CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.C/68/2012

[Arising out of Order-in-Appeal C.Cus. No.151/2012 dt. 13.03.2012 passed by Commissioner of Customs (Appeals), Chennai]

Asia Power Projects Ltd.	Appellant
Versus	
Commissioner of Customs, Chennai	Respondent

Appearance :

Ms.P. Kanthivisalakshi, Advocate
For the Appellant

Shri A. Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing : 10.12.2018
Date of Pronouncement :04.01.2019

FINAL ORDER No. 40016 / 2019

Per Shri Madhu Mohan Damodhar

The facts of the case are that appellants had imported goods declared as used machine tools and unmachined tools i.e. hand tools and sought clearance of the same vide three Bills of Entry all dated 24.08.2009 under OGL (applicable to duty on goods that are not restricted / prohibited). The imported goods contained both used machine tools as well as hand tools. The contention of the appellants conveyed vide letter dt. 03.09.2009 to the original authority was that as per para 9.12 of the Foreign Trade Policy (FTP), "capital goods" means any plant or equipment or machinery or accessories required for manufacture or production directly or indirectly including machine tools. Original authority vide an order dt. 07.05.2009 held that in terms of para 2.17 of the FTP, used hand tools are restricted for import and require a licence, hence ordered confiscation of the goods cumulatively valued at Rs.13,56,918/- under Section 111(d) of the Customs Act, however allowed them to be redeemed on payment of fine of Rs.2,00,000/- under Section 125 ibid. Penalty of Rs.1,36,000/- was also imposed under Section 112 (a) ibid. In appeal, the Commissioner (Appeals) vide impugned order dt. 13.03.2012 referred to the definition of "capital goods" given in para 9.2 of the FTP and concluded that while machine tools have been included as "capital goods", however the items under dispute are "hand tools" which have not found similar mention in the definition which means that 'hand tools' have been consciously excluded. On this reasoning, the LAA upheld the order of original authority and rejected the appeal. Aggrieved the appellants are before this forum.

2. When the matter came up for hearing, on behalf of the appellant, Ld. Advocate Ms. Kashivishalakshi made oral and written submissions which can be broadly summarized as under :

(i) The machine tools is an inclusive portion of definition under 'Capital goods' as per the Foreign Trade Policy on the purpose of usage of expression 'includes' in any Statute.

(ii) In Para 9.12 of Foreign Trade Policy that 'capital goods' definition may be seen that it is not as if the definition covers only machine tools and not hand tools. 'Hand Tools' are covered in the main definition itself.

(iii) The definition does not include 'Hand Tools' whereas the adjudicating authority says that by including 'Machine tools' in the definition, 'Hand tools' is excluded. Which is not sustainable under the law as the appellants already submitted, the main part of definition covering 'equipment' cover 'hand tools' also as per the meaning given in Webster's dictionary. Reliance is placed on the decision of The Supreme Court in CST Vs Taj Mahal Hotel 1971 (3) SCC 550 and in Regional Director ESIC Vs Highland Coffee Works, 1991 (3) SCC 617.

(iv) The appellants have taken a stand that in Chapter 5 of Foreign Trade Policy relating to EPCG scheme, at para 5.2 it is stated capital goods shall include spares (including refurnished/reconditioned spares), tools, jigs, fixtures, dies and moulds. As per Mcgraw Hills Dictionary of Science & Technology cited by Honourable Calcutta High Court in the decision in 1993 (66) ELT 594, tool is a any device, instrument or machine for the performance of an operation to equip a factory or industry for production. The appellant further submits that the tool is referred as 'machine' harmonious reading of all means indicated above must have been taken into consideration. The appellant further relied on the following judgements :

- Sony India (P) Ltd Vs Collector of Customs, New Delhi, 2000 (123) ELT 904 (Tribunal)
- Gripwell Forgings & Tools Vs Commr. of Cus., Nhava Sheva 2002 (146) ELT 136 (Tri.-Mumbai), the equipment is indirectly use for manufacture or rendering service it would qualify for consideration as capital goods.

(v) The CV duty charged on importation of 'tools' harmonious the definition of 'capital goods' in Foreign Trade Policy with meaning and expression of 'equipment', 'tool', 'instrument', 'device', and 'implement' etc. Further the definition of 'capital goods' in CENVAT Credit Rules and meaning given under Foreign trade Policy in respect of EPCG scheme could clearly indicate that 'hand tools' are not excluded from the scope of definition of capital goods.

3. On the other hand, Ld. A.R Shri A. Cletus supports the impugned order. He contends that definition of 'capital goods' in para 9.12 of the FTP only covers any plant, machinery, equipment, accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services. In the said definition, only there is mention of "machine tools" and not 'hand tools'. The list of examples of 'capital goods' given in the definition are of the type which are required for manufacture of production either directly or indirectly of goods or for rendering the services. However, the hand tools by their very nature and size will not come within the category of such 'capital goods'. For that reason, there is no specific mention of hand tools in the said definition. Hence there is no infirmity in the impugned order.

4. Heard both sides and have gone through the facts.

5.1 True, the definition of "capital goods" as found in para 9.12 of the FTP does not specifically mention "hand tools" . It is also true that details that have found mention are "machine tools". However, what is important to be adjudged is whether "hand tools" will fall within the scope of machinery, equipment or accessories required for manufacture or production either directly or indirectly of goods or for rendering services. The definition in para 9.12 of the FTP indicates only gives examples of capital goods which can be directly or indirectly used. It certainly does not disbar any equipment based on the size. The definition also includes a wide range of equipments like refractories, catalysts, instruments for testing, research and development, quality and pollution control and so on. Hence the relevant aspect whether the equipments concerned will be used directly or indirectly in the manufacture or production of goods or for rendering services, irrespective of the size of such equipment. It is not the case of the department that in hand tools have no such use.

5.2 In any case, within the same FTP in Chapter 5 relating to import of goods under Export Promotion Capital Goods (EPCG) Scheme “all tools and not just machine tools” have been included within the scope of capital goods in para 5.2 . So also, in para 6.5.1 in the list of capital goods permitted to be imported / procured from DTA “tools” have been specifically indicated, without restricting its scope only to “machine tools”.

5.3 We further note the assertion of the Ld. Advocate in respect of subsequent import the Commissioner (Appeals) vide an order No.639-641/2013 dt. 18.04.2013 has also agreed with the view of the appellant and held that used tools imported will be squarely covered under the definition of “capital goods” and hence do not require a specific licence for their import. It appears the said order of Commissioner (Appeals) has not been appealed against by the department, in which case, the said ratio would be binding on the Department. We also note that the Commissioner (Appeals) in that order, has relied upon a Tribunal decision in the case of *CC Nhava Sheva Vs Gripwell Forgings & Tools* - 2002 (146) ELT 136 (Tri.-Mumbai) which has inter alia, held that definition of “capital goods “in the import policy is extremely wide and that tools are covered by the term “equipment” and are ‘capital goods’. The relevant portion of the said Tribunal’s order is produced as under :

> "**5.** I now turn to the tools. The nature of the tools is not specified. It is not clear whether they are hand tools, tools manually operated, power tools operated with hand or machine tools. Paragraph 22 of the policy permits import *inter alia* of capital goods unless they are in the negative list or import is prohibited by any other policy. Paragraph 25 permits import of second hand capital goods subject to the condition contained therein. Paragraph 29 requires a licence or an appropriate public notice to cover import of second hand and other capital goods. The contention in the appeal is that the tools not being capital goods and having been found to be second hand would be covered by paragraph 29 and requite a licence which has not been produced. The definition in paragraph 7(12) of the term "capital goods" which the counsel for the respondent relies upon is extremely wide. It means any plant, machinery, equipment or accessories required for manufacture or production either directly or indirectly of goods or for rendering service including those required for replacement, modernisation, technological upgradation. The use of the term "directly or indirectly" is significant. The definition explains that it includes "machine tools, catalyst for initial charge, machine tools, equipment for research and development, quality and pollution control". Such items as machine tools and equipment for test in research and development and pollution control are not required directly for manufacture or production, but are indirectly required. If equipment is indirectly for manufacture or rendering service it would qualify for consideration as capital goods. The tools would be covered by the term "equipment". It is not the contention that such tools were not required in the factory by the respondent. It would then follow that they are therefore capital goods and second hand goods would be covered by paragraph 25 of the policy, there being no contention that any of the condition has not been complied. This appears to be the reasoning on which the Commissioner has proceeded."

5.4 In view of the discussions, conclusions herein above, and also relying upon the case laws cited supra, we are of the considered opinion that it is the functionality and utility of the equipments which would qualify for inclusion as ‘capital goods’ for the purpose of para 9.12 of the FTP, or otherwise. Nothing has been brought on record to prove that “hand tools” are not equipment and are not required for manufacture or production either directly or indirectly of goods or for rendering services. This being so, the impugned hand tools will very much come within the scope of “hand tools” for the purpose of para 9.12 of the policy and will then not become restricted for import in terms of para 2.17 of the FTP . Impugned order to the contrary cannot then sustain and is therefore set aside.

6. Appeal is allowed with consequential benefits, if any, as per law.

(order pronounced in court on 04.01.2019)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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