(2013) 03 MAD CK 0152

In the Madras High Court

Case No : W.A. (M.D.) No''s. 890 to 894, 949 to 961 and 1170 to 1188 of 2012

Commissioner of Customs and Another — APPELLANT

Vs

City Office Equipment and Others — RESPONDENT

Date of Decision : 14-03-2013

Acts Referred:

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

Citation : (2014) 302 ELT 212 : (2013) 21 GSTR 501

Hon'ble Judges : S. Vimala, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : R. Aravindan, in W.A. MD Nos. 890 to 894 of 2012, B. Vijay Karthikeyan, in W.A. MD Nos. 949 to 961 of 2012 and K.K. Senthilvelan, Assistant Solicitor General in W.A. MD Nos. 1170 to 1188 of 2012, for the Appellant; C. Natarajan for N. Viswanathan for Respondent No. 1 in W.A. (MD) Nos. 890 to 894, 954 to 957 and 959 to 961 of 2012, A. Arun Prasad for Respondent No. 1 in W.A. (MD) No. 958 of 2012 and K.K. Senthilvelan, Assistant Solicitor General for Respondent No. 2 in W.A. (MD) Nos. 890 to 894 of 2012., for the Respondent

Judgement

Chitra Venkataraman, J.—This batch of writ appeals arises out of the order of the learned single judge dated September 17, 2012 made in W.P. (MD) Nos. 12268 to 12270, 11307, 11958 to 11960, 11459, 11472, 11478, 11656, 12103, 12153, 12104 to 12108 and 12028 of 2012, filed by the Commissioner of Customs, Additional Commissioner of Customs (Imports), Director General of Foreign Trade and the Additional Secretary to the Government of India. The writ petitioners are the respondents in this batch of writ appeals. It is seen from the narration of facts herein that the first respondent in each of these writ appeals are engaged in the business of importing and selling of digital multifunction and copying machine as well as second hand used photocopier machines, besides trading in accessories, parts and consumables for the aforesaid machines. The facts in each of the appeals are similar and hence, it is suffice to refer to the general contentions taken, which are common in all these writ appeals.

2. The imports made in respect of all these cases fall for consideration under the Foreign Trade Policy, 2009-2014. The writ petitioners/respondents herein sought for a writ of mandamus to direct the Commissioner of Customs and the Additional Commissioner of Customs (Imports) to assess and permit clearance of used second hand digital multifunction print and copying machines, forming the subject matter under the respective bills of entry, upon the payment of applicable duties of customs on the assessable value as determined by the chartered engineer by holding that the restriction imposed under Notification No. 1(RE-2012)/2009-14 dated June 5, 2012 by the Director General of Foreign Trade against paragraph 2.17 of the Foreign Trade Policy read with clause 2.33 of the Handbook of Procedures (Vol. I) issued by the Director General of Foreign Trade do not govern the impugned goods, viz., used second hand digital multifunction print and copying machines, imported by the writ petitioners.

3. Considering the procedure as laid down under clause 2.33 of the Handbook of Procedures (Vol. I), read with paragraphs 2.7 and 2.17 of the Foreign Trade Policy, 2009-2014, the learned single judge allowed the writ petitions, thereby issuing directions to the appellants herein to release the imported goods on payment of customs duties by treating the imported goods as freely importable under clause 2.33 of the Handbook of Procedures (Vol. I).

4. A reading of the order of the learned single judge shows that considering the clear terms used in paragraph 2.17 of the Foreign Trade Policy, the learned single judge held that the import of second hand goods, even though restricted, could be imported as free goods under clause 2.33 of the Handbook of Procedures (Vol. I). In the absence of any other conditions stipulated anywhere as provided for under paragraph 2.17, even though the imported goods are used second hand digital multifunction print and copying machines, falling under the head of restricted second hand capital goods, the import made is covered by what is provided for under clause 2.33 of the Handbook of Procedures (Vol. I). Aggrieved by the order of the learned single judge, the Commissioner of Customs, Additional Commissioner of Customs (Imports), Director General of Foreign Trade and the Additional Secretary to the Government of India are on appeal before this court.

5. Learned standing counsel appearing for the Commissioner of Customs/the appellants herein submitted that they adopt the arguments of the learned Assistant Solicitor General, appearing for the Director General of Foreign Trade.

6. Learned Assistant Solicitor General, appearing for the appellants herein, taking us through the order of the learned single judge, pointed out that the digital multifunction and copying machine, even as per paragraph 2.17 of the Foreign Trade Policy, is a restricted item and it is not freely importable. As the Handbook of Procedures (Vol. I) is framed in consonance with the Foreign Trade Policy to carry out the objects and purpose of the Policy, the interpretation of clause 2.33 of the Handbook of Procedures (Vol. I) has to be in consonance with the Foreign Trade Policy. The Handbook of Procedures under the Foreign Trade Policy is

closely integrated to Foreign Trade Policy and hence, part of indirect taxation, as held in the decision reported in 2010 (253) ELT 203 .

7. He submitted that as held by the Bombay High Court in the decision reported in Narendra Udeshi Vs. Union of India (UOI) and Others, , in the event of any conflict between the Foreign Trade Policy and the Handbook of Procedures, the Foreign Trade Policy will prevail. Since as per paragraph 2.7 of the Foreign Trade Policy, restricted goods could be imported only subject to the conditions prescribed therein, the subject goods being one of second hand restricted goods, the import has to observe the provisions under paragraph 2.7 read with paragraph 2.17 of the Foreign Trade Policy. As held by the apex court in the decision reported in Om Prakash Bhatia Vs. Commissioner of Customs, Delhi, , being prohibited goods, they cannot be imported freely. Learned Assistant Solicitor General appearing for the appellants also placed reliance on, the decision reported in Atul Commodities Pvt. Ltd. and Others Vs. Commissioner of Customs, Cochin-9, and submitted that considering the law laid down by the apex court and that Foreign Trade Policy is a substantive provision made pursuant to section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred as "the Act"), the interpretation placed on the Handbook of Procedures is unsustainable in law. When the Foreign Trade Policy notified digital multifunction and copying machine as well as second hand used photocopier machines as restricted items, the import being only through authorisation, licence or permission from the appellants before import, there could be no free import and any such view taken would be in conflict with the Foreign Trade Policy.

8. Learned senior counsel appearing for the respondents supported the reasoning given by the learned single judge and submitted that when the terms of the Foreign Trade Policy and the Handbook are clear, there could be no interpretative process on paragraph 2.17 of the Policy and clause 2.33 of the Handbook of Procedures (Vol. I), the writ appeals be dismissed.

9. Heard learned counsel appearing for the appellants and the learned counsel appearing for the respondents and perused the materials placed on record.

10. We agree with the submissions made by the learned senior counsel appearing for the respondents and we have no hesitation in confirming the order of the learned single judge and thereby dismissing the writ appeals filed by the Commissioner of Customs, Additional Commissioner of Customs (imports), Director General of Foreign Trade and the Additional Secretary to the Government of India.

11. It is the admitted case of the parties herein that section 5 of the Act enables the Central Government to formulate from time to time the Export and Import Policy notified in the Official Gazette. The said provision also enables the Central Government to amend the policy laid down by it through Official Gazette. Section 6 speaks about the authority of the Director General of Foreign Trade. As per sub

section (2) to section 6, the Director General of Foreign Trade shall advise the Central Government in the formulation of the Export and Impart Policy and shall also be responsible for carrying out the policy. Sub-section (3) of section 6 states that other than the powers provided for under sections 3, 5, 15, 16 and 19 of the Act, by order published in the Official Gazette, subject to such conditions as may be specified in the order, the Central Government may direct that any power exercisable by it under the Act may also be exercised by the Director General of Foreign Trade. Sub-section (3) further states that such power may be directed to be exercised by such other officer subordinate to the Director General of Foreign Trade. In terms of section 5, evidently, the Foreign Trade Policy, 2009-2014 was formulated, which came into force with effect from June 5, 2012.

12. As per Notification No. 1 (RE-2012)/2009-2014, dated June 5, 2012 issued by the Director General of Foreign Trade and Additional Secretary to the Government of India, the revised edition of the Foreign Trade Policy for 2009-2014 was formulated, incorporating the changes up to June 5, 2012. As per Chapter 1A clause 1.3, in exercise of the powers conferred u/s 5 of the Act the Central Government has the right to make any amendment in public interest by way of notification to the Policy.

13. Chapter 2--"General provisions regarding imports and exports", makes provisions relating to the import of goods freely, unless regulated, prohibition on import and export of various goods, interpretation of policy, procedure, exemption from policy/procedure, import of restricted goods and services and what are second hand goods, etc.

14. As per paragraph 2.3 of the Foreign Trade Policy, the decision of the Director General of Foreign Trade on all matters relating to the interpretation of policy or provision in the Handbook of Procedures (Vol. I) and (Vol. H) or classification of any of them would be final and binding on all. As per paragraph 2.4 of the Foreign Trade Policy, the Director General of Foreign Trade has to specify the procedure to be followed by an exporter or importer or by any licensing/regional authority for the purpose of implementing the provisions of the Foreign Trade (Development and Regulation) Act, 1992, the Rules and the orders made thereunder and the Foreign Trade Policy. Such procedures or amendments, if any, shall be published by means of a public notice.

15. There is also an enabling provision under paragraph 2.5 that on grounds of genuine hardship and adverse impact on trade, under which, the Director General of Foreign Trade may exempt any person or class or category of persons from any provision of the Foreign Trade Policy or any procedure. While granting exemption, he may impose such conditions as he may deem fit.

16. As far as the present case is concerned, paragraphs 2.7 and 2.17 of the Policy are relevant. Paragraph 2.7 deals with the manner of import/export of restricted goods. Paragraph 2.17 deals with import of second hand capital goods. These goods are dealt with under two categories, viz., restricted category and

free category. Paragraphs 2.7 and 2.17 read as under:

2.7. Export/import of restricted goods/services.--Any goods/service, the export or import of which is ''restricted'' may be exported or imported only in accordance with an authorisation/permission/licence or in accordance to the procedure prescribed in a notification public notice issued in this regard.

2.17. Second hand goods.--For second hand goods, the import policy regime is given as under:

17. A reading of paragraph 2.7 of the Foreign Trade Policy makes it clear that restricted goods can be imported or exported only in accordance with an authorisation/confirmation or licence or in accordance with the procedure prescribed in the notification/public notice issued in this regard. That means, import or export of restricted second hand capital goods must comply with any one of those enumerated circumstances. The said paragraph does make the compliance of all those conditions as a cumulative one. Paragraph 2.17 gives the import policy regime as regards second hand capital goods, in particular, with reference to two categories falling under the head "Second hand capital goods"--"Restricted category" and "Free category".

18. As already seen from the extract of the provision, under the head, "restricted category", we have (i) personal computers/laptops, (ii) photocopier machines/ digital multifunction print and copying machines, (iii) air conditioners and (iv) diesel generating sets. While stating that these are falling under the restricted category, the conditions subject to which the import and export are facilitated are also given, namely, as per the provisions of the Foreign Trade Policy, the restricted goods have to be in accordance with the authorisation/permission/ conditions or in accordance with the procedure prescribed in the notice/public notice issued in this regard. Thus, we find, the conditions specified therein include what is prescribed under the Foreign Trade Policy, ITC(HS), Handbook of Procedures (Vol. I), public notice or an authorisation issued for import of the specified second hand item:

19. In terms of Chapter 2 of the Foreign Trade Policy, Handbook of Procedure (Vol. I) and (Vol. II) are formulated, the objective being to implement the provisions of the Act, Rules and the Policy. The procedures lay down the simple, transparent and compatible procedure so that the objectives of the Act, the Rules and the Policy are facilitated. The definitions as are available under the Act, the Rules and the orders made in the policy are applicable in the matter of understanding the various phrases used in the Handbook of Procedures (Vol. I) and (Vol. II).

20. Chapter 2 of the Handbook of Procedures (Vol. I) lays down the general provisions regarding the exports and imports. Under this, we have clause 2.33 relating to import of second hand capital goods, which reads as follows:

2.33. Import of second hand capital goods.--(a) Import of second hand capital goods including refurbished/reconditioned spares, except those of personal computers/laptops, shall be allowed freely, subject to conditions for following categories.

(b) Import of second hand computers including personal computers/laptops and refurbished/reconditioned spares thereof is restricted.

(c) Import of refurbished/reconditioned spares of capital goods, other than those of personal computers/laptops will be allowed on production of a Chartered Engineer certificate that such spares have at least 80 per cent. residual life of original spare.

21. Thus the procedure on import of second hand capital goods is governed by clause 2.33 of the Handbook of Procedures (Vol. I). As may be seen from the heading the reference is about second hand capital goods in general alone and is, not a separate paragraph to deal exclusively with second hand capital goods falling under restricted category. Thus, dealing with the procedure on the import of second hand capital goods, it specifically refers to some of those restricted items of second hand capital goods, namely, personal computers/laptops, which could be imported only subject to the conditions specified in the paragraph. Thus, while clause 2.33 allows free import of second hand capital goods, including refurbished/reconditioned spares as per sub-clause (a) of clause 2.33, one can say from the clear terms of the provision that there is no distinction made between second hand capital goods and second hand refurbished/ reconditioned capital goods for purposes of free import. Except for those specifically mentioned restricted category of second hand capital goods which are not allowed free import, all other second hand capital goods including other enumerated restricted category of second hand capital goods are permitted free import. Thus, with no distinction maintained between other restricted category of second hand capital goods and second hand capital free goods, we do not find any good ground to read in clause 2.33, a restriction on the free import of second hand digital multifunction print and copier machines. Thus reading sub-clause (a) to clause 2.33, if there is a restriction to be read on free import, it is only with reference to personal computers/laptops from among the restricted category of second hand capital goods group, which means, other restricted category under second hand capital goods group, specified in paragraph 2.17, namely, photocopier machine/digital multifunctional printing and copying machines, air conditioners, diesel generating sets, like other goods falling under free category, are permitted to be imported freely. Under sub-clause (b) of clause 2.33, there is a specific reference to the import of second hand computers, including personal computers/laptops and refurbished/reconditioned spares thereof, which suffer restricted import. Sub-clause (c) of clause 2.33 is with reference to import of refurbished/reconditioned spares of capital goods, such as what is covered under sub-paragraph (b), namely, personal computers/laptops. Thus, the refurbished/reconditioned spares of capital goods could be allowed for import only on production of chartered engineer''s certificate that such spares

have at least 80 per cent, of residual life of original spares. Thus, with classification of goods carrying conditions on import specifying the manner of import, the import policy regime on second hand capital goods dealt with under paragraph 2.17 is laid down in clear terms in clause 2.33 of the Handbook of Procedures (Vol. I) that there could be no confusion in the matter of understanding which type of second hand capital goods goes for free import and what goes for import with conditions. As already noted, the Handbook of Procedures'' (Vol. I) also specifically deals about refurbished/reconditioned spares of capital goods (clause 2.33(c)). Thus, even though photocopier and digital multifunction print and copying machines fall under restricted category in second hand capital goods group, yet, going by the only condition specified in clause 2.33 of the Handbook of Procedures (Vol. I), we do not find any justifiable ground to accept the contention of the Revenue that there exists a conflict between paragraph 2.17 of the Foreign Trade Policy and, clause 2.33 of the Handbook of Procedures (Vol. I). Thus, when paragraph 2.17 of the Foreign Trade Policy specifically refers the circumstances or the conditions under which the import policy regime is laid, in the absence of any other restriction specified anywhere either in the policy or in the Handbook of Procedures (Vol. I) with reference to any of those specified restricted category of second hand capital goods--photocopier machines and digital multifunction printing and copying machines as falling in line with personal computers and laptops, the mere instance of photocopier and digital multifunction printing and copying machines being restricted category of second hand capital goods, cannot bring them under any assumed restriction on par with personal computers/laptops for the purpose of imports into this country. Contrary to the assertion of the Revenue, the import policy regime, as spoken to in paragraph 2.17, touches on compliance of conditions alternative and not on cumulative basis. In the circumstances, we reject the plea of the Revenue.

22. It is no doubt true that in exercise of the powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992, read with paragraph 2.1 of the Foreign Trade Policy, 2009-2014, under Notification No. 35 (RE-2012)/2009-2014, dated February 28, 2013, the Government had amended paragraph 2.17 of the Foreign Trade Policy that under the head of "Second hand goods", in the category of "second hand capital goods", import of (i) personal computers/laptops, including their refurbished/reconditioned spares; (ii) photocopier machines/digital multifunction print and copying machines; (iii) air conditioners; and (iv) diesel generating sets can be imported only as against authorisation. Taking the said amendment further, rightly, the Handbook of Procedures (Vol. I) omitted clause 2.33. The amendment to the policy has no relevance to the import under consideration.

23. The Foreign Trade Policy and the procedure relevant to us is the one laid down in the policy covering the period 2009-2014. The amended paragraph 2.17 of the Policy and Handbook of Procedures (Vol. I) are relevant only for the period post February 28, 2013. Hence, by no stretch of imagination, the amendment

under Notification No. 35 (RE-2012)/2009-2014, dated February 28, 2013 could be taken as having any relevance for the import made prior to February 28, 2013. Even though the learned Assistant Solicitor General placed strong reliance on Notification No. 35 (RE-2012)/2009-2014, dated February 28, 2013 that it is a clarificatory amendment and hence will have relevance to the case on hand and that it is given under the hand of the Director General of Foreign Trade who has effected this notification, we fail to gather any such indication to read it so, particularly in the context of the powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act on the Government to make amendment to the policy. A comparative study of Notification No. 35 (RE-2012)/2009-2014, dated February 28, 2013 amending paragraph 2.17 of the Foreign Trade Policy and the provision that existed prior to February 28, 2013, show that the amended notification made the import policy regime as subject to an authorisation for import as against the original requirements, viz., allowed to be imported only as per the provisions of FTP, ITC(HS), HBP v I, public notice or an authorisation issued for import of the specified second hand item. In the light of the amendment and the clear provision, we do not find any justifiable ground to accept the case of the appellants to interfere with the order of the learned single judge. We have already held that there is no conflict between the policy and the procedure laid down. Read in the context of the choice laid down for compliance by an importer as spoken to in paragraph 2.17 of the policy, we have no hesitation in dismissing the appeal filed by the Director General of Foreign Trade.

24. As far as the decision reported in Atul Commodities Pvt. Ltd. and Others Vs. Commissioner of Customs, Cochin-9, relied on by the learned Assistant Solicitor General appearing for the appellants is concerned, the decision is distinguishable from the case on hand. There is no dispute over the fact that the import of goods by the respondents herein fall under the restricted category. Yet, the applicability of the decision reported in Atul Commodities Pvt. Ltd. and Others Vs. Commissioner of Customs, Cochin-9, has to be seen in the context of the Foreign Trade Policy. A reading of the decision shows that the notification was with reference to the exemption given for the period 2002-2007, whereas, the case on hand is covered by the policy relating to the period 2009-2014. Hence, the question of applying the decision rendered with reference to the policy relating to the period 2002-2007 does not arise, as the terms of both these policies are not identical.

25. As far as the decision reported in W.P.I.L. Ltd., Ghaziabad Vs. Commissioner of Central Excise, Meerut, U.P., is concerned, the said decision has no relevance to the case on hand. Considering the clear terms of the policy and the procedure, given the settled principle of law that the clear terms used in any Act or rule/ notification does not call for any interpretative process for an understanding, we reject the contention of the Revenue.

26. Learned Assistant Solicitor General placed reliance on the decision of the Bombay High Court reported in Narendra Udeshi Vs. Union of India (UOI) and

Others, . As in the case of the apex court reported in Atul Commodities Pvt. Ltd. and Others Vs. Commissioner of Customs, Cochin-9, , this decision also, does not, in any manner, help the appellants, for, the said decision again relates to the period 2002-2007. In the circumstances, the cases are distinguishable.

27. Learned Assistant Solicitor General also brought to our attention the decision of a Division Bench of this court in W.A. Nos. 2101 to 2103 of 2012, dated November 2, 2012 (Director General of Foreign Trade and Additional Secretary to the Government v. Nitin Traders). A reading of the said decision shows that it related to appeals filed against an interim order in the writ petitions relating to the import of second hand copier machines. In considering the order passed as an interim measure, the Revenue contended that the order had been made without considering the effect of paragraph 2.17 of the Foreign Trade Policy. This court viewed that the release of the goods, ordered at an interim stage, would amount to granting the relief in the main writ petitions. In the circumstances, this court held that before ordering the release of goods, the question as to the effect of paragraph 2.17 of the Foreign Trade Policy, 2009-2014 and the effect of the office memorandum dated March 27, 2012 had to be considered, and without considering the said questions, there could be no release of goods even as an interim measure.

28. The unreported decision referred to herein, has not, in any manner, dealt with the scope of paragraph 2.17 of the Foreign Trade Policy read with clause 2.33 of the Handbook of Procedures (Vol. I). In the circumstances, having gone through the order passed by the learned single judge and the provisions of the Act, we have no hesitation in dismissing the writ appeals preferred by the Revenue. Consequently, the order of the learned single judge stands confirmed.

29. Learned senior counsel appearing for the first respondent-importers (writ petitioners) pointed out that during the pendency of the writ petitions, this court permitted the writ petitioners to clear the goods on furnishing a bond. Since the claim of the writ petitioners is now allowed and the writ appeals dismissed, direction be issued for release of the goods within a time frame. Taking note of the facts and the decision taken by this court, the appellants are hereby directed to release the goods to the respective respondent-importers within a period of four weeks from today. In the result, the writ appeals stand dismissed. No costs. The connected miscellaneous petitions also stand dismissed.