

OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT)  
SPECIAL INVESTIGATION AND INTELLIGENCE BRANCH  
AIR CARGO COMPLEX, SAHAR, ANDHERI (EAST), MUMABI - 400 099

F.No. SIIB/TPR-3, 4 & 5/2012 ACC (I)

Date of Order: 29.03.2012

Date of Issue: 29.03.2012

Passed by : Shri Ranjan Prakash  
Dy. Commissioner of Customs,  
S.I.I.B. (Import) / IPR, ACC, Sahar

Order No. | CAO- DC/821/R.P/2011-12 Adj ACC.

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ORDER IN ORIGINAL

1. This copy is granted free of charge for the use of the person to whom it is issued.
2. Any appeal against this order lies with the Commissioner of Customs (Appeals), Mumbai - III, Awas Corporate Point (5<sup>th</sup> floor), Makwana Lane, Behind S.M. Centre, Andheri-Kurla Road, Marol, Mumbai - 400059 within sixty (60) days from the date of communication of this order.
3. Appeal should be filed in form C.A.I. appended to the Customs (Appeal) Rules, 1982
4. The Appeal should bear a court fees stamp of Rupees two only as prescribed under Schedule I items of the Court Fees Act, 1970
5. Any persons desirous of appealing against his decision or order shall pending appeal, deposit of the duty demand or the penalty levied therein and produce proof of such payment along with the appeal failing which the appeal is liable to be rejected for non-compliance with the provisions of Section 128 of the Customs Act, 1962.

O/c

**BRIEF FACTS OF THE CASE**

In this case three importers namely 1) M/s. Venktron Digital Systems Pvt. Ltd., Gala No.E-63, Rajasthan Indl. Estate, Near Bhajansons Dairy, Kaman-Bhiwandi Road, Kolkhi, Vasai (East), Thane, Maharashtra – 401201 (hereinafter referred to as ‘Venktron’) 2) M/s. Sapphire Micro Systems, A-302, Jasmine Building, Plot No. 797/1, Channel Upvan, Parvel, Dist : Raigad – 410206 (hereinafter referred to as ‘Sapphire’) and 3) M/s. Momentum Technology Inc. Pvt. Ltd., B-21, Moti Nagar, New Delhi – 110015 (hereinafter referred to as ‘Momentum’) filed Bills of Entry for import clearance of Dell Laptops of different models. Since the issue in all the three cases is the same, a common order is being passed. Details of consignments imported by the above said three importers are as follows:-

<b>IMPORTERS NAME</b>					
Sr. No.	Bill of Entry No. & date	Description of goods	No. of Pcs.	Country of Origin	Assessable Value
<b>M/s. Venktron Digital Systems Pvt. Ltd.</b>					
1	5783896 dt. 20.01.2012	Notebook Computers Dell Inspiron 15R N-5110 i3 Laptop	200	China	₹50,01,772.50
2	5783903 dt. 20.01.2012	Notebook Computers Dell Inspiron 15R N-5050 i3 Laptop	150	China	₹34,20,567.00
	-do-	Notebook Computers Dell Inspiron 15R N-5110 i7 Laptop	15	China	₹5,48,581.50
<b>M/s. Sapphire Micro Systems</b>					
3	5794656 dt. 21.01.2012	Laptop Computer, Dell Inspiron N5110 Notebook Intel Core i5-2430	29	China	₹7,70,606.08
	-do-	Laptop Computer, Dell Inspiron N5110 Notebook Intel Core i5-2450	50	China	₹14,21,199.74
	-do-	Laptop Computer, Dell Inspiron N5110 Notebook Intel Core i5-2430	8	China	₹2,12,580.99
<b>M/s. Momentum Technologies Inc. Pvt. Ltd.</b>					
4	5786408 dt. 20.01.2012	Computer Laptop Dell Inspiron 15R N5110 C15/15.6/4GB/750GB/ DVDRW/DOS with accessories	50	China	₹11,43,691.73

The above mentioned Bills of Entry were facilitated by RMS system except for ‘Momentum’ which was referred to IPR Section by Group. On examination of goods in the shed it was seen that they were the subject matter of an alert vide F. No. LRM/Target-55/2008-09 Part I dated 06.01.2012 which was issued in relation to the registration of Trade Mark vide Unique Permanent Registration Number (UPRN) A0474INDEL4TM filed by M/s. Dell India Pvt. Ltd. under the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. Hence they were forwarded to IPR Section as the import appeared to be in violation of the Intellectual Property Rights of M/s. Dell India Pvt. Ltd. The matter was referred to M/s. Dell India Pvt. Ltd. vide letter dated 21.01.2012 for no objection, however, Shri Yoga Kakumanu, representative of M/s. Dell India Pvt. Ltd. vide letter dated 24.01.2012 intimated their willingness to join the proceedings relating to suspension of the said consignment under rule 7 of the said rules and enclosed indemnity bond in accordance with Rule 5(b) of the said Rules read with Circular No. 41/2007. They also submitted details of filing of centralized bond and corresponding Bank Guarantees with Delhi Air Cargo which was the port of registration and having the following numbers : Central Bond Registration Number (CBRN) : INDEL40003B01 and Central Bond

Guarantee Number (CBGN) : BRNINDEI.40003. In accordance with the letter an amount of ₹98,68,013/- and ₹24,67,003/- was debited from the central bond and bank guarantee in respect of M/s. 'Venktron', ₹12,58,061/- and ₹3,14,515/- in respect of M/s. 'Momentum' and ₹26,44,826/- and ₹6,61,206/- respectively by the IPR Section and proceedings initiated in this regard.

### RECORD OF SUBMISSIONS MADE:

In this regard M/s. Dell India asked to make their submissions in the matter. Accordingly Shri Adarsh Ramanujan, duly authorized Attorney from M/s. Laxmikumaran and Sridharan appeared on 08.02.2012 in the Department where besides making his oral submissions in the matter has submitted copies of various judgments on the issue which are briefly stated as follows :

1. M/s. Wipro Cyprus Pvt. Ltd. Vs. Zeetel Electronics (2010 (44) PTC 307 (Mad.), where the Hon'ble judge of the Madras High Court while deciding the issue of parallel imports in respect of the YARDLEY brand held that if the defendant were allowed to import goods bearing plaintiff's trade mark it would amount to violation of Sec. 29 (6) (c) - as the statute itself contemplated exclusivity in using the trademark in India by a registered owner, then it would not lie in the mouth of the defendant to challenge or dispute the same. The court granted injunction against the defendant from importing such goods into India.
2. M/s. Samsung Electronics Company Ltd. & Anr. Vs. G. Choudhary and Anr. 2006 (33) PTC 425 (Del. ) where the Hon'ble Judge of Delhi High Court had granted injunction against the defendants from importing goods under the trademark "SAMSUNG" even though the goods were genuine as the sale did not conform to Indian laws and regulations.

They have further referred to Civil Appeal No. 116 of 1953, in the case of the Registrar of Trade Marks v/s. Ashok Chandra Rakhit Ltd., dealing with the Trademark Act, 1940, which affirms the reference to English judicial decisions in cases pertaining to trade marks.

They further quoted, in their defence the cases of Colgate-Palmolive Ltd. and Anr. Vs. Markwell Finance Ltd. and Anr. which was decided by the Court of Appeal in Britain and Zino Davidoff SA V. A & G. Imports Ltd. Levi Strauss & Co. and Levi Straus (U.K.) Ltd. Vs. Tesco Stores, Tesco PLC and Costco Wholesale UK Ltd. which were decided in the Court of Justice of European Communities which dwelt in detail on the subject of parallel imports.

Vide letter dated 10.02.2012 Shri Adarsh Ramanujan has stated that they were under instructions to state that the Right Holder would not grant any authorization in respect of the said consignments imported by M/s Venktron Digital Systems Pvt. Ltd as ignorance of the law was no excuse and that the said consignments were goods infringing intellectual property rights, hence amounting to prohibited goods under Rule 6 of the said Rules read with section 11 of the Customs Act, 1962. They however stated that the concerned importer could approach the Right Holder for authorization of such imports in future, subject to commercial negotiation between the parties.

The importer, M/s. Venktron Digital Systems Pvt. Ltd. have submitted the following :

They state that as per the law in India relating to importing of branded goods from foreign countries is contained in Section 30 sub section 3 of the Trade Mark Act, 1999 which states as under:

Section 30 – Limits on effect of registered mark

- (1) Nothing in Section 29 shall be construed as preventing the use of a registered trade mark by any person for the purposes of identifying goods or services as those of the proprietor provided the use –
  
- (3) **Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him not infringement of a trade mark by reason only of –**
  - (a) **the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods; or**
  - (b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.
  
- (4) Sub-section (3) shall not apply where there exists legitimate reasons for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market.

They state that the said Section 30 (3) of the Trade Mark Act, 1999, allowed any person to use the registered trademark which were lawfully acquired by any person and the said act was not infringement merely because the registered trademark was assigned by the registered proprietor to some other person. It was submitted that the exception carved out by the said section protected lawful importers who imported branded products which were lawfully acquired even if some other persons was the exclusively distributor in respect of that product. They further quoted the notes on clauses for section 30 (3) which states that “sub clause (3) and (4) recognize the principle of “exhaustion of right” by preventing the trademark owner from prohibiting on the ground of trademark right, the marketing of goods in any geographical area, once the goods under the registered trademark are lawfully acquired by a person.” They stated that Section 30(3) states that the rights of the trademark proprietor (in this case right holder) in trademarked goods are exhausted when the goods are first put on the market anywhere in the world.

They further submitted that even courts in the United Kingdom and the European Court of Justice have held the same view. They quoted the case of Revlon Znc and Ors. Cripps reported in (1980) Fleet Street Reports 85 followed in the case of Wilnthrop v. Sun Ocean (1988) FSR 430 where the court while interpreting a similar section of the English Trademark Act held, that no complaint would be entertained if products are sold or re-sold under that trademark by a parent company or its subsidiary in different parts of the world as the legal ownership of the mark did not go further and enable the owner or registered user to ensure that products

manufactured elsewhere were not sold within the territory of any country. They have further quoted the case of Xerox Corporation Vs. PunctSuri where the Hon'ble Delhi High Court has allowed the importer to import even second hand Xerox machines despite objections by right holder who claimed infringement of the right as owners of the trademark "Xerox".

They have further explained the legal position that parallel import does not infringe trademark rights of the right holder which was upheld by various case laws of the United Kingdom Courts and the United States which are mentioned as follows :

1. Matrix Essentials, Inc. V. Emporium Drug Mart, Inc., of Lafayette where it was held that the trademark law did not apply to the sale of genuine goods bearing a true mark, even if the sale is without the mark owner's consent.
2. Zip International Group LLC V. Trillini Imports, Inc. (09-CV-2437 (JG) (VVP) (EDNY, Decided May 24, 2011) where it was held that, " Trademark law does not reach the sale of genuine goods bearing a true mark even though the sale is not authorized by the mark owner, for there is no possibility of deception or confusion." They submitted that the Indian Courts frequently relied upon the English, United States and other common law courts for deciding issues arising under Indian law. Hence these cases were of great value.

They further submitted that Section 30 (4) of the Trade mark Act had no application in the present case as there was no change or impairment in the original condition of the goods after the goods have been put on the market. They quoted the case of the Wellcome Foundation V. ParanovaPharmazcutikaHandcls Case C-276/05 (2008) ECR I-10479 in support of their contention. They further submitted an expert view that parallel import was allowed as permitted by Section 30 (3) of the Trademark Act. The noted author Sonia Baldia's in her book, on Parallel Import has stated that ,

*"Indian Law is quite liberal in permitting parallel imports of genuine goods bearing registered trademarks, provided such goods have not been materially altered after they have been put in the market"... the general rule is that once trademarked goods are released anywhere in the world, by or with the consent of the trademark proprietor, that proprietor cannot assert its trademarks rights to prevent imports of such goods into, India, provided that such goods remain materially unaltered"*

They further submitted that the private arrangement between Dell India and Dell USA could not prevent them who were not parties to such contract from importing genuine unaltered goods which they were permitted to import under Sec.30(3) of the Trademarks Act, 1999 as the same would amount to overriding statutory law by a purely private arrangement and it was settled law in India that a private commercial arrangement could not override a statutory provision - Universal Petrochemicals Ltd. V. RSEB (air 2001 Cal 102 @ para 49). Hence, the Trademarks Act could not be used by Dell India as a means to sell to purchasing public in India to buy the products at substantially inflated prices. They further stated that the decision in the case of Wipro Cyprus Pvt. Ltd. V. Zectel Electronics 2010 (44) PTC 307 (Mad) did not apply to the facts of the present case because in the said case the right holder sought to enforce rights under the Trademark Act by filing a suit in the High Court and not enforcing rights under the Customs

Law and secondly that Yardley had sold the trademark in India of the name "Yardley" to the Indian entity. Thus, In India M/s. Wipro Cyprus Pvt. Ltd. was the owner of the trademark Yardley in India and in their case Dell India was not the owner of the trademark "Dell" in India. Hence, the case law could not be applied to their facts. In any event the Madras High Court had allowed the importer to re-export the goods from India to any other country.

In view of the same, they stated that the suspension of clearance in respect of their goods were invalid and their goods should be released immediately.

M/s. Sapphire Micro Systems in their defence submitted that when the goods were found to be genuine, then they were not infringing goods in any manner whatsoever. To support their claim they have already provided entire chain of documents alongwith serial numbers which establishes that these Laptops were 100% genuine and procured through a reputed authorized Dell Distributor channel, which could also be verified online. They also stated that for the purpose of Trade Mark Act, Section 29(1) & 29(6) of the Trade Marks Act, 1999 should not be referred in isolation but Section 30 (3) should also be taken into account. They further submitted that there was no doubt whatsoever, that India followed the regime of International Exhaustion which was evident from their earlier submissions and that there were several High Court orders which had approved parallel import of genuine material, but they would refrain to refer to them as in the case of *Southern Petrochemicals Co. Ltd. V/s. Electricity Inspector, 2007(5) SCC 477* wherein the apex court observed that:

"A decision, as is well known, is an authority for what it decides and not what can logically be deduced there from. A decision is not an authority on a point which has not been considered."

To further substantiate their claim, they have referred to several documents from the Government records and policy research papers of World Bank and World Intellectual Property Organization, alongwith opinion of certain authorities on the subject. Also they submitted Press Release from Ministry of Commerce & Industry ([http://commerce.nic.in/pressrelease\\_detail.asp?id=1633](http://commerce.nic.in/pressrelease_detail.asp?id=1633)) which mentioned that the 2nd amendment had made a provision under Section 107A (b) providing for 'parallel import' (that is, import of patented commodity from anywhere in the world where it is cheaper, even though it is patented here). However, this required that the foreign exporter was duly authorized by the Law to sell and distribute the product. They further mentioned that with regard to a specific query the department informed that "the concept of international exhaustion provided in section 107 A of the Patent Act, 1971 and in section 30(3) of the Trademarks Act, 1999 and in section 2(m) of the copyright law were similar. This provision was in tune with the national policy on exhaustion of rights".

M/s. 'Momentum' have enclosed certain judicial decisions in the following submissions:-

They have in support of their claims for release of the goods, enclosed copies of judgement of Delhi High Court in the Kingtech Electronics India Pvt. Ltd. v/s. Union of India & Others, where Hon'ble Justice directed to release the goods of the Petitioner alongwith the case of M/s. L.G. Electronics Pvt. Ltd. v/s. Shri Bharat Bhogilal Patel & Others where the Hon'ble Delhi High Court vide its interim order stayed ShriPatels complaint of infringement.

In furtherance of the proceedings it was proposed to examine the goods in the presence of importer and the right holder to ascertain their nature. On 29.02.2012, the goods were examined in the presence of representative of M/s. Dell India Pvt. Ltd., Shri Sapandeep Kapoor who was asked to state whether the said goods were genuine or counterfeit. Shri Sapandeep Kapoor, after examining the said goods was hesitating to give any opinion. Hence his statement was recorded under Section 108 of the Customs Act, 1962 on the same date at 04.15 P.M. where he inter alia stated that he was handling channel sales for West Asia and that he had not examined the goods imported by M/s. Momentum Technologies Pvt. Ltd. but with regard to the consignments of M/s. Venktron Digital System Pvt. Ltd. and M/s. Sapphire Micro Systems, he stated that the goods look like counterfeit as though the Dell trademark was placed on the note books but the goods imported into India had come through unauthorized route / companies and the said importers did not have a trademark license, and thus was neither permitted or registered users. Hence, the products imported infringed upon the Dell India trade mark, hence the goods were counterfeit according to the Trade Mark Law. He further stated that the official statement on this would be given by the Dell India Legal team.

In view of the above the goods were examined for independent opinion, after superficially examining all four consignments, representative samples of each type were drawn under Panchanama dated 01.03.2012 & 02.03.2012 in the presence of the respective importers and representative of M/s. Dell India Pvt. Ltd. Shri Sapandeep Kapoor, Regional Sales Manager.

The said representative samples were then referred to Shri Vagal AmrutSudhir, Chartered Engineer of M/s. Saaiamrut Associates who is an empaneled Chartered Engineer as per Public Notice No. 131/2011 dated 25.10.2011 of Jawaharlal Nehru Custom House who after examining the representative samples of all the mentioned shipments on 03.03.2012, Shri Vagal AmrutSudhir gave his opinion dated 05.03.2012, stating that all the said computer laptops bearing the Dell brand were genuine products manufactured by Dell Co. in China.

During the examination of the goods Shri Mayank Jain advocate of M/s. Lakshmi Kumaran & Shridharan by letter dated 01.03.2012 placed in file objected to the drawing of samples for the purpose of testing as according to him this was a case of Trademark Infringement. He stated that on behalf of the right holder it was immaterial and irrelevant that the products need to be tested as the three importers in this case were not permitted / authorized to use the Dell Trademark, hence, import by them was an act of infringement under the law. He further stated that on 08.02.2012, during the hearing they had submitted judgements of the Hon'ble Delhi High Court of M/s. Samsung Electronics and Hon'ble Madras High Court of M/s. Wipro Cyprus Pvt. Ltd. which were on identical facts and it was held that the importers had committed an act of infringement. He further referred to the judgement dated 17.2.2012 of the Delhi High Court in the matter of Samsung Electronics which reiterated the above findings. He further requested for grant of personal hearing for explanation of the same.

The said judgement passed in IA No. 7774/2011 & IA No. 10124/2011 in C.S. (OS) No. 1155/2011 by Hon'ble Mr. Justice Manmohan Singh in the case of M/s. Samsung Electronics Co. Ltd. v/s. Kapil Wadhwa & Sons (Flag J) where the Hon'ble Single Judge Bench observed that in the present case and on reading Section 29 (1) and Section 29 (6) together it became

unambiguous that the act of the importation amounted to infringement, if the said importer is not registered proprietor or permissive right holder. Further after considering various Section of Trademarks Act, 1999 he observed that in the absence of any other line of demarcation or difference between genuine and non-genuine goods for all practical purposes, in terms of Section 29 (1) of the Trademarks Act, 1999 for the purposes of infringement would be applicable to the fullest extent except for the exceptions within the section itself which is use either being by the registered proprietor or a permissible right holder. Therefore, it follows that any act of importation of the goods bearing the mark of the registered Proprietor Holder without the importer being a registered Proprietor or permissible Right Holder was statutorily engrafted infringement under Section 29 of the Trademarks Act, 1999. He thus ruled against parallel importation & restrained the defendant from using the trademark Samsung in any manner in respect of promotional activities including on websites. He further allowed the Plaintiff the liberty to take action in accordance with the law in respect of other products as concerned.

The above said order has been stayed by the Division Bench of the Hon'ble Delhi High Court vide order dated 29.02.2012 in FAO (OS) No. 93/2012 (Flag Stay) where it was observed that with the consent of the party's the application stands disposed of with direction that till disposal of the Appeal, the interim arrangement agreed to between the parties, as recorded in the order dated July 8, 2011 (in the suit) would continue to operate. It was clarified that the goods already imported by the appellant would be permitted to be sold without any further import being affected. This appeal has been listed for final hearing on 30<sup>th</sup> April 2012.

In this regard final P.H. was granted on 12.03.2012 at 11.30 AM in the Office of the DC/IPR Section, ACC, Sahar to all the parties involved. On the said date Shri Ajay Singhania, Ms. AnkitaSinghania and Shri T.S. Venugopalan appeared for M/s. Venktron Digital Systems Pvt. Ltd. wherein they re-iterated their earlier submissions dated 15.02.12 and in addition stated that the Division Bench of the Hon'ble Delhi High Court had on 29.02.12 made it absolutely clear in Para 2 of its order that further import of branded goods into India are allowed and Division Bench had also stayed the Single Judges judgement in KapilWadwa v/s. M/s. Samsung Electronics case. They stated that in light of the Division Bench's order, the Custom Authorities were free to release the goods and the Single Judges judgement is not binding on the department. ShriAdarshRamanujan appeared on behalf of M/s. Dell India Pvt. Ltd. for the hearing on the same day and stated that he was making submission in relation to these three importers. He re-iterated submissions made by him during the hearing conducted on 08.02.12 as also contents of their notice filed under rule 3. He further referred to his written submissions in the above matter and stated that the importers in these cases were not authorized to import the goods bearing the "Dell" Trademark. During the course of hearing they had submitted a copy of the order of the Hon'ble Delhi High Court dated 08.07.11 passed in the matter of KapilWadhwa v/s. Samsung Electronics Ltd. He further stated that while the Delhi High Court's order in the Samsung Electronics Ltd. dated 17.02.12 had been appealed against, the Division Bench had not stayed the operative part of the order dated 17.02.12. He stated that it was very evident from both Paragraphs 1 & 2 of order dated 29.02.12, that the Division Bench had merely recorded that the interim arrangement of July 8<sup>th</sup>, 2011 would continue to operate and that this would not affect future import. He had submitted a copy of the order dated 08.07.11 on record and that perusal of



this order would show that the said interim arrangement related only to the goods already cleared for the Home Consumption and seized by the learned local Commissioner, whereby the seized goods were permitted to be sold, subject to certain conditions, including 5% of revenue being submitted to the local Commissioner. He further stated that the matter over the interim injunction was decided by order dated 17.02.12 where the Hon'ble Delhi High Court had given complete injunction against the defendant, hence this order was against selling of imported products as well as of future imports. He stated that when the Division Bench of Hon'ble Delhi High Court in its order dated 29.02.12 referred to the order dated 08.07.11 it was only referring to the goods already imported into India which were already seized by the local Commissioner and neither the order of the single Judge or the order of Division Bench extended or permitted the defendants from importing in the future. That was why an express clarification had been made to this effect in Paragraphs 2 – 3 of the order dated 29.02.12. Hence, the operative portion of the order dated 17.02.12 had not been set aside or stayed by the Division Bench. He further stated that they had placed other decisions of the Delhi High Court, Madras High Court and from the UK, EU to support the case whereas the importer had placed nothing on record to rebut the law enunciated in these decisions.

### FINDINGS

I have considered the arguments and the written submissions made by the opposing sides. I observe that M/s. Dell India Pvt. Ltd. is mainly relying on the provisions of Section 29 of the Trade Marks Act, 1999, particularly the provisions of Section 29 (6) of the said Act which reads as under:

For the purposes of this section, a person uses a registered mark if, in particular, he –

- (a) Affixes it to goods or the packaging thereof;
- (b) Offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;
- (c) Imports or exports goods under the mark; or
- (d) Uses the registered trade mark on business papers or in advertising.

Whereas the said importers mentioned above are relying on the provisions of Section 30 of the Trade Marks Act, 1999 for claiming that their goods being genuine goods are not infringing the trademark of M/s. Dell India Pvt. Ltd.

Subsection 3 of Section 30 of the Trade Marks Act, 1999, provides that:

“Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of:

- (a) The registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods; or
- (b) The goods having been put on the market under the registered trade mark by the proprietor or with his consent.

By virtue of this section which clearly recognizes the principle of 'Exhaustion', it appears that import of such goods under the registered Trade Marks may be not considered as infringement. I also find that the goods have been certified to be genuine by an independent approved Chartered Engineer and this fact has not been disputed by M/s. Dell India Pvt. Ltd.

For enforcement of IPR, the CBEC has issued the Notification 47/2007-Cus (N.T.) dated 08<sup>th</sup> May, 2007 notifying Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. As per Para 6 of the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, the import of allegedly infringing goods into India shall be deemed as prohibited within the meaning of Section 11 of the Customs Act, 1962.

Further, Notification 51/2010-Cus. (N.T.), issued under powers conferred by Section 11 of the Customs Act, 1962, in relation to the Trade Marks Act, 1999, prohibits the import of the following goods intended for sale or use in India, subject to following of conditions and procedures as specified in the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, namely:-

- (i) Goods having applied thereto a false trade mark as specified in Section 102 of the Trade Marks Act, 1999 (47 of 1999);
- (ii) Goods having applied there to a false trade description within the meaning of clause (I) of sub-section (1) of Section 2 of the Trade Marks Act, 1999 (47 of 1999), otherwise than in relation to any of the matters specified in sub-clauses (ii) and (iii) of clause (za) of that sub-section.


The said provisions indicate that only those goods, in relation to the Trade Marks Act, 1999 are prohibited goods under Section 11 of the Customs Act, 1962 by virtue of the above notification where False Trade Marks of False Trade Description have been applied. Hence, I find that as the imported goods are found to be genuine, the import of the same are not prohibited by the said notification. The genuineness of the goods has also been verified by the independent Chartered Engineer. Further, I also observe that the provisions of the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 have not been discussed in the said judgement dated 17.02.2012 passed by the Hon'ble Delhi High Court.

I also observe that these consignments have been held up for almost two months due to the deliberate insistence of infringement of IPR under the provisions of the Trade Mark Act, 1999, read with the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 by the Attorneys of M/s. Dell India Pvt. Ltd., due to which the importers have suffered heavy financial loss and mental agony. The right holders while registering their UPRN No. A0474INDEL4TM must be well aware of the legal aspects of IPR and its liabilities and provisions. Accordingly, a decision will have to be taken on their compensation. Demurrage, detention and warehousing charges arising due to suspension of clearance are liquidated amounts and are to be borne by the right holder M/s. Dell India Pvt. Ltd. in terms of the Bond executed by them.

In view of the above finding, I pass the following order.

ORDER

- (a) I hold that goods imported in these cases do not infringe IPR of the right holder M/s. Dell India Pvt. Ltd. as registered vide Unique Permanent Registration Number (UPRN) A0474INDEL4TM.
- (b) The said Dell laptops imported vide Bills of Entry Nos. 5783903 & 5783896 both dated 20.01.2012 of M/s. Venktron Digital System Pvt. Ltd., Bill of Entry No. 5794656 dated 21.01.2012 of M/s. Sapphire Micro Systems and Bill of Entry No. 5786408 dated 20.01.2012 of M/s. Momentum Technologies Inc. Pvt. Ltd. whose clearances were suspended are to be released forthwith.
- (c) The demurrage and warehousing charges on these goods are to be recovered from M/s. Dell India Pvt. Ltd. by enforcing the Centralised Bank Guarantee furnished by M/s. Dell India Pvt. Ltd. to the extent needed for the purpose and paid to the custodian.
- (d) If the importer pays such demurrage to facilitate speedy clearance of goods, the amount should be reimbursed by enforcing the security given by M/s. Dell India Pvt. Ltd.

  
 (RANJAN PRAKASH)  
 DY. COMMISSIONER OF CUSTOMS  
 S.I.B. (Import)/I.P.R.,  
 Air Cargo Complex, Sahar.

Copy to :

- 1. M/s. Venktron Digital Systems Pvt. Ltd.,  
Gala No.E-63, Rajasthan Indl. Estate,  
Near Bhajansons Dairy, Kaman-Bhiwandi Road,  
Kolkhi, Vasai (East), Thane, Maharashtra - 401201.
- 2. M/s. Sapphire Micro Systems,  
A-302, Jasmine Building,  
Plot No. 797/1, Channel Upvan,  
Panvel, Dist : Raigad - 410206
- 3. M/s. Momentum Technology Inc. Pvt. Ltd.,  
B-21, Moti Nagar, New Delhi - 110015
- 4. M/s. Dell India Pvt. Ltd.  
Divyashree Greens, No.12/1,12/2A,& 13/1A,  
Koramangala, Inner Ring Road, Domlur Post,  
Bangalore-560 071, Karnataka.
- 5. M/s. Mumbai International Airport Authority Ltd.,  
Air Cargo Complex, Sahar, Andheri (E), Mumbai - 99
- 6. The Commissioner of Customs (Import),  
Air Cargo Complex, IGI Airport, New Delhi - 110 037
- 7. The Commissioner of Customs (Import),  
Air Cargo Complex, Sahar, Andheri (E), Mumbai - 99.
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