
(2011) 04 BOM CK 0010
In the Bombay High Court
Case No : Writ Petition No. 2523 of 2011

Akash Universal Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-04-2011

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 5 , 6, 8

Citation : (2011) 269 ELT 13

Hon'ble Judges : J.P. Devadhar, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Prakash Shah instructed by PDS Legal, for the Appellant; A.S. Rao a/w S.I. Shah, for the Respondent

Final Decision : Allowed

Judgement

A.A. Sayed, J.—Rule. Rule made returnable forthwith. By consent taken up for final hearing.

2. By the above petition, the petitioner has essentially impugned the communication dated 10-5-2010 issued by Respondent No. 2-the Director General of Foreign Trade (DGFT) rejecting petitioner's application for issuance of licence to import marble blocks for the year 2010-11. The petitioner has also prayed that the subsequent communications dated 19-10-2010 and 21-2-2011 reiterating the rejection, pursuant to the representations made by the petitioner, be also set aside.

3. The petitioner is a public limited company having their registered office at Mumbai and their factory at Silvassa. The petitioner is engaged in manufacture of marble tiles and marble slabs falling under Chapter 25 of the Central Excise Act, 1985. The goods are manufactured by the petitioner mostly out of imported marble blocks.

4. The Respondent No. 1 is the Union of India, Respondent No. 2 is the Director General of Foreign Trade appointed u/s 6 of the Foreign Trade (Development and

Regulation) Act, 1992 (hereinafter referred to as "the said Act"). Respondent Nos. 3 and 4 are the officers of Respondent No. 1 and subordinate to Respondent No. 2 and discharge their duties and exercise powers conferred upon them under the said Act.

5. Import of marble blocks into India are restricted under the Foreign Trade Policy, 2009-14 read with Licensing Notes to Chapter 25 of ITC-HS notified/ issued u/s 5 of the said Act. The marble blocks can be imported into India only under a licence issued under the said Act. The petitioner has been issued licences for import of marble blocks for last many years. Guidelines for issuance of licence to import marble blocks for the year 2010-11 was notified by the Central Government vide Notification No. 36/2009-14, dated 31-3-2010 and the Policy Circular No. 29/2009-14, dated 31-3-2010.

6. The petitioner applied to the Joint DGFT, Mumbai-Respondent No. 4 on 3-4-2010 for issuance of licence to import marble blocks in terms of the said notification read with policy circular dated 31-3-2010.

7. The Notification No. 36/2009-14, dated 31-3-2010 laid down the eligibility criteria to be satisfied by the units for obtaining licence to import marble which are as follows :-

(a) The unit which has applied for licenses to import marble should have installed marble gang saw machine on or prior to 23-12-2009 and the units should have been in operation for five years prior to 1st April of the current licensing year 2009-10.

(b) The eligible units as per Clause (a) above should have an indigenous sales turnover of processed marble slabs/tiles only, of Rs. 1 Crore and above in each of the previous five financial years (i.e. for the financial years 2004-05 to 2008/09).

8. Insofar as entitlement as regards import quota is concerned, as per the said notification, the quantity of marble allowed to be imported is subject to the following overall ceiling :-

(i) Unit having one marble gang saw machine is entitled for a maximum licence of 3,000 MT of rough marble blocks;

(ii) Units having more than one marble gang saw machine is entitled for a maximum licence of 3000 MT of rough marble blocks for the first gang saw machine and 1500 MT of rough marble blocks for each of the additional marble gang saw machines.

9. It is an admitted position that the petitioner has two gang saw machines installed in their factory. The petitioner's eligibility criteria of domestic sales turnover on annual basis of marble blocks/tiles which is Rs. 1 crore is also satisfied as the petitioner's annual turnover in the previous years is more than Rs. 16 crores and the average turnover during the last five years works out to Rs. 25 crores. The petitioner is thus an eligible unit and their entitlement is to

the extent of 4500 MT of marble blocks as per the said notification.

10. We have heard learned counsel for the petitioner and learned counsel on behalf of Union of India. The learned counsel for the petitioner pointed out that the application of the petitioner is rejected merely on the ground that there was a discrepancy in the domestic sales turnover shown in the Schedule H of the balance-sheet filed with the R.O.C. for the year 2005-06 and 2006-07 and the domestic sales turnover shown in the Chartered Accountant's Certificate (CAC) and that in the CAC for the relevant years the figure of high seas sales turnover has been included which is not permissible and that there was a deliberate attempt on the part of the petitioner to give an inflated turnover figure for the purpose of import quota under the policy for the import of rough marbles.

11. It is significant to note that the discrepancy stated is that instead of furnishing domestic sales turnover, the total turnover has been furnished. Admittedly, the domestic sales turnover achieved during the years/in question is much more than the prescribed domestic sales turnover of Rs. 1 Crore. Therefore, notwithstanding the discrepancy in domestic sales turnover as per the balance-sheet filed with R.O.C. for the financial years 2005-06 and 2006-07 and the CA Certificate, it cannot be disputed that the petitioner was infact entitled for allocation of import quota for import of rough marble blocks as per the Notification No. 36/2009-14, dated 31-3-2010 inasmuch as in both the years the domestic sales turnover was shown to be more than 22 crores which is way beyond the entitlement criteria of Rs. 1 crore of annual domestic sales turnover of the marble blocks. Thus, the discrepancy, if any, in submitting the domestic sales turnover inclusive of the high seas sales turnover of about Rs. 2 Crores which was incorrectly included in the CA Certificate, does not affect the merits of the case of the petitioner. It is noticed that the petitioner in their letter dated 28-4-2010 had however clearly set out the break-up of domestic sales figures alongwith high seas sales turnover separately. As such, it cannot be said that there was any attempt on the part of the petitioner to suppress any fact or to furnish inflated figures. In any event, it cannot be said that by inflating the figures, the petitioner's entitlement to the import quota would in any manner have been affected. At best, it can be only said to be negligence on the part of the petitioner and the petitioner can-

12. The learned counsel for the Union of India also does not dispute the position that the petitioner would not have gained any additional benefit by showing inflated figures from Rs. 22 crores (approx.) to Rs. 24 crores (approx.) in the CA Certificate and that their entitlement would not have been in any manner affected on that count. It is pertinent to note the observations of the Director General of Foreign Trade in his order dated 29-7-2010 which was passed pursuant to the show cause notice dated 19-5-2010 issued to the petitioner for imposition of penalty and suspension/cancellation of IEC code u/s, 8 of the said Act for misdeclaration. The concluding paragraphs of the said order dated 29-7-2010 reads as under :-

I have gone through the documents submitted by the firm and facts of the case and find that the firm had submitted different information in the statement of accounts filed with the Income Tax and ROC with difference in turn over as is apparent from a scrutiny of the same. For the allocation for the 3rd and 4th quarter of the financial year 2009-10 also the firm had changed the CA certificates twice and at that stage a liberal view was taken on account of ceiling on entitlement because of gang saw limit. It is clear that although by increasing the figures of domestic sales turn over, there will be no change in the entitlement this time and accordingly no mala fide can be ascribed to them; however by submitting different figures of turnover on two occasions, it is a case of misdeclaration (which may be due to negligence or carelessness) which cannot be allowed to go scot free. Therefore, a token penalty of Rs. 1 Lakh is imposed on the firm. No other penal action appears necessary.

13. Thus, even according to the DGFT, by increasing the figures of the domestic sales turnover, there would have been no change in the entitlement of the petitioner and no mala fide intention could be ascribed to them and that the misdeclaration on the part of the petitioner may be on account of negligence or carelessness. The DGFT has proceeded to impose a token penalty of Rs. 1 lakh on the petitioner in pursuance of the show cause notice.

14. The learned counsel for the Petitioner has stated before us that although the petitioner has filed an appeal, the same shall be withdrawn. The learned counsel submitted that the petitioner is seriously prejudiced by the denial of import quota to them inspite of being clearly entitled to the same and that the petitioner's business has reduced substantially and that the petitioner is only interested in the import licence for the import quota and that they are not pressing their prayer to set aside the order dated 29-7-2010 imposing penalty of Rs. 1 lakh, (which is paid by them under protest) if the petitioner is granted the important licence. We accept the statements of the learned counsel for the petitioner.

15. Having regard to the facts and circumstances of the case, though the petitioner has been penalised by imposing costs of Rs. 1 lakh for the discrepancy which really has no bearing on the merits of the case, in our view, the DGFT was not justified in rejecting the petitioner's application for issuance of licence. Accordingly, the impugned communication dated 10-5-2010 and the subsequent communications dated 19-10-2010 and 21-2-2011 reiterating the rejection pursuant to the petitioner's representations are also quashed and set aside. The respondents are directed to grant the licence for import of marble blocks for the year 2010-11 to the petitioner forthwith.

16. The petition is allowed and rule is made absolute in the aforesaid terms. No order as to costs.