(2011) 01 DEL CK 0275

In the Delhi High Court

Case No : Writ Petition (C) No. 3739 of 2010

Air Travel Bureau Ltd. and Another APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 04-01-2011

Acts Referred:
Customs Act, 1962 — Section 124

Citation : (2011) 266 ELT 179

Hon'ble Judges : Dipak Misra, C.J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Sushil Kumar, for the Appellant; Mukesh Anand, for the Respondent

Judgement

Sanjiv Khanna, J.—The Petitioner No. 1-Air Travel Bureau Ltd. avers that it is a travel agency and for the purpose of its business activities had imported five cars subject matter of the present petition, under the Export Promotion Capital Goods Scheme (hereinafter referred to as EPCG, for short) under the Foreign Trade Police 2002-07. The four licenses, for import of the said cars were issued by the Director General of Foreign Trade (hereinafter referred to as DGFT, for short). As under the EPCG Scheme the cars had been imported by the Petitioner No. 1 at concessional/reduced rate of customs duty being a service provider, and subject to the condition that the service provider shall generate export obligation equal to/worth five or eight times, depending upon the Circulars issued from time to time, the CIF value of the capital goods on FOB basis within a period of eight years from issue of the licences.

2. The Petitioner No. 1 had at the time of customs clearance on reduced/ concessional rate of duty had given bonds and bank guarantees of total value of Rs. 1.73 crores, as per the following details:

License No. Date of obtaining/ applying Bank Guarantee no. Date of issuance of Bank Guarantee Amount of Bank Guarantee Bond amount

0530133531 20.11.2002 200311 IBGF0144 16.06.2003 Rs. 42,85,000 Rs.

43,80,000					
0530133993	25.03.2003	1113/2003	18.06.2003	Rs. 39,35,000	Rs. 44,40,000
0530133994	26.03.2003	1130/2003	1.10.2003	Rs. 35,36,000	Rs. 63,00,000
0530134159	12.05.2003	1131/2003	1.10.2003	Rs. 35,10,000	Rs. 35,36,000

3. By way of the present petition, the Petitioner No. 1 has challenged and made prayers for quashing the two show cause notices both dated 3rd May, 2010 issued by the Commissioner of Customs, ICD Tughlakabad, u/s 124 of the Customs Act, 1962 (hereinafter referred to as the Act, for short) and for quashing the proceedings arising there from. The Petitioner No. 1 has also prayed for return of the four bank guarantees and cancellation of the bonds given by the Petitioner Nos. 1 and 2 to the Customs Department at the time of release of the cars.

4. In the show cause notices, allegations have been made that the Petitioner No. 1 was required to install or use the capital goods, i.e. the cars for specific purpose, which it appears was not complied with and the Petitioner No. 1 had not fulfilled the export obligation imposed on them. It is alleged that the imported cars were not exclusively earning the requisite foreign exchange. It is also alleged that the Export Obligation Discharge Certificate (hereinafter referred to as EODC, for short) issued by DGFT is not acceptable to the Customs Department.

5. The Petitioner No. 1 has challenged the said show cause notices on the ground that DGFT had issued Circular No. 7 dated 7th May, 2008 wherein it was postulated that the cars/vehicles imported under EPCG Scheme by the service provider should be registered as tourist vehicles if EODC has not been obtained by 30th June, 2008. But by further clarification dated 26th September, 2008, DGFT has specified that this condition was not applicable to those who have applied for EODC by 30th June, 2008 and they are therefore protected. It is further alleged that in 2004, the Petitioner had faced enquiry conducted by Director of Revenue Intelligence (hereinafter referred to as DRI, for short) but no show cause notice was issued to the Petitioner No. 1 in respect of the five cars, subject matter of import licence mentioned above. Lastly, reliance is placed upon the decision of this Court dated 3rd August, 2010 in Customs Appeal Case No. 5 and 6 of 2009 dismissing the appeal filed by the Commissioner of Customs assailing Order dated 16th December, 2008 passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi in respect of the two cars which were imported under licence dated 17th September, 2002.

6. Department of Customs has contested the present petition and has filed a counter affidavit pointing out that the role of DGFT and Department of Customs is distinct and governed by different provisions of law. The licences were issued by DGFT but operationalised by Customs for which separate notification is issued under the law. As per Clause (ii) of para 4 of the Explanation given to Notification

No. 44/2002-cus. it is submitted, that the Customs Department has full right and authority to examine whether or not the Petitioner No. 1 has fulfilled the export obligation in compliance with the terms of the import or has violated the conditions of Notification No. 44/2002-cus.

7. Reliance is also placed by the Customs Department on Sheshank Sea Foods Pvt. Ltd., Karnataka Vs. Union of India (UOI) and Others, . Referring to this judgment in Customs Appeal Case No. 5 and 6 of 2009, the Division Bench of this Court in the judgment dated 3rd August, 2010 has observed:

6. Once we apply this yardstick to the facts of the present case, the conclusion would be that the Respondents have been able to fulfil the obligation under EPCG license as pointed above, which was the very condition imposed in the said license by the DGFT. DGFT has redeemed the license and has taken the view that the Respondents have fulfilled their export obligation. No doubt, the opinion of the DGFT would not be conclusive and any such certificate cannot press the power of the authority to reopen even a concluded matter it if is shown that the such conclusion was vitiated by fraud concealment of facts or misrepresentation or misdeclaration as held by the Apex Court in Sheshank Sea Foods Pvt. Ltd., Karnataka Vs. Union of India (UOI) and Others, . However, in the present case, the Appellants have not been shown that there is any fraud, concealment of facts or misrepresentation or misdeclaration on the part of the Respondents.

8. In the present case, the matter is pending at the show cause stage. Customs Department has made certain allegations and the Petitioner No. 1 has refuted and denied the said allegations. Facts and factual matrix of the case have to be gone into, examined and verified. Each import under the EPCG licence is a separate and a distinct import. Each case has to be examined on its own facts. Service provider may have fulfilled the obligations imposed in respect of one EPCG licence but may not have fulfilled the obligations in respect of another licence. This will depend upon the factual matrix of each case. Moreover, the judgment dated 3rd August, 2010 was on an appeal filed by the Customs Department on a question of law. Of course, the Petitioner No. 1 is entitled to rely upon the legal ratio in the case of Interglobe Enterprises Ltd. Vs. Union of India (UOI) and Others, referred to in the judgment of the Division Bench dated 3rd August, 2010. It will be premature and will not be appropriate to interfere with the show cause notices dated 3rd May, 2010 at this stage and prevent any verification or scrutiny.

9. Learned Counsel for the Petitioners has submitted that the matter has been prolonged and delayed and the Petitioners had earlier filed Writ Petition (Civil) No. 9396/2009 for release of the bank guarantees which was dismissed as withdrawn on 4th May, 2010 as the Respondent-Department of Customs had issued show cause notices dated 3rd May, 2010. It is submitted that the Petitioner has been forced to repeatedly renew the bank guarantees worth Rs. 1.73 crores and accordingly is suffering and is being harassed. Learned Counsel for the Department of Customs has disputed and denied the said contentions and

during the course of hearing has stated that the show cause notices would be adjudicated and decided within six weeks from the date on which copy of this Order is received by them. The statement made by the learned Counsel for the Department of Customs is taken on record and it is directed that the two show cause notices dated 3rd May, 2010 should be adjudicated and decided within six weeks from the date copy of this Order is received by the Department of Customs. In case, the proceedings are dropped, the bank guarantees and the bonds given by the Petitioner No. 1 company or on their behalf, shall be released. In case the stand of the Petitioner No. 1 is not accepted, the bank guarantees and the bond shall not be invoked and enforced for a period of four weeks from the date of service of the adjudication order to enable the Petitioners to file appeal or take steps to challenge the said order in accordance with law. The adjudication order as required, should be a speaking order dealing with the contentions and the pleas raised by the Petitioners. Petitioners are also given liberty to file additional or further response along with documents within two weeks from the date copy of this order is received. Hearing will be also given to the Petitioner No. 1.