(2014) 12 BOM CK 0227

In the Bombay High Court

Case No : Writ Petition Nos. 233 and 237 of 2013

Tata Teleservices Ltd. — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 20-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 320 ELT 65

Hon'ble Judges : S.C. Dharmadhikari, J;A.A. Sayed, J.

Bench : Division Bench

Advocate : Janak Dwarkadas, Sr. Advocate, Sushant Murthy and Rohit Jain i/b Madhur R. Baya, for the Appellant; Anil Singh, Addl. Solicitor General and Beni Chatterjee i/b Neeta V. Masurkar, for the Respondent

Final Decision : Allowed

Judgement

1. Rule. Respondents waive service. By consent, rule is made returnable forthwith. These Writ Petitions under Article 226 of the Constitution of India are directed against the order passed on 13 July, 2012, by which the Petitioners'' application for consideration of fulfillment of export obligation by treating them and one M/s. Tata Teleservices Ltd. as a group company, is rejected.

2. The facts necessary for disposal of these Writ Petitions can be briefly set out.

In Writ Petition No. 233 of 2013, the Petitioners are a company incorporated under the Indian Companies Act, 1956 and are telecom service provider. They have been issued license and in terms of the same they are operating the telecom services. The Petitioners have also obtained a license to import the capital goods at concessional rates of duty subject to the fulfillment of an Export Obligation (EO) under the Export Promotion Capital Goods Scheme (EPCG) of the Foreign Trade Policy (FTP). These licenses have been issued to the Petitioners by Respondent No. 4 to this Writ Petition. Respondents Nos. 1 to 3 are exercising powers under the Foreign Trade (Development & Regulation) Act, 1992.

3. The Writ Petition is filed by relying upon the Foreign Trade Policy. That, according to the Petitioners, gives impetus to the export business in India. That is to generate earnings in Foreign Exchange. The policy evolved over passage of time gives fillip and encourages the exports. The Petitioners point out that for the purpose of sustained export growth they are required to import high quality of machinery and technology. That is why the Export Promotion Capital Goods Scheme was formulated under which the import of capital goods, for pre-production and post-production of capital goods and/or export services at concessional rates of duty, subject to the Export Obligation equivalent to eight times the duty saved on the capital goods imported under the above scheme has been permitted. The Petitioners point out that subsequent amendments being made to this Scheme are in the nature of additional facilities or benefits. The Petitioners rely upon para 5.4 of the Foreign Trade Policy amended by Notification No. 28/2003, dated 28-1-2004. They submit that benefit of utilization of excess exports of the group company in computation of the export obligation was, therefore, granted to the EPCG License holder. However, the term "Group Company" was not defined. Therefore, on the very day the Notification was issued clarifying this concept. The Petitioners rely upon clarification and particularly on para 9.28, which was introduced by the Foreign Trade Policy 2004-09 declared on 31-8-2004. They rely upon the speech of the then Commerce Minister while introducing this Foreign Trade Policy. They also rely upon the changes in the Telecom industry and then submit that, relying upon para 5.4 of the Foreign Trade Policy read with para 9.28 thereof, the Petitioners approached the Respondents requesting that the excess export of their group company M/s. Tin Plate Company of India Ltd. be considered for the purpose of calculating the export obligation required to be fulfilled in terms of the EPCG scheme. They rely upon the shareholding structure of the Petitioners vis-a-vis TCS. They also rely upon the correspondence carried out from time to time. The matter was then referred to Respondent No. 5. Respondent No. 5 during the meeting held on 26 November, 2010 and presided over by Respondent No. 2 for the first time considered the case of the Petitioners as a group company in accordance with this paragraph 9.28 of the Foreign Trade Policy. That request was rejected without giving any reasons and by simply observing that M/s. Tin Plate India Ltd. and the Petitioners were not a group company under para 9.28 of the Foreign Trade Policy. The communication of the decision or interpretation placed in this meeting was received by the Petitioners on 2 February, 2011. The Petitioners tried to pursue the matter, but having failed to satisfy the authorities, they approached this Court by filing Writ Petition and which Writ Petition came to be disposed of by order dated 3 May, 2012 (Writ Petition No. 2374 of 2011).

4. In terms of the directions issued in this order, Respondent No. 5 considered the issue once again in the meeting held on 13 July, 2012. Since the request of the Petitioners as contained in the written application came to be rejected once again on 13 July, 2012, the present Writ Petitions have been filed.

5. Mr. Dwarkadas, learned Senior Counsel appearing for the Petitioners submitted

that the Petitioners are entitled to the benefits and in terms of para 9.28 of the Foreign Trade Policy. He relied upon the order of this Court to submit that this Court had expressly directed that the request of the Petitioners should be considered in terms of the Policy and a decision taken consistent with the object and purpose sought to be achieved by the Foreign Trade (Development & Regulation) Act, 1992. Mr. Dwarkadas would submit that the definition of "Group Company" and as set out in para 9.28 would denote as to how the authorities have understood that two or more enterprises directly or indirectly exercising voting right and to the extent or percentage indicated or appointing more than fifty percent of members of Board of Directors in the other enterprise could be termed as "Group Company". Therefore, this concept and as defined ought to be construed liberally. Mr. Dwarkadas has heavily relied upon the shareholding pattern in relation to both the Petitioners and to submit that they satisfy the essential condition in para 9.28 of the Foreign Trade Policy. Mr. Dwarkadas submits that the word "Group" is defined not in singularly but plurally. Therefore, the group company comprises of two or more enterprises and controlling voting power or the management and to the extent indicated in the other enterprise. In these circumstances, when the connection or nexus between the companies was squarely established and proved, then the interpretation goes contrary to the order passed by this Court, the Foreign Trade Policy and the mandate of the Foreign Trade (Development & Regulation) Act itself. For all these reasons, Mr. Dwarkadas would submit that the Writ Petitions deserve to succeed.

6. Mr. Anil Singh, learned Additional Solicitor General, who appears on behalf of the Respondents, relied upon the chart handed over to us during the course of hearing. Mr. Singh would submit that the chart itself will indicate as to how the criteria evolved has not been satisfied in this case. He relied upon the chart to indicate as to how the definition or the concept must be understood. He submits that if A company is head or controlling entity and has required percentage of voting power in B & C companies, then it may be in a position to exercise that directly in B & C companies both. However, this requirement is not enough. Further the requirement is that B company should be in a position to exercise the same percentage of rights in C company. It is not permissible to exercise such rights indirectly and through A company. The reverse should also be the position with regard to company-C. Mr. Singh, therefore, submits that this illustration would demonstrate as to how the Petitioners rely only on the controlling authority and power of a company styled as "parent or controlling entity". That does not satisfy the requirement of those being controlled directly having some connection or nexus with this entity. Therefore, by indirect process and contrary to the definition a benefit is claimed. That is rightly denied.

7. Mr. Singh has contended that Tata Consultancy Services Ltd. does not satisfy the criteria, because it neither directly nor indirectly can be said to be having the requisite power. In this case, he relies upon the order passed and to contend that the requirement as per para 9.28(a) of the Foreign Trade Policy is that one enterprise should be in a position to exercise 26% or more of voting rights in

other enterprise. In the present case, the other enterprise is Tata Services Ltd. and that is not in a position to exercise 26% or more of the voting rights in Tata Teleservices (Maharashtra) Ltd., either directly or indirectly. The criteria is not fulfilled if Tata Services Ltd., holding company, is not in a position to exercise 26% or more of voting rights in Tata Teleservices (Maharashtra) Ltd. In these circumstances, it is submitted that the affidavit-in-reply filed by the Respondents amply clarifies the position and factually. Once a particular interpretation of the Policy has been placed by those in-charge of implementing it, then, merely because another view is possible, this Court should not interfere in such matters in exercise of its writ jurisdiction. That is the main plank or essential contention of the learned Addl. Solicitor General. He submits that the interpretation placed by the Policy Interpretation Committee is a possible one, in the given facts and circumstances, then, it deserves to be upheld. For all these reasons and when the Petitioners are not a group company, Writ Petitions be dismissed.

8. With the assistance of the learned counsel appearing for both sides we have perused both Writ Petitions and the orders impugned therein. We have also perused the relevant annexures, particularly the application that was made by the present Petitioners. We need not reproduce all those documents or refer to contents thereof in detail. Inasmuch as, the Policy Interpretation Committee met and considered the request of M/s. Tata Teleservices (Maharashtra) Ltd., EPCG authorized holder for consideration of M/s. Tata Consultancy Services Ltd. as it is group company as per the directions of this Court.

9. The Policy Interpretation Committee observed that M/s. Tata Tele-services (Maharashtra) Ltd. have admitted that they do not hold 26% or more equity in M/s. Tata Consultancy Services Ltd., hence in terms of para 9.28 of the Foreign Trade Policy, M/s. Tata Consultancy Services Ltd. cannot be treated as a group company of M/s. Tata Teleservices (Maharashtra) Ltd., which is authorized holder.

10. Similarly, M/s. Tata Teleservices Ltd. have admitted that they do not hold 26% or more equity in M/s. Tinplate India Ltd. and hence in terms of para 9.28 of the Foreign Trade Policy, M/s. Tinplate India Ltd. cannot be treated as a group company of M/s. Tata Teleservices Ltd.

11. In so far as argument based on indirect control is concerned, that is dealt with in para 4 of the decision/order passed by the Policy Interpretation Committee and which reads as under:

"4. As regards the issue whether Tata Teleservices (Maharashtra) Ltd. and Tata Consultancy Services can be treated as group companies on the ground that Tata Consultancy Services is indirectly in a position to exercise 26% or more of voting rights in Tata Teleservices (Maharashtra) Ltd., the PIC discussed the issue that since Tata Sons Ltd. is a holding company and has share holding of more than 50% both in Tata Teleservices (Maharashtra) Ltd. and Tata Consultancy Services, therefore, whether these companies may be treated as group companies. The requirement as per Para 9.28(a) of FTP is that one enterprise should be in a position to exercise 26% or more of voting rights in other enterprise. In this case the other enterprise is Tata Consultancy Services who is not in a position to exercise 26% or more of voting rights in Tata Teleservices (Maharashtra) Ltd. either directly or indirectly. It is in fact M/s. Tata Sons Ltd., the holding company, who is in a position to exercise 265 or more of voting rights in Tata Teleservices (Maharashtra) Ltd. The Committee, therefore, could not accept the claim of the applicant that Tata Consultancy Services is indirectly in a position to exercise 26% or more of voting rights in Tata Teleservices (Maharashtra) Ltd. within the meaning of Para 9.28(a) of FTP."

12. Upon perusal of this paragraph it is apparent that the Policy Interpretation Committee is of the opinion that requirement as per para 9.28(a) of the Foreign Trade Policy is that one enterprise should be in a position to exercise 26% or more voting rights in other enterprise. In this case, other enterprise is Tata Consultancy Services Ltd., which is not in a position to exercise 26% or more voting rights in Tata Teleservices (Maharashtra) Ltd. either directly or indirectly.

13. In that regard one must peruse the chart that has been relied upon in the case of M/s. Tinplate India Ltd. The shareholding pattern as of 31 March, 2008 is set out at page 37 in the memo of Writ Petition No. 233 of 2013. That reads as under:

Similarly, the composition of the companies in Writ Petition No. 237 of 2013 is to be found at page 12 of the memo of Writ Petition No. 237 of 2012 and that reads as under:

14. To appreciate these charts, one must reproduce paras 5.4 and 9.28 of the Foreign Trade Policy. They read as under:

"5.4 Alternatively, export obligation may also be fulfilled by exports of other good(s) manufactured or service(s) provided by the same firm/company or group company/managed hotel which has the EPCG license.

However, in such cases, the additional export obligation imposed under the EPCG Scheme shall be over and above the average exports achieved by the unit/ company/group company/managed hotel in preceding three licensing years for both the original and the substitute product(s)/service(s)..."

9.28 "Group Company" means two or more enterprises which, directly or indirectly, are in a position to--

(i) Exercise twenty-six percent, or more of voting rights in other enterprise, of

(ii) Appoint more than fifty per cent, of members of board of directors in the other enterprise.

For group companies to claim benefits or have their exports counted for benefits to be claimed by another member of group, the group company should have been in existence at least 2 years prior to date of application under any of export promotion schemes notified in FTP."

15. A perusal of the definition of "Group Company" would reveal that it means two or more enterprises. Secondly, they ought to be in a position directly or indirectly to exercise 26% or more voting rights in other enterprise or appoint more than 50% members of the Board of Directors in the other enterprise. For group companies to claim benefits or have their exports counted for benefits to be claimed by another member of the group, the group company should have been in existence at least 2 years from the date of application under any of export promotion schemes notified in Foreign Trade Policy. At the outset, we must clarify that clause (ii) and other requirement is not in issue before us. Group companies are in existence for the required or the requisite period. The only issue is whether the minimum 26% voting rights in the Petitioners are exercised by the group companies.

16. After carefully perusing the relevant material, we are of the opinion that the Policy Interpretation Committee has completely overlooked the requirement stipulated in para 9.28 of the Foreign Trade Policy. The requirement is not of a direct control. The requirement is fulfilled by indirect control as well. If a group company means two or more enterprises and which are indirectly in a position to exercise 26% or more voting rights in other enterprise, the requirement is fulfilled. The stand taken before us by the Respondents and reiterated by the learned Addl. Solicitor General is that neither of the two firms namely Tata Tele-services (Maharashtra) Ltd. and Tata Consultancy Services are in a position to exercise 26% or more voting rights in the other enterprise or in a position to appoint more than 50% of the members of the Board of Directors either directly or indirectly. We do not see how such a stand can be taken and in the teeth of the language of para 9.28. The Policy Interpretation Committee should place an interpretation consistent with the policy and not contrary to it. If the Foreign Trade Policy is formulated in terms of the powers conferred in the competent authority by the Foreign Trade (Development & Regulation) Act, 1992 and in this case it is formulated so as to promote and encourage the export, then we expected the Policy Interpretation Committee to place a reasonable interpretation on this document and the definition thereof. It should not have ignored its own stipulation. If the definition was only to allow a singular entity to claim the benefits and not when it is associated or a part of the group company, then one could have understood the interpretation placed. However, when it is permitted by the policy maker that the group company to claim benefits ought to have direct or indirect control in other enterprise then, in our opinion, the requirement is fulfilled. The learned Addl. Solicitor General is not right when he submits that it is direct control which is envisaged or the reverse control by other enterprise in the group company. That is not what is intended. The group company means two or more enterprises and which directly or indirectly can control the other enterprise. In the instant case, the clear argument of the Petitioner and which has been noted is that they fulfill this requirement in para 9.28. In these circumstances, an interpretation consistent with the policy should be placed. The interpretation which is totally contrary to the same having been

placed that the order passed and impugned in these Petitions cannot be sustained. The Petitioners have clarified not once but on several occasions that Tata Teleservices (Maharashtra) Ltd. availed of EPCG Scheme with the hope of satisfying export obligation from its own exporter, but it is difficult in terms of the estimation due to stiff reduction in the International Long Distance charges. They are, therefore, in principle agreeable to share export earnings of Tata Consultancy Services for meeting export obligation of Tata Teleservices (Maharashtra) Ltd. They only sought a clarification from the Director General of Foreign Trade as to whether criteria evolved under para 9.28 is fulfilled. They pointed out that Tata Sons Ltd. is holding 21% equity in Tata Teleservices (Maharashtra) Ltd. Tata Sons Ltd. is holding 74% equity in Tata Consultancy Services. Tata Sons Ltd. is holding 36% equity in Tata Teleservices Ltd. and Tata Teleservices Ltd. is holding 38% equity in Tata Teleservices (Maharashtra) Ltd., Tata Sons Ltd., and Tata Teleservices Ltd. together hold more than 26% voting rights in Tata Teleservices (Maharashtra) Ltd. That is why they sought this clarification whether M/s. Tata Teleservices (Maharashtra) Ltd. and Tata Consultancy Services are covered by the definition of "Group Company". That is how they relied upon the chart. None disputed this factual position or that the Tata companies are not a group. However, despite this Court emphasizing and repeatedly that this writ petitioner''s case is based on indirect control, there does not seem to be any attempt by the Policy Interpretation Committee to appreciate and abide by this direction. The earlier order of the Division Bench is based on the finding and conclusion that the Policy Interpretation Committee has neither interpreted the policy provisions nor did it consider the claim of the Petitioners that they indirectly fulfill the first condition set out in para 9.28 of the Foreign Trade Policy. We do not see how in the teeth of such clear and unambiguous direction of this Court the Policy Interpretation Committee had committed the same mistake. It failed to abide by this Court''s direction in its Letter and Spirit. It was the indirect control and emphasized before this Court by the writ petitioner and request based thereon that was required to be examined and scrutinized by the Policy Interpretation Committee. That having not been done and admittedly the Petitioners'' case clearly falling within the parameters/criteria evolved in para 9.28 that we have no alternative but to quash and set aside the decision of the Policy Interpretation Committee dated 13 July 2012.

17. We also see no justification and for deviating from the stand taken in the communication of the Government of India, Ministry of Commerce & Industry, Directorate General of Foreign Trade dated 11 November, 2008, copy of which is a part of Writ Petition No. 237 of 2012. There the All India Association of Industries had sought similar clarification and the Deputy Director General of Foreign Trade clarified that if a company holding a specified share in another company which further holds share with a third company, then, in such situation all such companies under the Companies Act, 1956 shall be taken as "Group Company" as per 9.28 of Foreign Trade Policy. If this is a communication from Directorate General of Foreign Trade, then we do not see why the Policy

Interpretation Committed omitted this clarification and in writing issued by the Directorate General of Foreign Trade. All the more, the interpretation placed by the Policy Interpretation Committee in the impugned decision cannot be sustained.

18. As a result of the above discussion, both Writ Petitions succeed. Rule is made absolute in terms of prayer clause (a) of both the Writ Petitions. The decision of the Policy Interpretation Committee impugned in the Writ Petitions is quashed and set aside. All consequences of quashing and Setting aside of that decision shall follow and the benefits as contemplated and to both the Petitioners in terms of Foreign Trade Policy be extended to them accordingly. We would expect the authorities now to implement our order and direction as expeditiously as possible and within three months from the date of receipt of copy of this order. No order as to costs. All concerned to act on simple copy of this order duly authenticated by the Associate of this Court.

