
(2009) 02 SC CK 0061

In the Supreme Court Of India

Case No : Civil Appeal No's. 2999, 5259, 3226 and 3977 of 2007

Atul Commodities Pvt. Ltd. and Others

APPELLANT

Vs

Commissioner of Customs, Cochin-9

RESPONDENT

Date of Decision : 24-02-2009

Acts Referred:

Customs Act, 1962 — Section 111, 124

Foreign Trade (Development and Regulation) Act, 1992 — Section 15, 16, 19, 3, 5

Citation : (2009) 168 ECR 1 : (2009) 4 JT 23 : (2009) 5 SCC 46 : (2009) 3 SCR 589 : (2009) 7 UJ 3189

Hon'ble Judges : S. H. Kapadia, J;H. L. Dattu, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.H. Kapadia, J.

Civil Appeal No. 2999 of 2007:

1. This civil appeal is directed against the judgment and order dated 7.4.2006 in Customs Appeal No. 15/05 delivered by the Division Bench of Kerala High Court by which the Department's appeal came to be allowed and the judgment of the Tribunal dated 12.7.2005, following the decision of its Larger Bench in the case of Atul Commodities Pvt. Ltd. v. CC, came to be set aside.

2. The issue involved in this civil appeal is - Whether, during the period in question, Photocopying Machines (Photocopiers) were "freely importable" or whether its import required a licence/permission/certificate.

Facts:

3. The facts lie within a very narrow compass. 4. In exercise of the powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government notified Foreign Trade Policy ("FTP" for short) for the period 2004-09 incorporating the Exim Policy for the period 2002-07 as modified.

The Policy was announced on 31.8.2004. It came into force with effect from 1.9.2004. It remains in force up to 31.3.2009, unless otherwise specified.

5. The appellant imported in January, 2005 Photocopying Machines under the category "general imports".

6. On 25.2.2005, the Dy.CoC (Import) issued a show cause notice u/s 124 of the Customs Act alleging that the Used Photocopying Machines were restricted items for import under para 2.17 of the current FTP 2004-09 read with circular No. 20 dated 23.2.2005 issued by DGFT. In the show cause notice, it was thus alleged that goods have been imported without a valid import licence and consequently, they were liable to be confiscated u/s 111(d) of the Customs Act, 1962 read with para 2.17 of the FTP (2004-09).

7. In its reply dated 3.3.2005, appellant submitted inter alia that photocopying machine (photocopier) is an item of capital goods. The appellant pointed out that on 21.8.2003 the Customs House, Cochin, had obtained a clarification from JDGFT, Cochin, which confirmed that photocopying machines can be classified under Capital Goods and Second Hand Photocopier Machines which are less than 10 years old shall be allowed free importation under para 2.33 of the Handbook of Procedures 2002-07. In its reply, the appellant further pointed out that, circulars of DGFT No. 16 dated 29.9.2003 and No. 19 dated 11.11.2003 had been issued specifically for EPCG Scheme(s) only and not for normal imports on which full duty is payable. It is further pointed out that the above policy circulars are intended to be applied to EPCG Scheme wherein there is a provision for an exemption of customs duty and, therefore, the above two circulars cannot be suo motu applied to the imports in question.

8. Vide Order of adjudication dated 11.3.2005, the adjudicating authority (Commissioner) came to the conclusion that as per para 2.17 of the FTP all second-hand goods, except capital goods, came in the category of "restricted for import". He relied upon circular No. 19 dated 11.11.2003 in support of his above conclusion. It was held that second-hand photocopier machines, air-conditioners, diesel generating sets are all covered under the definition of "second-hand goods" and, therefore, their import is governed by para 2.17 of the current Policy which restricts import of second-hand goods without a licence. Accordingly, the adjudicating authority confirmed the show cause notice.

9. Aggrieved by the Order of adjudication dated 11.3.2005, the matter was carried in appeal to the Tribunal, which, as stated above, allowed the appeal in favour of the appellant placing reliance on the decision of the Larger Bench of the Tribunal dated 11.5.2005.

10. Aggrieved by the decision of the Tribunal, the Department carried the matter in appeal to the High Court. By the impugned judgment dated 7.4.2006, the High Court held that, the import of second-hand photocopier machines effected prior to 19.10.2005 (the date on which Notification No. 31/05 came to be issued amending the current Policy) would be governed by circular Nos. 16/03, 19/03

and 20/05 issued by DGFT warranting a licence for import. It was further held that on a combined reading of circulars 16/03, 19/03 and 20/05 made the position clear that second-hand photocopier machines are not covered by the definition of capital goods as defined under para 9.10 of the FTP (2004-09). It was further observed that second-hand photocopier machines were not freely importable as "capital goods". The Division Bench of the Kerala High Court vide its impugned judgment observed that it did not agree with the view taken by the Andhra Pradesh High Court in Central Excise Appeal No. 52/2005 in favour of the assessee.

11. Before concluding the facts, we may state that, vide Notification No. 31/05 dated 19.10.2005 issued by the GoI u/s 5 of Foreign Trade (Development and Regulation) Act, 1992 read with para 1.3 of FTP 2004- 09 import of second-hand photocopier machines, air-conditioners etc. are made restricted items warranting a licence for import. However, we are concerned with the imports effected prior to 19.10.2005.

Judgment of the Larger Bench of the Tribunal:

12. The controversy in hand first came to be decided, even before the impugned judgment, on 11.5.2005 by the Larger Bench of CESTAT which came to the conclusion that Used Photocopier Machines are capital goods. In this connection, it may be noted that there was a difference of opinion between different Benches of the Tribunal. One view was that photocopying machines were consumer goods. The other view was that photocopying machines were capital goods. Therefore, the matter came to be decided by the Larger Bench, which took the view that photocopying machines are capital goods, particularly in view of its definitions in para 9.12 of the FTP (2004-09). As regards the applicability of circulars 16/03, 19/03 and 20/05, the Larger Bench held that all the three Circulars came to be issued in the context of imports made under EPCG Scheme with the "actual user" condition attached to the import of capital goods under the said Scheme and that the said three circulars had no application to "general imports" made by the appellants. Accordingly, the Larger Bench of the Tribunal decided the matter in favour of the appellant. This view of the Larger Bench of the Tribunal stood overruled by the impugned judgment of the High Court, hence, this civil appeal is filed by the appellant.

Contentions:

13. Shri S.K. Bagaria, learned senior counsel appearing on behalf of the appellant, submitted that in this case we are concerned with normal imports and not imports under the EPCG or Advance Licencing or Passbook or 100% EOU or EPZ Scheme(s). He submitted that the definition of the words "capital goods", "consumer goods", "second-hand goods" are all to be seen in the context of the Scheme. He submitted that in the case of normal/general imports, there is no concession/exemption which is there under EPCG Scheme. He submitted that export promotion stood on a different footing vis-à-vis general imports. He

submitted that in the case of EPCG, we have important other conditions like, fulfilment of export obligations, existence of a licence, Actual User condition etc., which are not there in the case of general imports. He further submitted that, each Scheme under the FTP forms a Code by itself and therefore one has to read the definition of capital goods, consumer goods and second-hand goods in the context of each of these Schemes. He submitted that existence of a licence is required whenever an import falls under any of the above Schemes. He submitted that the general/normal imports do not come under any of the above Schemes. He further submitted that it is only GoI which is empowered to amend the Policy. According to the learned senior counsel, DGFT has the power to interpret and issue administrative circular(s) in implementation of the Policy but he has no power to amend the Policy, which power u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992 ("1992 Act") remains vested only in GoI. In this connection, learned Counsel placed reliance on Sections 5 and 6(3) of the 1992 Act. He further contended that the three Circulars issued by DGFT were clarificatory in nature. They were not amendatory. He further submitted that DGFT had no authority to issue a circular which is contrary to the statute consisting of the 1992 Act, the FTP, the ITC(HS) and the Handbook of Procedures. Learned Counsel further submitted that all the three circulars issued by DGFT were confined to imports under EPCG. They had no connection with general/normal imports. He further submitted that the above circulars did not bind the assessee. They do not bind the Courts. He further submitted that there are three broad categories of item-wise imports mentioned in ITC(HS), they are "free", "restricted" and "prohibited". According to the learned Counsel, ITC(HS) is goods-specific whereas Other Conditions like actual user, export obligations, existence of licence etc. are Scheme-specific. Learned Counsel submitted that the basic error in the impugned judgment is that the High Court has only applied the above three circulars, which had no application to normal imports, to come to the conclusion that import of photocopying machines, air-conditioners etc. required a licence. According to the learned Counsel, it has not considered the Scheme of the 1992 Act and it has failed to consider the basic fact that the imports in question were made under the category of "general imports" and not under EPCG Scheme.

14. Shri K. Radhakrishnan, learned senior counsel appearing on behalf of the Revenue, submitted that it is clearly mentioned in the FTP 2004-09 that second-hand goods, other than second-hand capital goods, are restricted for import. According to the learned Counsel, the imported items are second hand goods. They are, therefore, restricted. Therefore, they require a licence. In this connection, learned Counsel placed reliance on circular No. 20 dated 23.2.2005, which came to be issued prior to Notification No. 31 dated 19.10.2005. According to the learned Counsel, second-hand photocopying machines came within the definition of second-hand goods and consequently their import stood governed by para 2.17 of the FTP and shall not be permitted to be imported under para 5.1 of the Policy. According to the learned Counsel, para 2.17 of the Policy restricts

import of second-hand goods without a licence. This position, according to the learned Counsel, stood reaffirmed vide Policy circular No. 20 dated 23.2.2005. Learned Counsel submitted that Second Hand Photocopying machines imported by the appellant(s) were second-hand goods other than second-hand capital goods, hence, the said import is restricted by FTP (2004-09) and Policy circular No. 20/05. According to the learned Counsel, the import of subject goods is made during the current FTP, that para 2.1 of the FTP postulates that exports and imports are "free" unless regulated, that it further postulates that such regulation can be by FTP and that DGFT is the statutory authority in-charge of the implementation of the 1992 Act and the Policy thereunder. According to the learned Counsel, the said circular No. 20/05 was part of the FTP, that FTP is regulated through para 2.17 and that the said para 2.17 read with circular No. 20/05 declares second-hand photocopying machines as second-hand goods other than second-hand capital goods. According to the learned Counsel, circular No. 20/05 prohibits imports of second-hand photocopying machines under para 5.1 of FTP because the said machines are not capital goods. According to the learned Counsel, the amendment to para 2.17 via Notification dated 19.10.2005 re-affirms the Circular No. 20/05, which in turn refers to para 2.17 and therefore it cannot be confined to EPCG Scheme. According to the learned Counsel, a combined reading of paras 2.1, 2.2, 2.3, 2.17 and Circular No. 20/05 lead to unequivocal conclusion that the import of second-hand photocopying machines is restricted under FTP (2004-09) since they are second-hand goods other than second-hand capital goods, hence, the civil appeal is liable to be dismissed.

15. To decide the controversy we need to examine the 1992 Act read with the FTP (2002-07), the FTP (2004-09), the Handbook of Procedures and ITC(HS).

(A) Contents of the Policy including ITC(HS) and the Handbook of Procedures:

(i) Notification No. 1/2004-09 dated 31.8.2004:

TO BE PUBLISHED IN THE GAZETTE OF INDIA EXTRAORDINARY PART-II,
SECTION-3, SUB SECTION (ii)

GOVERNMENT OF INDIA MINISTRY OF COMMERCE AND INDUSTRY

NOTIFICATION No. 1/ 2004-09 NEW DELHI: the 31st August, 2004, In exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (No 22 of 1992) read with paragraph 1.2 of the Foreign Trade Policy, 2004-09, the Central Government hereby notifies the Foreign Trade Policy 2004-09 as contained in Annexure to this notification. The Policy shall come into force from 1st September, 2004.

This issues in public interest.

(GOPAL. K. PILLAI) Director General of Foreign Trade and Ex Officio Additional Secretary to the Government of India (F. No. 01/94/180/Foreign Trade Policy / AM05/PC-IV)

(ii) Important provision(s) of the 1992 Act:

Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 reads as follows:

5. Export and import policy.- The Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy.

...

6. Appointment of Director General and his functions.-

...

6(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under Sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.

(iii) Important provisions of the Policy (2004-09).

CHAPTER-1A LEGAL FRAMEWORK

Duration 1.2 In exercise of the powers conferred u/s 5 of The Foreign Trade (Development and Regulation Act), 1992 (No. 22 of 1992), the Central Government hereby notifies the Foreign Trade Policy for the period 2004- 2009 incorporating the Export and Import Policy for the period 2002-2007, as modified. This Policy shall come into force with effect from 1st September, 2004 and shall remain in force upto 31st March, 2009, unless as otherwise specified.

The Central Government reserves the right in public interest to make any amendments to this Policy in exercise of the powers conferred by Section-5 of the Act. Such amendment shall be made by means of a Amendments 1.3 Notification published in the Gazette of India.

Transitional 1.4 Any Notifications made or Public Notices issued or Arrangements anything done under the previous Export/ Import policies, and in force immediately before the commencement of this Policy shall, in so far as they are not inconsistent with the provisions of this Policy, continue to be in force and shall be deemed to have been made, issued or done under this Policy.

Licences, certificates and permissions issued before the commencement of this Policy shall continue to be valid for the purpose and duration for which such licence, certificate or permission was issued unless otherwise stipulated.

CHAPTER-2 GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS

Exports and 2.1 Exports and Imports shall be free, except in cases where Imports free they are regulated by the provisions of this Policy or any unless

regulated other law for the time being in force. The item wise export and import policy shall be, as specified in ITC (HS) published and notified by Director General of Foreign Trade, as amended from time to time.

Interpretation 2.3 If any question or doubt arises in respect of the of Policy interpretation of any provision contained in this Policy, or regarding the classification of any item in the ITC (HS) or Handbook (Vol.1) 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.

If any question or doubt arises whether a licence/ certificate/permission has been issued in accordance with this Policy or if any question or doubt arises touching upon the scope and content of such documents, the same shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

Procedure 2.4 The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing or any other competent authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and this Policy. Such procedures shall be included in the Handbook (Vol.1), Handbook (Vol.2), Schedule of DEPB Rate and in ITC (HS) and published by means of a Public Notice. Such procedures may, in like manner, be amended from time to time.

The Handbook (Vol.1) is a supplement to the Foreign Trade Policy and contains relevant procedures and other details. The procedure of availing benefits under various schemes of the Policy are given in the Handbook (Vol.1).

Actual User 2.16 Capital goods, raw materials, intermediates, Condition components, consumables, spares, parts, accessories, instruments and other goods, which are importable without any restriction, may be imported by any person.

However, if such imports require a licence/ certificate/permission, the actual user alone may import such goods unless the actual user condition is specifically dispensed with by the licensing authority.

Second Hand 2.17 All second hand goods, excepting second hand capital Goods goods, shall be restricted for imports and may be imported only in accordance with the provisions of this Policy, ITC(HS), Handbook (Vol.1), Public Notice or a licence/certificate/permission issued in this behalf. Import of second hand capital goods, including refurbished/ reconditioned spares, shall be allowed freely. (This clause is not there in FTP 2002-07) (emphasis supplied)

CHAPTER-5 EXPORT PROMOTION CAPITAL GOODS SCHEME

EPCG Scheme 5.1 The scheme allows import of capital goods for pre production, production and post production (including CKD/SKD thereof as well as computer

software systems) at 5% Customs duty subject to an export obligation equivalent to 8 times of duty saved on capital goods imported under EPCG scheme to be fulfilled over a period of 8 years reckoned from the date of issuance of licence. Capital goods would be allowed at 0% duty for exports of agricultural products and their value added variants.

EPCG for 5.1B An EPCG licence can also be issued for import of capital Projects goods for supply to projects notified by the Central Board of Excise and Customs under S.No 441 of Customs Exemption Notification No 21/2002 dated 01.03.2002 wherein the basic customs duty on imports is 10% with a CVD of 16%.

The export obligation for such EPCG licences would be eight times the duty saved. The duty saved would be the difference between the effective duty under the aforesaid Customs Notification and the concessional duty under the EPCG Scheme.

Conditions for 5.3 Import of capital goods shall be subject to Actual User import of Capital condition till the export obligation is completed. Goods

CHAPTER-9

DEFINITIONS

9.1 For the purpose of this Policy, unless the context otherwise requires, the following words and expressions shall have the following meanings attached to them.

9.4 "Actual User" means an actual user who may be either industrial or non-industrial.

9.5 "Actual User (Industrial)" means a person who utilises the imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit.

9.6 "Actual User (Non-Industrial)" means a person who utilises the imported goods for his own use in

(i) any commercial establishment carrying on any business, trade or profession; or

(ii) any laboratory, Scientific or Research and Development (R&D) institution, university or other educational institution or hospital; or

(iii) any service industry.

9.12 "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. Capital goods also include packaging machinery and equipment, refractories for initial lining, refrigeration equipment,

power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in the services sector.

9.15 "Consumables" means any item, which participates in or is required for a manufacturing process, but does not necessarily form part of the end-product. Items, which are substantially or totally consumed during a manufacturing process will be deemed to be consumables.

9.16 "Consumer Goods" means any consumption goods, which can directly satisfy human needs without further processing and includes consumer durables and accessories thereof.

9.48 "Public Notice" means a notice published under the provisions of paragraph 2.4 of the Policy.

(iv) Important provisions of the Handbook of Procedures (2004-09):

Para 2.33 of the Handbook:

"Import of Second Hand Capital Goods-

2.33 Import of second hand capital goods including refurbished/reconditioned spares, shall be allowed freely, subject to conditions for the following categories: The Import of second hand computers including personal computers and laptops are restricted for imports.

The import of refurbished/ reconditioned spares will be allowed on production of a Chartered Engineer certificate that such spares have a residual life not less than 80% of the life of the original spare."

(v) Important provisions of ITC(HS):

Col.3 Policy:

Two types of Restrictions have been indicated in this column, namely, 'Prohibited' and 'Restricted'.

Items which do not require any licence under the Exim Policy have been denoted as 'Free' subject to the Licensing Notes contained in the relevant chapter/ heading/sub-heading or as may have been indicated under column 4 mentioning conditions relating to the policy and is also subject to any other law for the time being in force.

Wherever the policy indicated as 'State Trading Enterprise (STE)', the nominated STE shall make any such purchases or sales involving imports solely in accordance with the provision at para 2.11 of Foreign Trade Policy.

Exim Code 9009 reads as follows:

EXIM Item Description Policy Code

9009 Photocopying apparatus incorporating an optical system or of the contact-type and thermo-copying apparatus

Electrostatic photocopying apparatus: 9009 11 00 Operating by reproducing the original image Free directly onto the copy (direct-process)

9009 12 00 Operating by reproducing the original image Free via an intermediate onto the copy (indirect- process)

Other photocopying apparatus: 9009 21 00 Incorporating an optical system Free

9009 22 00 Of the contact type Free 9009 30 00 Thermo-copying apparatus

Free Parts and accessories: 9009 91 00 Automatic document feeders Free 9009

92 00 Paper feeders Free 9009 93 00 Sorters Free 9009 99 00 Other Free

(B) Policy Circulars (2002-07):

(i) Policy Circular No. 16 dated 29.9.2003:

Government of India Ministry of Commerce & Industry Department of Commerce Directorate General of Foreign Trade Udyog Bhawan, New Delhi. ----- POLICY CIRCULAR No. 16(RE-2003)/2002-07

dated : 29 /09/2003

To All Licensing Authorities, All Commissioners of Customs.

Sub:- Import of second hand personal computers (PCs)/ Laptops - clarification regarding. -----

1. Attention is invited to Para 2.17 of EXIM Policy, 2002- 07 stipulating that all second hand goods shall be restricted for imports and may be imported only in accordance with the provisions of the Policy, ITS(HS), Handbook (Vol.I), Public Notice or a licence/certificate/permission issued in this behalf.

2. Representations have been received seeking clarifications as to whether second hand personal computers (PCs)/Laptops are covered under the definition of second hand capital goods and allowed freely as per the provisions of Para 2.33 of Handbook of Procedures (Vol.I) 2002-07, provided these are not more than ten years old.

3. The matter has been deliberated upon and it is clarified that the second hand personal computers (PCs)/Laptops are covered under the definition of "second hand goods" and their import is 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 EXIM Policy and Para 2.33 of Handbook of Procedures (Vol.I). In view of this, second hand personal computers (PCs)/Laptops can also not to be permitted for import under EPCG scheme under the provisions of para 5.1 of the Exim Policy, even for service providers.

4. All the Licensing Authorities are advised to take action accordingly.

This issues with the approval of DGFT.

(M.C. Jauhari) Jt. Director General of Foreign Trade

(ii) Policy Circular No. 19 dated 11.11.2003:

Government of India Ministry of Commerce & Industry Department of Commerce
Directorate General of Foreign Trade Udyog Bhawan, New Delhi. ----- POLICY
CIRCULAR No. 19 (RE-2003)/2002-07

11th Nov.2003.

To All Licensing Authorities, All Commissioners of Customs.

Subject: Import of second hand photocopier machines, Air Conditioners, Diesel
Generating Sets, etc., - clarification reg. ----

1. In continuation of Policy Circular No. 16 dated 29.9.2003 whereby it was clarified that Second Hand Personal Computers(PCs)/Laptops are covered under the definition of Second Hand goods, it is further clarified that the second hand Photocopier Machines, Air Conditioners, Diesel Generating Sets, 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, 2002-07. 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.

2. However, import of new Personal Computers (PCs) / Laptops , Photocopier Machines, Air Conditioners, Diesel Generating Sets, etc., may be permitted under EPCG Scheme provided these are required for manufacturing of goods or rendering services.

3. Licensing Authorities are advised to take action accordingly.

4. This issues with the approval of DGFT.

(M.C. Jauhari) Jt. Director General of Foreign Trade

(iii) Policy Circular No. 20 dated 23.2.2005:

Government of India Ministry of Commerce & Industry Department of Commerce
Directorate General of Foreign Trade Udyog Bhawan, New Delhi _____

POLICY CIRCULAR No. 20 (2004-2009) Dt 23/02/2005 To All Licensing
Authorities, All Commissioners of Customs.

Subject: Import of Second Hand Diesel Generating Sets - clarification reg.

1. Attention is invited to Policy Circular No. 19 dt.11.11.2003 vide which it was clarified that Second Hand Photocopiers, Air Conditioners, Diesel Generating

Sets, etc. will not be permitted to be imported under EPCG Scheme under the provision of Para 5.1 of the Exim Policy 2002-2007 even if these are less than 10 years old and even for Service Providers. The intention of this Circular is to restrict the import of such items under EPCG Scheme which are in the nature of Consumer goods.

2. Since Second Hand Diesel Generating Sets of 10 KVA and above have industrial application and import of second hand capital goods without any age restriction is permitted under EPCG Scheme in the Foreign Trade Policy 2004-09, it is therefore clarified that Second Hand Diesel Generating Sets of 10 KVA and above shall be allowed to be imported under EPCG Scheme without any age restriction.

3. However since Second Hand Photocopiers, Air Conditioners and Diesel Generating Sets (below 10 KVA) etc. are covered under the definition of 'Second Hand Goods', therefore their import shall be governed by the provisions of Para 2.17 of Policy and shall not be permitted to be imported under Para 5.1 of Policy.

4. Licensing Authorities are advised to take action accordingly.

5. This issues with the approval of DGFT.

Sd/- (M.K. Parimoo) Dy. Director General of Foreign Trade

(Issued from F. No. 01/94/160/14/AM05/PC-IV)

(C) Para 2.17 of the Exim Policy (2002-07):

Second Hand Goods

2.17 All second hand goods shall be restricted for imports and may be imported only in accordance with the provisions of this Policy, ITC(HS), Handbook (Vol.1), Public Notice or a licence/certificate/permission issued in this behalf."

Para 2.33 of the Handbook of Procedures (2002-07):

2.33 Import of Second Hand Capital Goods

Import of second hand capital goods, which are not more than 10 years old, shall be allowed freely.

(D) Notification No. 31 dated 19.10.2005:

GOVERNMENT OF INDIA MINISTRY OF COMMERCE AND INDUSTRY DEPARTMENT OF COMMERCE

NOTIFICATION No. 31 (RE-2005) / 2004-2009 NEW DELHI, DATED 19th October, 2005

S.O. (E) In exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (No. 22 of 1992) read with paragraph 1.3 of the Foreign Trade Policy, 2004-09 as amended from time to time, the

Central Government hereby makes the following amendments:

1. The Paragraph of Para 2.17 will be amended to read as follows:

Import of second hand capital goods, including refurbished/ re-conditioned spares shall be allowed freely. However, second hand personal computers/ laptops, photocopier machines, air conditioners, diesel generating sets will only be allowed against a license issued in this behalf.

This issues in public interest.

(K.T. Chacko) Director General of Foreign Trade And Ex-Officio Additional Secretary to the Govt. of India

(Issued from File No. 01/94/162/270/AM06/PC-1A)

Findings:

(A) Interpretation of Policy Circular Nos. 16/03, 19/03 and 20/05:

16. Before coming to the circulars, one needs to understand the Scheme of the 1992 Act. The said Act is enacted to provide for development and regulation of Foreign Trade by facilitating imports into, and augmenting exports from India. u/s 3, the Central Government is empowered by Order published in the Official Gazette to make provision for the development and regulation of foreign trade. Under Sub-section (2) of Section 3 the Central Government may by Order published in the Official Gazette prohibit, restrict or otherwise regulate import/export of goods subject to such exceptions as it may deem fit. u/s 5, the Central Government is empowered from time to time to formulate and announce by notification in the Official Gazette the Exim Policy and it may also amend that policy from time to time. u/s 6, DGFT is empowered to advise the Central Government in the formulation of Exim Policy and shall be responsible for carrying out that Policy. u/s 6(3) of the 1992 Act only Central Government is empowered to amend the FTP.

17. Under para 2.3 of the FTP (2004-09) DGFT is empowered to interpret the Policy. If any doubt or question arises in respect of interpretation of any provision in FTP or in the matter of classification of any item in the ITC (HS) or in the Handbook, the said question or doubt shall be referred to the DGFT, whose decision thereon shall be final and binding.

18. We have referred to the provisions of the 1992 Act and Para 2.3 of the FTP to demonstrate the difference between amendment and clarification. The power to amend the FTP is exclusively vested in the Central Government whereas the power to clarify is vested in DGFT. On 31.8.2004, the Central Government vide Notification No. 1/2004-09 notified the FTP 2004-09. The Policy was announced on 31.8.2004. The Policy came into force from 1.9.2004. That Policy came to be amended vide Notification No. 31 dated 19.10.2005 issued by the Central Government u/s 5 of the 1992 Act by which the position came to be changed and, for the first time, import of second-hand photocopying machines imported

under the "general" category came under the "restricted" category of imports, which made the importer to import the said machine only against a licence issued in that behalf. Why was that Notification necessary? By the said Notification, import of photocopying machines came to be restricted. It was provided that the said import shall be against a licence. Such a restriction could be placed only by an Amendment and not by Policy Circular(s). Hence, after 19.10.2005, second-hand photocopying machines came within the "restricted" category. Such a change of category has to take place by way of Amendment by Central Government u/s 5 of the 1992 Act. On the other hand, the three administrative/policy circular Nos. 16/03, 19/03 and 20/05 only refer to clarifications issued by DGFT pursuant to representations received by him from the Trade. These circulars are clarificatory and not amendatory in nature. Therefore, under the scheme of the Statute, one finds a clear demarcation between an amendatory provision and a clarificatory provision. Section 5 of the 1992 Act contemplates amendment to the FTP. It empowers only the Central Government to amend the Policy. This power is not given to the DGFT. It is not open to DGFT vide circulars to change categorization of items from the category of "free" to the category of "restricted" imports. This aspect is important for two reasons. Firstly, notification No. 31 dated 19.10.2005, quoted hereinabove, is an amendment to the Policy. It operates only from 19.10.2005. It recites that second-hand capital goods are importable freely. The Notification states that after 19.10.2005, however, import of second-hand photocopying machines will be allowed only against a licence. This amendment pre-supposes that photocopying machines are kept out of the purview of "second hand capital goods" only after 19.10.2005. Secondly, as stated above, broadly imports fall in two categories - general and restricted categories including prohibited category. When there is change of categorization, it can be done only by an amendment. This has been done by notification No. 31 dated 19.10.2005. It is only by Amendment that import of second-hand photocopying machines can be kept out of the definition of "second-hand capital goods".

19. As stated above, in this case, we are concerned with imports dated January, 2005. It is submitted on behalf of the Department that in January, 2005 Policy circular No. 20 dated 23.2.2005 was applicable. However, Policy circular No. 20/05 is in continuation of Policy circular Nos. 16/03 and 19/03. They have to be read together. In this connection, it may be noted that para 1 of Policy circular No. 16/03 recites that import of all second-hand goods stood restricted under the FTP (2002-07). That circular clarified that import of second-hand PCs/Laptops would fall in the category of "second hand goods". That circular was in the context of FTP 2002-07. However, in the Handbook of Procedures relating to FTP (2002-07) it was provided that import of second-hand capital goods, not more than 10 years old, would be allowed freely (see para 2.33 of the Handbook). In other words, old and used goods of not more than 10 years was treated as "second-hand capital goods". This led to confusion. Therefore, representations came to be made to DGFT seeking clarifications as to whether second-hand PCs/

Laptops stood covered under the definition of second-hand capital goods, provided they were not more than 10 years old. It is these representations which came to be answered vide Policy circular No. 16 dated 29.9.2003 in the manner indicated above. Accordingly, by Policy circular No. 16/03, it was clarified that second-hand PCs/Laptops would not fall under "second hand capital goods" as defined under Para 2.33 of the Handbook and consequently their import could only be against a licence. In continuation of Policy circular No. 16/03, circular No. 19/03 came to be issued by which photocopying machines were sought to be brought in the connotation of "second hand goods" in contradistinction to "second hand capital goods". However, both these Policy circular Nos. 16/03 and 19/03 pertain to period prior to January, 2005 when appellant imported photocopying machines. Both the said circulars referred to FTP (2002-07) whereas appellant imported the machines under FTP (2004-09) in which para 2.17 of FTP and para 2.33 of the Handbook had undergone a change. As can be seen from para 2.17 of the FTP (2004-09) a statement is added to para 2.17 of the FTP (2002-07) that statement reads as under:

Import of second hand capital goods, including refurbished/reconditioned spares, shall be allowed freely.

This statement was not there in para 2.17 of the FTP (2002-07). Similarly, as quoted hereinabove, para 2.33 of the Handbook of Procedures (2004-09) has been completely recasted. Therefore, Policy circular Nos. 16/03 and 19/03 has no application to the facts of the present case.

(B) Interpretation of Circular No. 20 dated 23.2.2005 read with Para 2.17 of FTP (2004-09) and Para 2.33 of the Handbook of Procedures:

20. Policy circular No. 20/05 appears to be in continuation of Policy circular Nos. 16/03 and 19/03. In this connection, para 1 of Policy circular No. 20/05 requires to be noted. As stated above, under FTP (2002-07) import of "second-hand goods" could be made only against a licence. They came in the restricted category. However, in the Handbook (2002-07) it was inter alia provided that old and used capital goods which were not more than 10 years old could be imported freely. Those goods, therefore, were treated as "new" goods. This resulted in confusion. Therefore, DGFT stepped in to clarify that second-hand photocopying machines, irrespective of the period of use, shall fall in the restricted category (see Policy circular No. 19/03). Para 1 of Policy circular No. 20/05 recites that photocopying machines are not to be imported without a licence even if they are less than 10 years old and even if the photocopying machines are imported for service providers. Vide para 3, the Policy circular No. 20/05 clarifies that second-hand photocopying machines are covered under the definition of "second-hand goods", therefore, their import shall be governed by the provisions of para 2.17 of the Policy and shall not be permitted to be imported under para 5.1 of the Policy. Reverting to para 2.17 of FTP (2004-09) read with para 2.33 of the Handbook (2004-09) one finds that import of second-hand capital goods is made "free". Para 2.17 of FTP (2004-09) is in two parts. The first part deals with the

meaning of the words "second-hand goods". The second part states that import of second-hand capital goods shall be allowed freely. Para 3 of the Policy circular No. 20/05 states that import of second-hand goods shall be governed by the provisions of para 2.17 of the Policy. Para 2.17 has to be read in its entirety. That para draws a dichotomy between "second-hand goods" and "second-hand capital goods". Para 2.33 of the Handbook (2004-09) places restriction only qua computers and not qua photocopying machines. In our view, therefore, one has to give weightage to the second part of para 2.17 which allows "free" import of second-hand capital goods. What is not permitted vide para 3 of the Policy circular No. 20/05 is importation under EPCG. As stated above, in this case, we are concerned with imports under general category and not under EPCG. We are in agreement with the view expressed by the Larger Bench of the Tribunal that photocopying machines are capital goods as defined under para 9.12. The Tribunal has held that the use of these machines for rendering services makes them capital goods. In fact, this finding on the "user" is not challenged by the Department. Therefore, import of old and used photocopying machines stands covered by the concept of "second-hand capital goods" in para 2.17 (particularly in the light of the last statement in the said para, which we have underlined hereinabove).

21. One more aspect needs to be mentioned. Para 2.33 expressly states that import of old and used computers/second-hand computers are restricted. Para 2.33 of the Handbook do not restrict photocopying machines. Import of photocopying machines are expressly restricted only by Notification No. 31 dated 19.10.2005. This itself indicates that categorization/re-categorization cannot be done by policy circulars. Such exercise has to be undertaken by specific amendment to the Policy vide Section 5 of the 1992 Act. In this case, Notification No. 31 dated 19.10.2005 indicates that the Central Government has brought in photocopying machines into the category of second-hand goods vide amendatory Notification, therefore, import of photocopying machines stand restricted only on and after 19.10.2005. In fact, if the argument of the Department is to be accepted, then there was no need to issue Notification No. 31 dated 19.10.2005.

22. For the aforesaid reasons, we set aside the impugned judgment of the High Court and we restore the decision of the Larger Bench of the Tribunal dated 11.5.2005 in the case of Atul Commodities Pvt. Ltd. v. CC.

23. Accordingly, we allow the civil appeal filed by the assessee with no order as to costs.

Civil Appeal Nos. 3226, 3977 and 5259 of 2007:

24. These civil appeals are filed by the Department against the judgment and order dated 15.1.2007 of the Calcutta High Court upholding the view expressed by the Larger Bench of CESTAT in the case of M/s Atul Commodities Pvt. Ltd. v. CC.

25. For the reasons given by us in Civil Appeal No. 2999/07, hereinabove, we

dismiss all the three civil appeals filed by the Department with no order as to costs.