

(2012) 05 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 2003 of 2011

Tata Teleservices (Maharashtra) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-05-2012

Acts Referred:

Citation : (2012) 281 ELT 484

Hon'ble Judges : M.S. Sanklecha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Janak Dwarkadas, with Sushant Murthy instructed by and Madhur R. Baya, for the Appellant; B.M. Chatterjee with A.S. Rao and Pradeep S. Jetly, for the Respondent

Judgement

J.P. Devadhar, J.—Rule. Rule, returnable forthwith. By consent of the parties, the petition is taken up for final hearing.

2. This petition is filed to challenge the decision of the Policy Interpretation Committee of the DGFT dated 26th November, 2010 and 29th March, 2011 wherein it is held that the petitioner namely, Tata Teleservices (Maharashtra) Ltd. and Tata Consultancy Services Ltd. cannot be considered as group companies under para 9.28 of the Foreign Trade Policy 2004-2009.

3. The relevant facts are that, the petitioner is a Company engaged in the business of providing wireless telecommunication services in accordance with the Universal Access Service Licence (UASL) granted by the Government of India. For the aforesaid business, the petitioner had imported telecommunication and network equipment into India. Under the said licence, the petitioner was required to fulfill the export obligation to the extent specified and within the period specified in the licence.

4. As per 5.4 of the Foreign Trade Policy, 2004-2009, the export obligation required to be fulfilled by the assessee could be fulfilled upto 50% of the export obligation, by export of other goods manufactured or services provided by the

same petitioner company or a group company which has EPCG authorisation. Para 9.28 of the Foreign Trade Policy 2004-2009 defines the expression group company as follows :-

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

- (i) exercise twenty-six per cent, or more of voting rights in other enterprise; or
- (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.

5. In the present case, on 31st March, 2010 the petitioner had requested the Additional DGFT to consider the petitioner company and Tata Consultancy Services Ltd. ("TCS" for short) as a group company under the Foreign Trade Policy and excess exports effected by the TCS be considered for fulfilling the export obligation of the petitioner under the EPCG scheme. By the impugned orders dated 26th November, 2010 and 29th March, 2011, the Policy Interpretation Committee has held that the petitioner and TCS cannot be considered as group companies under para 9.28 of the Foreign Trade Policy. Challenging the aforesaid orders, the present Writ Petition is filed.

6. It is argued by Mr. Dwarkadas, learned senior Advocate appearing on behalf of the petitioner that the impugned orders are bad in law as no reasons have been given for rejecting the claim of the petitioner. Moreover, under para 9, 28 of the Foreign Trade Policy any two enterprises could be said to be group company if any one of the two conditions set out therein are fulfilled. The first condition in para 9.28 is that when two or more enterprises directly or indirectly are in a position to exercise 26 per cent or more of voting rights in the other enterprise, then the two enterprises can be said to be group companies. In the present case, it is the case of the petitioner that Tata Sons Ltd. held 74% equity shares of TCS and 21% equity shares of the petitioner company and thus indirectly, the petitioner company is in a position to exercise 26 per cent or more of voting rights in TCS and, therefore, TCS and the petitioner company are liable to be considered as group companies under para 9.28 of the Foreign Trade Policy. This argument of the petitioner has not been considered by the Policy Interpretation Committee and, therefore, it is submitted by counsel for the petitioner that the impugned orders are liable to be quashed and set aside.

7. The argument of Mr. Chatterjee, learned counsel for the revenue is that the petitioner company and TCS can be considered as group companies, only if the petitioner company controls 26% voting rights of TCS or appoints 50% of the members of the Board of Directors of TCS. Since the petitioner company does

not fulfill any of the above conditions, the petitioner company and TCS cannot be said to be group companies.

8. We have carefully considered the rival submissions.

9. At the outset, it may be noted that neither in the order dated 26th November, 2010 nor in the order dated 29th March, 2011, the Policy Interpretation Committee has assigned any reasons as to why the petitioner company and TCS cannot be considered as group companies. The fact that Policy Interpretation Committee consists of high ranking officers of the Director General of Foreign Trade ("DGFT" for short) and that the interpretation of policy given by the Policy Interpretation Committee is final and binding, it is not open to the Policy Interpretation Committee to arbitrarily pass an order rejecting the claim of the assessee without assigning any reasons. In the present case, the Policy Interpretation Committee has neither interpreted the policy provisions nor considered the claim of the petitioner that it indirectly fulfills the first condition set out in para 9, 28 of the Foreign Trade Policy, but merely stated that the Petitioner and TCS cannot be considered as group companies. Such an order passed without assigning any reasons, cannot be said to be an order interpreting the policy provisions.

10. In the affidavit in reply filed on behalf of the respondents, it is sought to be contended that the petitioner company does not directly or indirectly fulfill the conditions set out in para 9.28 of the policy. We see no merit in the above contention because, firstly, correctness of an order is to be judged from the reasons set out in the order and not by way of an affidavit. Secondly, even in the affidavit in reply the specific plea of the petitioner that they indirectly fulfill the condition of para 9.28 has not been considered.

11. In these circumstances, the impugned orders dated 26th November, 2010 and 29th March, 2011 are quashed and set aside and the Policy Interpretation Committee is directed to consider the matter afresh in accordance with law.

12. Mr. Rao, learned counsel appearing for the DGFT states that the Policy Interpretation Committee shall dispose of the matter and pass appropriate order on merits within a period of four months from today.

13. Rule is made absolute in the above terms with no order as to costs. All contentions of both the sides are kept open.