

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.06.2015

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THE HONOURABLE MR.JUSTICE T.RAJA

W.P.No.16218 of 2015

M/s Gamesa Wind Turbines Pvt. Ltd.,
rep.by its Director and Authorised
Signatory Mr.Kishore Bharani
having its office at
The Futura, B - Block, 8th Floor
No.334, Rajiv Gandhi Salai
Sholinganallur
Chennai 600 119 ... Petitioner

vs.

- 1.The Deputy Commissioner of Customs
Special Valuation Branch (SVB)
O/o Commissioner of Customs (Sea)
Customs House
No.60, Rajaji Salai
Chennai 600 001
- 2.The Commissioner (Appeals-II)
Customs House
No.60, Rajaji Salai
Chennai 600 001 ... Respondents

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, calling for the records of the second respondent culminating in the passing of the order in Appeal No.C.Cus.II No.382/2015 dated 31.03.2015 and quash the same and consequently direct the second respondent to consider the appeal afresh after affording adequate opportunities of hearing including production, marking of documents, in the manner known to law.

For Petitioner :: Mr.P.S.Raman
Senior Counsel for Ms.V.Pushpa

For Respondents :: Mrs.Mallika Srinivasan
Standing Counsel

ORDER

This writ petition has been filed challenging the correctness of the order in Appeal No.C.Cus.II No.382 of 2015 dated 31.03.2015 passed by the second respondent, on the ground that the second respondent has wrongly refused to accept the certified copy of the document, namely, Technology Transfer Agreement (TTA).

2. Mr.P.S.Raman, learned senior counsel for the petitioner submitted that the petitioner is a subsidiary of world-renowned company called M/s Gamesa Corporation having its registered office at Spain in Europe. Its principal business is the manufacture of wind energy generators, setting up of wind farms and offering various such services relating to the business of wind energy. The principal of the petitioner company has diversified into solar energy installations and the primary business of the petitioner company is to promote green energy resources globally. He has also submitted that the principal company has 21 years of experience in the field of wind energy and has 30,000 MW of installed power spread over to 50 countries in the world. Pleading further he argued said that one of the special features of the company is that the installed energy prevents the emission of more than 45 million tonnes of carbon dioxide in the atmosphere and also prevents the use of fossil fuel and saves the usage of approximately 6.4 million tonnes of petroleum. While so, the petitioner company has started its operation in India in the year 2009 and has installed close to 2,000 MW of wind energy generators and is in the process of setting up 10,000 MW of wind farms in India with manufacturing facilities in Tamil Nadu and Gujarat. Since there is a growing thrust towards utilisation of non-conventional energy sources, it is a matter of pride for the company that consistently for the last five years, the petitioner company has been the market leader, as most of the components, equipments and machineries from its parent company as well as from various other sister concerns are being imported. The petitioner company has been strictly adhering to all the provisions of the Customs and other Acts.

3. Adding further, the learned senior counsel submitted that when the petitioner company is a wholly owned subsidiary of M/s Gamesa Technology and Innovations, Spain, they are related in terms of Rule 3(3)(a) of the Customs Valuation Rules, 2007. In this background, the valuation of imports of M/s Gamesa Wind Turbines Private Limited, Chennai from M/s Gamesa Eolica SL, Spain and group companies were taken up for investigation on the assumption that both the importers and the foreign supplier are related, hence, the issue required investigation as to its acceptability of the declared invoice price for the purpose of assessment. Accordingly, as per Board's Circular No.11/2001 dated 23.2.2001, a case was registered in the SVB unit and Circular No.352/2009-SVB dated 17.12.2009 was issued for provisional duty assessment with one percent extra duty deposit. In this regard, a reply was called for to the standard questionnaire and the Indian

company submitted its reply to the questionnaire along with the following documents by their letter dated 19.1.2010:

- (i)Memorandum of Association;
- (ii)Balance sheet for the year 2006-07 & year ending report for December 2008 and 2009;
- (iii)Details of the directors of the Indian company and
- (iv)Company profile.

In the reply to the standard questionnaire, the Indian company has made it clear that it is a subsidiary of M/s Gamesa Eolica SL, Spain and is importing from M/s Gamesa Eolica SL, Spain and other group companies such as Gamesa Trading (Tianjin) Co.Ltd., China, M/s Made Technologies Renovables, SAU, Spain, M/s Valencia Power Convertors S.A., Spain, Gamesa Blade (Tianjin) Co.Ltd., China, M/s Gamesa Wind (Tianjin) Co.Ltd., China, M/s Gamesa Energy Transmission S.A.U., Spain and M/s Gamesa Innovisin Technology, Spain; that the directors of the Indian company are employees of the group companies; that the importers and suppliers are of same family; that the importers are engaged in the local manufacture of suppliers' products; that the imported goods are not supplied to any other person in India by the supplier, etc. This apart, the importers in their letter dated 22.7.2010 submitted the cost construction statements along with local sales invoices for the goods manufactured using the imported components and declared that they are not paying any royalty and commission to the related supplier by showing the gross profit margin as 5%, which does not include the storage and transport cost and the same was not quantified, since it was first year of operation. In addition thereto, a request was made to give personal hearing. Finally the assessing officer, on examination of the documents and statements, has found that the petitioner is related to the foreign suppliers and finally applying Rule 3(3)(a) of the Customs Valuation Rules, 2007, which says where the buyer and seller are related, the transaction value shall be accepted, provided that the examination of circumstances of the sale of the imported goods indicate that the relationship did not influence the price, accordingly, held that no additions to the transaction value are warranted under Rule 10(1)(c) of Customs Valuation Rules, 2007.

4. However, the department has filed appeal against the order-in-original on the ground that no investigation has been carried out examining the circumstances surrounding the sale nor the petitioner was asked to demonstrate the correctness of the declared value, hence, the order of accepting the invoice price as the true transaction is not correct. Accepting the appeal, the second respondent/appellate authority allowed the appeal setting aside the order-in-original on the sole ground that the agreement copy submitted to the department does not lend any scope to the assessing officer to conclude that royalty has no nexus with the imported goods, more particularly, when it can be seen that factually there is a nexus between the royalty and the imported goods and the existence of conditions of sale conclusions have to be drawn based on that.

Besides, when the balance sheet shows the flow back of Rs.18,11,20,000/- in the year 2010-11 to the related supplier in the name of fees for shared services, the petitioner company has not produced any original agreement in this regard. Although the petitioner company has submitted a copy of service agreement dated 1.4.2010, on their failure to produce the original of the same, the unwillingness strengthens the suspicion of tampering within the copy, therefore, the agreement cannot be said to be complete or implementable, on this basis, the appellate authority has wrongly come to the conclusion that the service agreement had ceased to have any value. Such an approach, the learned senior counsel pleaded, is absolutely unfounded. Mr.P.S.Raman, placing on record an affidavit filed by the Managing Director-Technology of Gamesa Corporation Technologica, S.A. Dated 15.5.2015, submitted that when the Managing Director-Technology in Gamesa Innovation and Technology S.L. was one of the two signatories to the Technical Transfer Agreement dated 1.1.2009 relating to Wind Turbine Model AE 59/800 KW on behalf of the aforesaid company, Gamesa Innovation and Technology, S.L. with Gamesa Wind Turbines Private Limited and has also sworn to an affidavit that the certified copy is to be considered as true copy of the original of the aforesaid agreement, as the original agreement is not traceable despite diligent search, a direction may be given to the appellate authority to reconsider the case of the petitioner on the basis of the certified true copy of the original agreement.

5. Concluding his arguments, Mr.P.S.Raman further submitted that when the appellate authority has set aside the order passed by the assessing officer on the sole ground that the petitioner company has not submitted the original agreement, there is no embargo or impediment for accepting the certified true copy of the original when one of the signatories to the original agreement has sworn to an affidavit stating that the original agreement was executed by him as an authorised signatory of Gamesa Innovation and Technology, S.L., Spain. Adding further he submitted that if the matter is remanded back to the appellate authority to reconsider the issue on the basis of the latest affidavit filed by the Managing Director-Technology of Gamesa Corporation Technologica, S.A., accepting the certified true copy of the Technical Transfer Agreement dated 1.1.2009, no prejudice would be caused to anyone.

6. Per contra, Mrs.Mallika Srinivasan, learned standing counsel for the respondents, refuting the submissions made by Mr.P.S.Raman, urging this Court to dismiss the writ petition on the ground that there is an alternative remedy before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), submitted that the second respondent has complied with all the procedures contemplated under Section 128-A of the Customs Act and as per the said section, only in cases where an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund, the petitioner would be given an opportunity of showing cause against the proposed order. Being so, the present case is not an enhancement

of penalty or fine or confiscation of goods of greater value or reduction of refund amount, but it is a case of examination of related party transactions, wherein it is explicitly clear that royalty agreed to be impliedly paid by the sister company to the parent company outside India should be part of the assessable value and when all other aspects of the issue has been remanded back to the original authority, no interference is called for.

7. But this Court is unable to agree with the submissions made by the learned standing counsel for the respondents. The reason is that the second respondent-Commissioner of Customs (Appeals) has already come to a definite conclusion against the petitioner that they have not produced the corresponding annexures without which the agreement cannot be said to be complete or implementable. Further more, while dealing with the balance sheet which shows the flow back of Rs.18,11,20,000/- in the year 2010-11 to the related supplier in the name of fees for shared services, the second respondent-appellate authority has given a finding that the petitioner has not produced any agreement in this regard, on this basis, the assessing officer has been directed to redetermine the value in terms of the Customs Valuation Rules, 2007 for the period commencing from 2010 onwards with a further finding that the declared value cannot be accepted in terms of Rule 3(3)(a) / 3(3)(b) of the Customs Valuation Rules, 2007. In this regard, it must be mentioned that the certified true copy of the Technical Transfer Agreement has been filed before this Court with supporting affidavit sworn to by one of the two signatories to the Technical Transfer Agreement dated 1.1.2009 relating to Wind Turbine Model AE 59 / 800 KW on behalf of Gamesa Innovation and Technology, S.L. with Gamesa Wind Turbines Private Limited stating that the original of the Technical Transfer Agreement executed by him as an authorised signatory of Gamesa Innovation and Technology, S.L, Spain is not traceable despite diligent search, however, as per the established internal practice of the company, as soon as an agreement is executed, the original is scanned and the scanned copy is archived and the attached copy of the aforesaid agreement initialed by him is print out of the original agreement so scanned and archived. Moreover, he is presently employed as the Managing Director-Technology in Gamesa Corporation Tecnologica, S.A., therefore, when one of the signatories to the Technical Transfer Agreement dated 1.1.2009 relating to Wind Turbine Model AE 59 / 800 KW has filed an affidavit along with the certified true copy of the original agreement dated 1.1.2009, this Court finds no embargo or impediment for the second respondent to consider the same as per Section 63 of the Indian Evidence Act, which says that the certified copy of the original, accompanied by a sworn affidavit of one of the signatories to the original Technical Transfer Agreement dated 1.1.2009 relating to Wind Turbine Model AE 59 / 800 KW on behalf of the company, can be taken as secondary evidence. One of the illustrations given under the said section also shows that a photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the

original, therefore, there is no impediment for the second respondent to consider the issue afresh.

8. In view of the above, the impugned order is set aside and the matter is remanded back to the second respondent for fresh consideration of the appeal on merits and also on the basis of the certified true copy of the Technology Transfer Agreement dated 1.1.2009. It is needless to mention that the second respondent will issue notice in advance and, after giving personal hearing to the petitioner, shall pass orders on the appeal afresh in accordance with law, within a period of ten weeks from the date of receipt of a copy of this order. It is open to the petitioner to produce the required documents and thereafter making use of the personal hearing, can represent the matter. The writ petition stands allowed. Consequently, M.P.No.1 of 2015 is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Deputy Commissioner of Customs
Special Valuation Branch (SVB)
O/o Commissioner of Customs (Sea)
Customs House
No.60, Rajaji Salai
Chennai 600 001

2.The Commissioner of Customs (Appeals-II)
Customs House
No.60, Rajaji Salai
Chennai 600 001

+1cc to Mr.Mallika Srinivasan, Advocate, S.R.No.32398
+1cc to M/s.V. Pushpa, Advocate, S.R.No.32233

RV(CO)
EU(16/07/2015)

W.P.No.16218 of 2015