

(2010) 08 DEL CK 0148

In the Delhi High Court

Case No : Cus. A.C. 5 of 2009 and Cus. A.C. 6 of 2009

The Commissioner of Customs

APPELLANT

Vs

Air Travel Bureau Ltd.

RESPONDENT

Date of Decision : 03-08-2010

Acts Referred:

Customs Act, 1962 — Section 111

Citation : (2010) 260 ELT 78

Hon'ble Judges : Reva Khetrapal, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Mukesh Anand and Mohit Yadav, for the Appellant; Ashok Garg and Ankit Khushu, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—These two appeals arise out of the common order dated 16th December, 2008 passed by the Customs, Excise and Service Tax, Appellate Tribunal, New Delhi (CESTAT). M/s AIR Travel Bureau Ltd., the respondents herein had imported certain cars (two BMW cars) after obtaining EPCG license dated 17th September, 2002. In view of the said license which was issued for the "travel agency", the custom authorities charged duty @5% on the basic amount. However, it was subject to the condition that the respondents shall fulfill the export obligation of about Rs. 2.06 crores. It is not in dispute that the respondent's company has been able to fulfill the said obligation inasmuch as its claim has been accepted by the Director General Foreign Trade (DGFT) vide communication dated 18.03.2004. However, the custom authorities took the view that the cars were not used directly for earning foreign exchange and therefore, initiated proceedings for recovery of the normal custom duty as well as penalty by issuing show cause notice. Show cause notice in this behalf was issued on 15.02.2005. After receiving reply from the respondent and giving them hearing vide order dated 31.01.2006, whereby those two BMW cars were confiscated u/s 111(d) and 111(o) of the Customs Act, with an option to redeem. This order also

confirmed the demand custom duties along with interest, penalty etc. In the appeal preferred by the company and its Managing Director, the CESTAT set aside the order dated 31.01.2006. Against that order, the present appeal is preferred by the department as aforesaid. According to the customs-appellant, the respondents have failed to fulfill the obligation under the EPCG license and the scheme. It is, contended that the aforesaid cars were never used for serving foreign tourists with a view to earn foreign exchange as stipulated under the Scheme and in the EPCG license. It is their submission that the importer being the license holder is required to fulfill the export obligation by or through use of capital goods. To the contrary, in the present case, the respondents obtained certificate of discharge of obligation from the DGFT against the foreign exchange earned through sale of tickets etc.

2. It is found as a matter of fact that the respondents are in the business of travel agency and the cars were utilized for the intended purposes i.e. they were added attraction for the foreign tourists to come to India and the respondents rendered the services of arranging/ booking air and train tickets, accommodation, site-seeing and booking train tickets etc. Without these services, rendered by the respondents, incremental foreign exchange earnings could not have been achieved. Another finding of fact which is recorded by the Tribunal is that it has not been shown before the Tribunal that the imported vehicles had been used for any purpose other than those related to travel and tour as stipulated in EPCG license. On this basis, the Tribunal opined that the term tour and travel is a very wide term and it cannot be said that the EPCG license envisaged only the amounts collected by use of imported cars to be accounted towards export obligation under the said license.

3. Thrust of the reasoning given by the Tribunal is that if with the fleet of the aforesaid two imported cars, the respondents have been able to attract foreign tourists to come to India by providing these services, the foreign exchange earned through the foreign tourists would be treated as earning of foreign exchange by using those cars as well.

4. This Court in the case of "Interglobe Enterprises Ltd. v. Union of India and Ors." was concerned with almost identical issue namely use of imported cars by travel agency. This Court was concerned with the same interpretation and in the process decided as to how such imported cars could be of more use to a travel agency for fulfilling the EPCG Scheme. Perusal of the Judgment would show that the Revenue on the one hand and the assessee on the other hand had come out with extreme positions in support of their respective submissions, whereas, the assessee argued that the only answer for the assessee was to show fulfillment of export obligation and whether in this process, imported goods were used or not was not relevant.

5. On the other hand, submission of the Revenue was that the export obligation should be fulfilled with the direct use of the imported items namely cars in the said case. Both the interpretations were not accepted, the Court took a balance

of view by interpreting the EPCG policy in the following manner:

The true position appears to us to be that while capital goods may or may not be capable of generating convertible foreign exchange by their independent use as is the position in the case of the lift in a hotel or the cars imported by the travel agent, the least that the importer must demonstrate is that the goods were put to use for the business activity for which the same were imported. The Scheme does not in our view envisage imports where the goods are not meant for use in the business activity of the importer nor can the goods be diverted for some other use without violating the conditions of actual user which is fundamental to the Scheme.

6. Once we apply this yardstick to the facts of the present case, the conclusion would be that the respondents have been able to fulfill 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 if it 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.

7. We, thus, are of the opinion that no substantial question of law arises. These appeals are accordingly dismissed.