

(2011) 03 BOM CK 0249

In the Bombay High Court

Case No : Civil Appellate Jurisdiction Writ Petition No. 9259 Of 2010

Bhilwara Spinners Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Foreign Trade (Regulation) Rules, 1993 — Rule 8

Citation : (2011) 3 ALLMR 586 : (2011) 113 BOMLR 1140 : (2011) 267 ELT 49 : (2013) 20 GSTR 626

Hon'ble Judges : R.S. Dalvi, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : V. Shridharan and Prakash Shah, instructed by PDS Legal, for the Appellant; A.J. Rana A.S. Rao and Pradeep Jetly, for the Respondent

Judgement

J.P. Devedhar, J.—Rule, returnable forthwith. By consent, petition is taken up for final hearing.

2. The Petitioner is aggrieved by the decision of the CESTAT dated 11/5/2010 as also the larger Bench decision of the CESTAT dated 18/1/2008, wherein it is held that the licensing authorities do not have the power to amend the licence with retrospective effect.

3. The Petitioner is engaged in the business of manufacture and sale of yarn. The Petitioner had applied for and obtained Export Promotion Capital Goods licence ("EPCG licence" for short) dated 14/1/1998, with obligation to export goods 6 times the CIF value of the capital goods imported. At the relevant time, there were two types of EPCG licences namely 10% basic duty EPCG licence (10% Basic duty + Nil CVD) and zero duty EPCG licence ("Nil" Basic dty + 10% CVD). The Petitioner opted for zero duty EPCG licence. Para 6.3 of the Foreign Trade Policy as well as condition No. 5 of Notification No. 29/97 governing zero duty EPCG licence provided that the minimum CIF value of capital goods to be imported under zero duty EPCG licence should be Rs. 20 crores and if the same is not complied, the importer shall be liable to pay full duty with interest.

4. The Petitioner who had obtained zero duty EPCG licence could not import the capital goods of the value of Rs. 20 crores and therefore applied for revalidation of the licence. Accordingly, the licence was revalidated upto 31/7/2001. However, even within the extended period, capital goods worth Rs. 20 crores could not be imported.

5. In these circumstances, the customs authorities issued various show cause notices calling upon the Petitioner to show cause as to why the capital goods imported by the Petitioner should not be confiscated for violating condition No. 5 of Notification No. 29/97 and why duty with interest and penalty should not be recovered from the Petitioner.

6. The Petitioner thereupon applied for conversion of licence from zero duty EPCG licence" into "10% duty EPCG licence" so that there is no requirement of importing capital goods worth Rs. 20 crores and consequently there is no violation of the condition No. 5 in Notification No. 29/97. The application was considered by EPCG Committee consisting of both the licensing authorities and the customs authorities and approval for conversion of licence was granted. Accordingly, the licensing authority by its letter dated 8/9/2003 informed the Petitioner that the licence has been allowed to be converted into 10% duty EPCG licence. Thereupon the Assistant Commissioner of Customs, EPCG issued "No Dues" certificate and the Foreign Trade Development Officer by his communication dated 21/4/2006 informed that the Petitioner has fulfilled the export obligation by exporting goods 6 times the value of the capital goods imported and that they can approach the customs authorities for release of BG/LUT executed by the Petitioner.

7. In the meantime, by an order in original ("OIO") dated 27/2/2001, one of the show cause notice was adjudicated and it was

5 wp9259-10 held that the failure to import capital goods worth Rs. 20 crores under zero duty EPCG licence was in violation of condition No. 5 in Notification No. 29/97 and, therefore, the Petitioner was liable to duty, interest and penalty.

8. The Petitioner challenged the OIO dated 27/2/2001 by filing an appeal before the CESTAT. During the pendency of appeal, since the zero duty EPCG licence was converted into 10% duty EPCG licence by order dated 8/9/2003, the question arose as to whether the conversion of licence would apply retrospectively. The Division Bench of CESTAT referred the matter to the larger bench for decision on the following issues:

(i) Whether DGFT has powers to amend the licences including the re-validation (obviously referring of a situation where validity is expired) and whether amendment will be retrospective in nature ?

(ii) Whether as to the amendment carried out by the DGFT, whether right or wrong can be the subject matter of the scrutiny and challenge by the customs authorities

9. The larger Bench of CESTAT by its decision dated 18/1/2008 held thus:

(i) The licensing authorities do not have powers to amend any licence retrospectively.

(ii) The Customs authorities cannot challenge the powers of the licensing authority for amendment of the licence.

10. When the appeal filed against the another order in original dated 20/4/2006 came up for hearing before the Division Bench of CESTAT, the Petitioner contended that in view of the conversion of the licence it cannot be said that there is violation of Notification No. 29/97. The Division Bench of the CESTAT by its order dated 11/5/2010 held that in view of the larger Bench decision to the effect that the licensing authorities do not have the power to amend the licence retrospectively, the Petitioner cannot escape duty liability on account of the conversion of licence by order dated 8/9/2003. Challenging the aforesaid order passed by the CESTAT dated 11/5/2010 as well as the larger Bench of the CESTAT dated 18/1/2008 the present petition is filed.

11. We have heard Mr. Sridharan learned Counsel for the Petitioner, Mr. Rana, learned senior counsel for the DGFT and Mr. Jetly, learned Counsel for Respondent Nos. 1 to 5.

12. The basic dispute in the present case is, whether the DGFT who is the licensing authority under the Foreign Trade (Development & Regulation) Act, 1992 is empowered to amend the licence with retrospective effect.

13. Rule 8 of the Foreign Trade (Regulation) Rules, 1993 reads thus:

Rule 8 -Amendment of licence -The licencing authority may on its own motion or on an application by the licensee, amend any licence in such manner as may be necessary or to rectify any error or omission in the license

14. From the aforesaid rule, it is evident that the licensing authorities have the power to amend the licence in such a manner as may be necessary. The question is, whether such a power can be exercised retrospectively, to the advantage of the licence holder ?

15. In the present case, the application for conversion of licence was made by the Petitioner after the expiry of the licence period and after the customs authorities had adjudicated that the Petitioner had violated condition No. 5 of Notification No. 29/97 and accordingly confirmed the duty with interest and imposed penalty. The object of making an application for conversion of the licence after the expiry of the licence period was obviously with a view to overcome the difficulty in complying with condition No. 5 in Notification No. 29/97.

16. The fact that the licensing authorities as also the EPCG Committee which consists of both the licensing authorities as well as the customs authorities have permitted conversion of licence even after the licence had expired long back,

clearly shows that the said conversion was allowed obviously with a view to enable the Petitioner to overcome the condition No. 5 of Notification No. 29/97. Although the Petitioner had obtained zero duty EPCG licence with a view to import capital goods worth Rs. 20 crores, in view of the changed market conditions, the Petitioner could not import capital goods exceeding Rs. 12.5 crores. Condition No. 5 in Exemption Notification No. 29/97 provides that where the zero duty EPCG licence holder does not import capital goods worth Rs. 20 crores then the entire duty with interest would be recoverable on the quantity of imports made under the said licence. Accordingly, the customs authorities had demanded duty with interest and penalty.

17. Once the EPCG Committee consisting of both the licensing authorities and customs authorities, after considering the case of the Petitioner, decide to convert zero duty EPCG licence into 10% duty EPCG licence, it is obvious that the imports made under zero duty EPCG licence would have to be treated as imports made under 10% EPCG licence and consequently condition No. 5 of Notification No. 29/97 would not be applicable and the 10% CVD paid under zero duty EPCG licence would have to be treated as 10% basic customs duty paid under the 10% duty EPCG licence. Thus, on conversion of licence there was no obligation to import capital goods worth Rs. 20 crores and consequently there was no obligation to comply with condition No. 5 of Notification No. 29/97.

18. It is not the case of the customs authorities that the decision of the licensing authorities to convert the "zero duty EPCG licence" into "10% duty EPCG licence" was not a bonafide decision or the said decision was vitiated by malafides. Since the policy empowers the DGFT to exempt any person from any provision of Foreign Trade Policy or any procedure, in the facts of the present case, bonafide decision was taken by the EPCG committee / licensing authority to convert the licence so as to relieve the Petitioner from complying with condition No. 5 of the Notification No. 29/97. Therefore, the larger Bench of the CESTAT was not justified in holding that the licensing authorities do not have the power to amend the licence retrospectively especially when the Foreign Trade Policy and the Rules framed thereunder empower the DGFT to do the needful in deserving cases.

19. It is relevant to note that neither the DGFT nor the EPCG Committee were party Respondent before the larger Bench. Since the decision to convert the licence was taken by the DGFT with the approval of the EPCG Committee (which includes customs authorities), the Commissioner of Customs / Commissioner of Central Excise were bound by the decision of the EPCG committee and could not have challenged the decision. Similarly, the larger Bench of the CESTAT could not have held behind the back of the licensing authorities that they do not have the power to amend the licence retrospectively.

20. Moreover, the larger Bench decision of the CESTAT is mutually contradictory, because the larger Bench on the one hand holds that the customs authorities cannot challenge the powers of licensing authorities to amend the licence and on

the other hand holds at the instance of the customs authorities that the licensing authorities do not have the power to amend the licence retrospectively. Such an order of the CESTAT which is mutually contradictory cannot be sustained in so far as it holds that the licensing authorities do not have the power to amend the licence retrospectively.

21. Strong reliance was placed by Mr. Jetly on the decision of the Punjab & Haryana High Court in the case of Vikrant Overseas Vs. Union of India and Others, . In that case, the licence was amended by the licensing authority to the prejudice of the licence holder. In that context, it was held that the licence cannot be amended retrospectively so as to make the imports already made pursuant to the licence illegal. In the present case, the licence is converted at the instance of the licence holder that too much after the expiry of the licence period and much after the customs authorities initiated action for not complying with the condition No. 5 in the Notification No. 29/97. Therefore, it is clear that the conversion of licence was made with a view to operate retrospectively so that the Petitioner was not obliged to fulfill condition No. 5 in Notification No. 29/97 and consequently, no duty, interest and penalty could be recovered from the Petitioner.

22. The Jt. DGFT has filed an affidavit duly affirmed on 8/3/2011 to the effect that para 2.5 of the Foreign Trade Policy empowers the DGFT to exempt any person or class or category of persons from any provision of Foreign Trade Policy or any procedure and that the amendments carried out by the DGFT cannot be the subject matter of scrutiny and challenged by the customs authorities. In the present case, the licensing authority has held that the Petitioner has fulfilled the export obligation under the 10% EPCG licence, by exporting goods 6 times the CIF value of the capital goods imported and accordingly export obligation discharge certificate has been issued on 21/4/2006. Once the licensing authority has found that the licence conditions have been fulfilled, it would not be open to the customs authorities to contend that the imports under the licence are contrary to law and take action against the licence holder.

23. For all the aforesaid reasons, we set aside the larger Bench decision of the CESTAT dated 18/1/2008 and the Division Bench decision of the CESTAT dated 11/5/2010 to the extent they hold that the licensing authorities do not have the power to amend the licence with retrospective effect from the date of granting the licence. Consequently, the decision of the customs authorities seeking to recover duty with interest and penalty on the footing that the Petitioner has violated condition No. 5 of Notification No. 29/97 is also quashed and set aside.

24. Rule is made absolute in the above terms with no order as to costs.