than 30 minutes, then the camera would be incapable of performing its primary function of clicking and storing still images.

58. The question whether the restriction on the maximum length of the video in a single sequence comes via software or via a mechanical timer or via storage capacity is irrelevant. As long as the user cannot record a video clip of 30 minutes or more in a single sequence using maximum (included expanded) capacity, the cameras imported by the appellant shall be covered by the exemption notification dated 01.03.2005, as amended on 17.03.2012. In fact the said feature has also been noted in the Explanatory notes to the Combined Nomenclature of the European Community in the following words:

"Unaffected by the storage capacity, some cameras automatically terminate the recording of video after a certain period of time."

59. Thus, the 'digital still image video camera' imported by the appellant would be entitled to BCD exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012.

60. Learned special counsel appearing for the department however placed reliance upon the judgment of the Supreme Court in **Commissioner of Cus. (Import), Mumbai vs. Dilip Kumar & Company**¹⁵ to contend that an exemption notification should be constituted strictly.

15. 2018 (361) E.L.T. 577 (S.C.)

61. Learned counsel for the appellant however placed reliance upon the subsequent decision of the Supreme Court in **Government of Kerala & Anr. vs. Mother Superior Adoration Convent**¹⁶ and contended that the notification dated 01.03.2005 is not a general exemption notification but is a notification which seeks to promote the trade in Information Technology products, including a digital still image video camera and the exemption has been granted pursuant to the obligation undertaken by the Government of India under the ITA.

62. In **Mother Superior Adoration Convent** the Supreme Court observed that there is a distinction between exemption provisions generally and exemption provisions which have a beneficial purpose. In the latter type of cases, if there is any ambiguity, the provision should be construed in favour of what is exempted. The relevant observations are:

"22. A recent 5-Judge Bench judgment was cited by Shri Gupta in *Commr. of Customs v. Dilip Kumar & Co.* (2018) 9 SCC 1. The 5-Judge Bench was set up as a 3-Judge Bench in *Sun Export Corporation v. Collector of Customs* 1997 (6) SCC 564 was doubted, as the said judgment ruled that an ambiguity in a tax exemption provision must be interpreted so as to favour the assessee claiming the benefit of such exemption. This Court after dealing with a number of judgments relating to exemption provisions in tax statutes, ultimately concluded as follows:

"66. To sum up, we answer the reference holding as under:

66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

66.2. When there is ambiguity in exemption notification which is subject to strict interpretation,

16. 2021 (3) TMI 93-Supreme Court

the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

66.3. The ratio in Sun Export case [Sun Export Corpn. v. Collector of Customs, (1997) 6 SCC 564] is not correct and all the decisions which took similar view as in Sun Export case stand overruled."

23. It may be noticed that the 5-Judge Bench judgment did not refer to the line of authority which made a distinction between exemption provisions generally and exemption provisions which have a beneficial purpose. We cannot agree with Shri Gupta's contention that sub-silently the line of judgments qua beneficial exemptions has been done away with by this 5-Judge Bench. It is well settled that a decision is only an authority for what it decides and not what may logically follow from it (see *Quinn v. Leatham* [1901] AC 495 as followed in *State of Orissa v. Sudhansu Sekhar Misra* (1968) 2 SCR 154 at 162,163).

24. This being the case, it is obvious that the beneficial purpose of the exemption contained in Section 3(1)(b) must be given full effect to, the line of authority being applicable to the facts of these cases being the line of authority which deals with beneficial exemptions as opposed to exemptions generally in tax statutes. This being the case, a literal formalistic interpretation of the statute at hand is to be eschewed. **We must first ask ourselves what is the object sought to be achieved by the provision, and construe the statute in accord with such object. And on the assumption that any ambiguity arises in such construction, such ambiguity must be in favour of that which is exempted.** Consequently, for the reasons given by us, we agree with the conclusions reached by the impugned judgments of the Division Bench and the Full Bench."

(emphasis supplied)

63. In view of the aforesaid observations of the Supreme Court and taking into consideration the fact that the notification dated 01.03.2005, as amended on 17.03.2012, seeks to promote the trade in Information Technology products, including the cameras imported

by the appellant and in view of the fact that India is a signatory to ITA and exemption has been granted pursuant to the obligation undertaken by the Government of India, the said notification has to be interpreted in a manner so as to promote the obligation undertaken by India.

64. The view that we have taken, namely, that 'digital still image video cameras' imported by the appellant would be entitled to BCD exemption under the notification dated 01.03.2005, as amended on 17.03.2012, is contrary to the view taken by the Division Bench of the Tribunal on 19.12.2017 in the earlier round of proceedings arising out of the show cause notice dated 09.08.2014.

65. It would, therefore, be appropriate to refer the matter to the President of the Tribunal for constituting a larger bench of the Tribunal for deciding the following issues:

- “(i) Whether the 'digital still image video cameras' imported by the appellant would be entitled to BCD exemption under the notification dated 01.03.2005, as amended by the notification dated 17.03.2012, whereby an 'Explanation' was added;
- (ii) Whether the Tribunal, in the decision rendered on 19.12.2017, has correctly interpreted the scope of 'Explanation'.”

66. The papers may, accordingly, be placed before the President of the Tribunal.

(Order Pronounced on **08.03.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)