

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NOS: C/701 & 702/2011

[Arising out of Order-in-Appeal No. 363 and 364 (EPCG)/2011 (JNCH)/ EXP- 58 & 59 dated 29/07/2011 Passed by Commissioner of Customs Excise (Appeals), Mumbai – II.]

For approval and signature:

Hon'ble Shri S K Mohanty, Member (Judicial)

Hon'ble Shri C J Mathew, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
 3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
 4. Whether Order is to be circulated to the Departmental authorities? : Yes
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Travel Planners Ltd.
Shikhar Chandra Jain

... Appellants

versus

Commissioner of Customs
Nhava Sheva

...Respondent

Appearance:

None for appellant

Shri MK Mall, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 08/08/2018
Date of decision: 11/12/2018

ORDER NO: A/ 88091-88092/2018

Per: C J Mathew

As both these appeals arise out of the same order-in-appeal no. 363 & 364 (EPCG)/2011 (JNCH)/EXP-58 & 59 dated 29th July 2011 of Commissioner of Customs (Appeals), Jawaharlal Nehru Custom House, Nhava Sheva, we dispose off these by a common order. M/s Travel Planners Pvt Ltd had imported two cars, a Toyota Camry through Nhava Sheva and a BMW through ICD, Tughlakabad, against license issued by Director General of Foreign Trade under the Export Promotion Capital Goods scheme in the Foreign Trade Policy. In the present proceedings, we are concerned with the first of the two cars. At the time of import, duties of customs amounting to ₹ 7,62,548 had been foregone by recourse to notification no. 55/2003-Cus dated 1st April 2003 pertaining to imports under the said scheme. Ruling on the ineligibility of the imported car for the benefits of the scheme, and thereby the exemption notification, recovery of the duty foregone ordered by the original authority along with confiscation of the car to be redeemed on payment of fine of ₹ 5,00,000 under section 125 of

Customs Act, 1962 and the imposition of penalty of ₹ 7,62,548 under section 114A of Customs Act, 1962 was upheld by the first appellate authority which is now disputed before us. The penalty of ₹ 2,00,000 under section 112 of Customs Act, 1962 imposed on Shri Shikhar Chandra Jain, Managing Director, is challenged in the second appeal.

2. The defence of the appellant, who is a travel agent, is that they had imported the car to provide services to their clients and that the value of services rendered by them had earned sufficient foreign exchange within a period of four years from the date of import instead of the stipulated eight years to enable issue of 'export obligation discharge certificate' by the licensing authority on 29th May 2007. According to them, with the issue of the certificate by the competent authority, no further claim lies against them from customs authorities; they rely upon circular no. 62/2002-Cus dated 26th September 2002, 25/2003-Cus dated 1st April 2003 and 46/2004-Cus dated 26th July 2004 of Central Board of Excise & Customs precluding customs authorities from proceeding unilaterally when discharge certificate has been issued by the licensing authority. It is also contended that the second car imported by them and subjected to similar proceedings was relieved of the detrimental consequences by the Tribunal in final order no. 53779-53780/2014 dated 24th September 2014 which followed the decision of the Hon'ble High Court of Delhi in *Commissioner of Customs v. Air Travel Bureau Ltd* [2010 (260) ELT 78 (Del)].

3. Learned Authorised Representative places reliance on the decision of the Hon'ble High Court of Kerala in *Commissioner of Customs v. Kumarakam Lake Resorts [2011 (268) ELT 153 (Ker)]*

4. It is seen from the records that the proceedings were initiated against the appellants as the entitlement to import of motor vehicles under the scheme was considered to be questionable and that, in consequence of the privileges arising solely from discharge of obligation through earnings in freely convertible foreign exchange from export of goods, the appellants could have obtained the license by mis-declaration in their application. Consequently, it was held that benefits of the exemption notification was not available to the appellants and that the 'export obligation discharge certificate' had been obtained by fraudulent mis-declaration of compliance to the licensing authority.

5. It is seen that the proceedings were initiated by customs authorities who had, under a notification issued under section 25 of Customs Act, 1962, permitted duty-free import. It is also apparent that the said notification governing the administration of imports under the Export Promotion Capital Goods scheme was primarily drafted for realisation of foreign exchange proceeds from export of goods; however, recognising the importance of service industry, the scheme has been utilised to grant licenses to service providers. It was in pursuance of this extension that the appellants had obtained a license

for the import of cars subject to realisation of foreign exchange through rendering of services. That the licensing authority was fully cognizant of the intended use of the imported motor vehicle to render services is not in doubt. In the circumstances, the validity of the 'export obligation discharge certificate' is beyond the competence of customs authorities to question. Moreover, unlike goods, in which customs authorities are the final repository of evidence of actual shipment and thereby enabled to inform the licensing authorities of any fraudulent declaration besides initiating action on their own, for denial of exemption notification claimed for rendering of services, customs authorities are bereft of such records, and of competence to adjudge, the consummation of obligation. Further, as pointed out by the appellant, customs authorities have also been instructed by the Central Board of Excise & Customs not to proceed unilaterally. In the present instance, the proceeding was not only initiated but also in excess of jurisdiction to do so.

6. The decision of the Hon'ble High Court of Kerala in *re Kumarakam Lake Resort* was rendered in the context of patent and uncontroverted violations and the specific finding of

'5.... We are of the view that Joint Director General of Foreign Trade recklessly and indifferently issued the discharge certificate under the EPCG Scheme without reference to the customs notification under which the concessional rate of import duty was availed by the

respondent. This is not a case of customs rejecting the certificate issued by the Joint Director General of Foreign Trade or going against the export and import policy clarified by the DGFT as projected by respondent's counsel....'

in relation to the issue of discharge certificate. In the present instance, the discharge certificate itself is questioned only against the background of eligibility of a service provider based in India to apply for, and to obtain, a licence under a scheme that was originally formulated for export of goods. The evolution of the scheme beyond physical exports is within the purview, and only, of the Director General of Foreign Trade. It is not open to customs authorities to contend that, *sans* the empowerment, powers not existing, the license itself was issued on the basis of fraudulent submissions. In *re Air Travel Bureau Ltd*, the Hon'ble High Court of Delhi, relying upon its own decision in *Interglobe Enterprises Ltd v. Union of India & Ors* [2006 (203) ELT 202 (Del)], held that

'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. v. Union of India & Ors. - (1996) 11 SCC 755 = 1996 (88) ELT 626 (SC) 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. In these circumstances, and as in an identical matter pertaining to themselves, the Tribunal having set aside the recovery of duty and other detrimental consequences, we, too, find no reason to sustain the impugned order. Accordingly, we set aside the impugned order and allow the appeals.

(Pronounced in Court on 11/12/2018)

(S K Mohanty)
Member (Judicial)

(C J Mathew)
Member (Technical)