

Commissioner of Customs Vs Atul Commodities Pvt. Ltd.

Court: High Court Of Kerala

Date of Decision: April 7, 2006

Acts Referred: Constitution of India, 1950 " Article 22B

Customs Act, 1962 " Section 111, 112, 124

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 " Rule 10(A), 6, 8

Foreign Trade (Development and Regulation) Act, 1992 " Section 5

Citation: (2006) 202 ELT 392 : (2006) 3 ILR (Ker) 15

Hon'ble Judges: K.S. Radhakrishnan, J; K.M. Joseph, J

Bench: Division Bench

Advocate: John Varghese, ASG, for the Appellant; S.K. Bagaria, V.M. Kurian, Mathew B. Kurian and K.T. Thomas, for the Respondent

Final Decision: Allowed

Judgement

K.S. Radhakrishnan, J.

These appeals have been preferred by the Commissioner of Customs. Common questions arise for consideration

in all these appeals and hence we are disposing of these cases by a common judgment. Question posed is whether second-hand photocopiers are

capital goods or consumer goods and whether the import of second-hand photocopiers require licence and whether the import is governed by

paragraph 2.17 of the Export Import Policy 2004-2009. Conflict of opinions were expressed by various Benches of the Tribunals and

consequently the matter was referred to a Full Bench of CESTAT. CESTAT took the view that second-hand photocopiers are capital goods

within the meaning of paragraph 9.12 and freely importable under paragraph 2.17 and are not consumer goods within the meaning of Exim Policy

for the year 2004-2009 Commissioner of Customs is aggrieved by those orders and has preferred these appeals. For disposal of these appeals we

may refer to the facts in CUA. No. 11 of 2005.

2. Respondent private limited company had filed B/E 154419/25-1-05 for import of various models of used photocopiers. The goods were

invoiced at US \$ CIF and the total assessable value worked out to Rs, 19,20,474/-. Goods were examined in the Office of the Customs and were

found to be as per the declaration. The declared price was compared with the contemporary import price at other ports and the price of models of

photocopier was found to be low. The details of said prices were given to the importer and it was proposed to raise a query on the importer and

reject the transaction value in terms of Rule 10(A) of Customs Valuation Rules, 1988 and the value was proposed to be re-fixed under Rule 6/8 of

Valuation Rules, 1988 based on the contemporary import price/Chartered Engineer Certificate. The proposed assessable value worked out to Rs.

24,11,741/-. It was noticed that the second-hand photocopiers are not importable under para 2.33 of Hand Book of Procedures to Foreign

Trade Policy and the same was restricted under para 2.17 of the Foreign Trade Policy. Since the exporter had failed to produce any valid import

licence it was noticed that the goods are liable to confiscation u/s 111(d) read with para 2.17 of Foreign Trade Policy. It was also noticed that the

importer was liable for penalty u/s 112 of Customs Act, 1962. Importers were therefore called upon to show cause to the Commissioner of

Customs as to why the goods imported under B/E 154419, dated 25-1-2005 should not be confiscated and penalty imposed. A show cause

notice dated 25-2-2005 was therefore issued to the importer u/s 124 of the Customs Act, 1962. Reasons for issuing such show cause notice has

been specifically stated in the notice. We may extract the reasons for easy reference.

As per para 2.17 of Foreign Trade Policy 2004-2009 all second-hand goods except capital goods are restricted for import. As per para 2.33 of

Hand Book of Procedures of Foreign Trade Policy, import of second- hand capital goods shall be allowed without licence. Similar provision for

import of second-hand capital goods existed under para 2.17 of Export Import Policy 2002-2007 as well as at para 2.33 of Hand book of

Procedures to the same. Under this policy it was clarified by the DGFT vide circular 16 dated, 29-9-2003 that second-hand personal computers

and laptops are covered under definition of second-hand goods and their import is governed by para 2.17 of the policy and not covered under the

definition of capital goods as defined under para 9.10 of policy and para 2.33 of hand book of procedures. In continuation to that it was further

clarified by DGFT vide Circular 19, dated 11-11-2003 that second-hand photocopier machines, air-conditioners, diesel generating sets are also

covered under the definition of "second-hand goods" and their import is governed by 2.17 of policy which restricts import of second-hand goods

without licence. Thus, by Circular 16, dated 29-9-2003 and 19 dated 11-11-2003 DGFT clarified that import of second-hand photocopiers are

governed by para 2.17 and not by para 2.33. Para 2.17 restricts import without licence. It was further reaffirmed by DGFT under the current

policy (2004-2009) also vide policy Circular 20 (2004-09) dated 23-2-2005 that the used photocopiers are restricted for import under para

2.17. Copy of policy circular is enclosed. Thus in view of the clarification cited above, used photocopiers are not importable under para 2.33 of

Hand Book of Procedures to Foreign Trade Policy and the same is restricted under para 2.17 of the Foreign Trade Policy.

Respondent importer then filed reply to the show cause notice stating as follows:

It has been the recent Practice for the past few months by the Custom House Cochin to adjudicate consignments of Used Photocopiers by

misinterpreting the circular of DGFT Policy Circular No. 16 (RE-2003)/2002-07 dated 29-9-2003 and 19 (RE-2003)/2002-07, dated 11-11-

2003 which are specifically issued for EPCG Schemes only and not for normal importers who are paying full duty and do not import under the

EPCG Scheme. These circulars are intended to be applied to the EPCG Scheme wherein there is a provision for an exemption of customs duty

with certain fulfillment criteria. Therefore the said two circulars issued under the EPCG Scheme cannot be suo motu applied to other importers

paying full import duty and having no export obligations.

Objection filed by the respondent importer was considered by the Commissioner of Customs who rejected the objections stating that Director

General of Foreign Trade vide Policy Circular No. 16 (RE-2003)/2002-07, dated 29-9-2003 clarified the position of import of second-hand

personal computers and laptops. DGFT further clarified vide Policy Circular 19/RE-2003)/2002-07, dated 11-11-2003 that the second-hand

photocopying machines etc. are also covered under the definition of ""Second-hand goods"" and their import is governed by the provisions of para

2.17 of Exim Policy. Further it is also stated that the position has been further reiterated by Policy Circular No. 20(2004-2009) dated 23-2-2005

by Director General of Foreign Trade and thus in view of policy Circular Nos. 16/03 and 19/03 and 20 (2004-2009), dated 23-2-2005 used

photocopying machines cannot be imported without licence under para 2.33 of Hand Book of Procedures. It is also stated that the policy circulars

are only issued by Director General of Foreign Trade, New Delhi which are binding on all concerned. Therefore the Commissioner of Customs

rejected the arguments raised on the side of the importer and decided to confiscate the used photocopiers covered under B/E No. 154419, dated

25-1-2005 u/s 111(d) of the Customs Act, 1962. Commissioner also determined the assessable value of Rs. 19,20,474/- and was given option to

the importer to redeem the same on payment of a fine of Rs. 6 lakhs. Further a penalty to Rs. 2 lakhs was also imposed u/s 112 of the Customs

Act, 1962. Aggrieved by the said order matter was taken up before the CESTAT. CESTAT allowed the appeal vide its order dated 11-5-2005.

3. Tribunal took the view that second-hand photocopiers are capital goods within the meaning of paragraph 9.12 and freely importable under

paragraph 2.17 and are not consumer goods. Tribunal has also found the circulars Nos. 16/03, 19/03 and 20/05 issued by the Director General of

Foreign Trade dealt with imports under the EPCG Scheme and those circulars have no application to the general imports of the nature made by the

importer and therefore held that second-hand photocopiers are capital goods within the meaning of paragraph 9.12 and freely importable under

paragraph 2.17 and are not consumer goods.

4. Sri John Varghese, Assistant Solicitor General contended that since the respondent assessee is a trader dealing in the purchase and sale of

photocopiers it cannot be said that purchase and sale of second-hand photocopiers can be considered as capital goods. Counsel further submitted

that Circular Nos. 16, 19 and 20 are applicable to imports in general and that the second-hand photocopiers are the second-hand goods and are

not freely importable as capital goods. Further Counsel also submitted as per para 2.3 of the Foreign Trade Policy 2004-2009 the DGFT is the

final authority for interpretation of policy provisions which is final and binding on all the parties. In support of his contention he placed reliance on

the decision of the Supreme Court in M.J. Export Ltd. and another Vs. The Customs, Excise and Gold (control) Appellate Tribunal, Bombay and

others, . Counsel submitted in any view of the matter the clarificatory notification issued by the DGFT would take effect retrospectively. Counsel

submitted that the Tribunal has not properly appreciated the scope and ambit of Foreign Trade Policy 2004-2009.

5. Sri S.K Bagaria, Senior Counsel, appearing for the importer submitted that the Tribunal has correctly come to the conclusion that the second-

hand photocopiers are capital goods within the meaning of paragraph 9.12 and freely importable under paragraph 2.17 and are not consumer

goods. Counsel submitted that the DGFT has no jurisdiction to sit in judgment over the Exim Policy issued for the year 2004-2009. Counsel

referred to paragraph 2.17 of the una-mended policy and submitted that as per the policy second-hand capital goods could be freely imported and

that policy was amended only on 19th October 2005 by Government of India in exercise of its powers conferred u/s 5 of the Foreign Trade

(Development and Regulation) Act, 1992 read with paragraph 1.3 of the Foreign Trade Policy, 2004-09. Counsel submitted, amendment would

take into effect only prospectively and would not apply in the case of the respondent since respondent had imported goods prior to 19th October,

2005, Counsel submitted, the Circulars No. 16/03, 19/03 and 20/05 are not applicable to second-hand photocopiers. Counsel referred to the

Exim Policy for the year 2004-2007 as well as 2004-2009 and submitted that wherever restricted items of consumer goods were enumerated,

photocopiers did not find place in the list and that they appear as capital goods. Counsel submitted that second-hand photocopiers would not fall

under the definition of consumer goods as given in paragraph 9.16 of the Foreign Trade Policy. Counsel submitted the various circulars issued are

not applicable to import of second-hand photocopiers, but only to import under EPCG Scheme. Counsel elaborately took us through various

provisions of the Exim Policy in order to support his contentions.

6. Indisputedly on the issuance of the notification by Government of India on 19th October, 2005 in exercise of powers conferred u/s 5 of the

Foreign Trade (Development and Regulation) Act, 1992 read with paragraph 1.3 of the Foreign Trade Policy, 2004-2009. Import of second-

hand personal computers, laptops, photocopier machines, air conditioners, diesel generating sets will only be allowed against a licence issued in this

behalf. Question to be considered is as to whether import of second-hand photocopiers effected prior to 19th October, 2005 would be governed

by the circulars Nos. 16/03, 19/03 and 20/05 issued by DGFT warranting a licence for import. As per paragraph 2.3 of the EXIM Policy if any

question or doubt arises in respect of the interpretation of any provision contained in the Exim Policy or regarding the classification of any item in

the ITC (HS) or Handbook (Vol. I) or Handbook (Vol. 2) or Schedule of DEPB Rate, the said question or doubt shall be referred to the Director

General of Foreign Trade whose decision thereon shall be final and binding. Representations were received by the Ministry of Commerce and

Industry seeking clarification as to whether second-hand personal computers/laptops are covered under the definition of second-hand capital

goods and allowed freely as per the provisions of paragraph 2.33 of Hand Book of Procedures (Vol. 1), 2002-2007, provided they are not more

than ten years old. The matter has been deliberated upon by the DGFT and held that those items are not covered under the definition of capital

goods as defined under Paragraph 9.10 of Exim Policy and Paragraph 2.33 of Hand Book of Procedures (Vol. I). It was therefore clarified by

circular No. 16/03 that second-hand personal computers/laptops can also not to be permitted for import under EPCG Scheme under the

provisions of Paragraph 5.1 of the Exim Policy, even for service providers. In continuation of the policy circular No. 16/03, dated 29-9-2003

DGFT had further clarified by circular No. 19, dated 11-11-2003 that second-hand personal computers/laptops are covered under the definition

of second-hand goods and their import is governed by the provisions of paragraph 2.17 of Exim Policy 2002-07. The above clarificatory portion

of the circular was applicable to second-hand photocopier machines not covered by EPCG Scheme. Further policy circular No. 19 states as

follows:

In view of this, Second Hand Photocopier Machines, Air Conditioners, Diesel Generating Sets, etc. can also not to be permitted for import under

EPCG Scheme under the provisions of Para 5.1 of EXIM Policy even if these are less than ten years old and even for Service Providers.

Policy circular No. 19 deals with three categories of cases. First category is regarding the import of personal computers/laptops, second-hand

photocopier etc. which are covered by "second-hand goods". When we read above category along with circular No. 16 it is clear that second-

hand photocopiers are governed by the provisions of Para 2.17 of Exim Policy 2002-07 and not covered under the definition of "capital goods" as

defined under Para 9, 10 of the Exim Policy. Second category deals with import of second-hand photocopiers etc. under the EPCG Scheme

which says that it cannot be permitted to be imported, under the provisions of para 5.1 of Exim Policy. The third category is the only exemption

which says that import of new personal computers, photocopiers etc. may be permitted under EPCG Scheme provided they required for

manufacturing of goods or rendering services. On a combined reading of circular Nos. 16/03, 19/03 and 20/05 we are of the view the second-

hand photocopiers are not covered under the definition of capital goods as defined under paragraphs 9, 10 of Exim Policy. Same is the position

under the EPCG Scheme as well and the only exception is that import of new photocopier machines may be permitted under the EPCG Scheme

provided they required for manufacturing of goods or rendering services. Above being the meaning and purport of the various circulars we are of

the view the finding of the Tribunal that those circulars relate only to import under EPCG Scheme cannot be sustained.

7. We are of the view, second-hand photocopier machines imported by the importer would also be governed by the above-mentioned circulars

the exemption which we have already stated is with regard to the import of new photocopier machines, under EPCG Scheme provided they are

required for manufacturing of goods or rendering services. The goods imported by the importer will not fall under that category. Consequently the

order passed by the Tribunal cannot be sustained and the same stands set aside.

8. Counsel appearing for the respondent referred to a decision of the Delhi High Court in Prashant Glass Works Pvt. Ltd. Vs. Collector of

Customs, , Narendra Udeshi Vs. Union of India (UOI) and Others, , G.P. Dave and Sons (Shipping) Vs. Collector of Customs and Others, and

submitted that in several cases courts have interfered with the circulars issued by the DGFT since those circulars are contrary to the policy and

therefore this court should ignore circulars 15/03, 19/03 and 20/05. We find it difficult to accept that contention. First of all the decisions cited by

the counsel are decisions where the vires of circulars were challenged in a petition under Article 22B of the Constitution of India. The circulars as

such have not challenged in these proceedings and therefore respondents importers are bound by those circulars unless they are annulled in

appropriate proceedings. Therefore the decisions cited by the importer are not applicable to the facts of these cases. Further we also notice that

DGFT has got the power to issue circulars under clause 2.3 of the Foreign Trade Policy read with clause 1.A.4 of Foreign Trade Policy 2004-

2009. In any view the power of DGFT in issuing those circulars have not been questioned by the importer in appropriate proceedings.

9. Counsel further submitted that the order impugned in these cases have already been appealed against by the revenue before the Andhra Pradesh

High Court in Central Excise Appeal No. 52 of 2005. A Division Bench of the Andhra Pradesh High Court dismissed the appeal stating that no

question of law was raised much less and substantial question of law. Counsel submitted, since the appeal has been dismissed by the Division

Bench of the Andhra Pradesh High Court the Commissioner is bound by that decision and judicial discipline demands that this court shall not

interfere with the impugned common order which was upheld by the Andhra Pradesh High Court. We find it difficult to agree with the reasoning of

the Andhra Pradesh High Court stating that no question of law has been raised for consideration. We have already found that the importer is

bound by the policy Circulars No. 16/03, 19/03 and 20/05 and the second-hand photocopier machines are second-hand goods and are not freely

importable as ""capital goods"", the only exemption is with regard to the import of new photocopier machines, provided they are imported under

EPCG Scheme and are required for manufacturing of goods or rendering services. Under such circumstance we are inclined to allow these appeals

and set aside the orders passed by the Tribunal.