



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.01.2025

PRONOUNCED ON : 19.02.2025

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CORAM:

THE HON'BLE DR.JUSTICE ANITA SUMANTH
AND
THE HON'BLE MR.JUSTICE G.ARUL MURUGAN

W.A.No.683 of 2011
and M.P.No.1 of 2011

M/s.Asianet Satellite Communication Limited,
Now Represented by its Senior Vice President (Legal) &
Company Secretary M.V.Sasikanthan,
2A, 2nd Floor, Leela Infopark Technopark,
Kazhakuttom,
Thiruvananthapuram - 685 581,
Kerala.
Formerly represented by its Managing Director,
C.M.Radhakrishnanan Nair,
and previously situated at
3rd Floor, Karimpanal Arcade, East Fort,
Thiruvananthapuram. ...

Appellant /
Petitioner

versus

- 1.The Customs and Central Excise
Settlement Commission,
Narmada Block, Custom House,
No.60, Rajaji Salai,
Chennai - 600 001.
Represented by its Secretary
- 2.The Director General of Foreign Trade,
Udyog Bhavan, New Delhi.
- 3.The Commissioner of Central Excise & Customs,



Kochi - 1.

4.The Commissioner of Customs,
Airport, Chennai - 600 027.

5.Commissioner of Customs,
Seaport, Chennai - 600 001.

6.The Deputy Commissioner of Customs,
Tuticorin.

7.The Senior Manager,
Federal Bank Limited,
Statute Branch, Statue,
Thiruvananthapuram - 695 001. ...

Respondents /
Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 23.02.2011 in W.P.No.7931 of 2006(T).

For Appellant : Mr.Hari Radhakrishnan

For Respondents : Mr.Rajnish Pathiyil
Senior Panel Counsel - R1, R3 to R6
No Appearance - R2 & R7

J U D G M E N T

[*Judgment* of the Court was made by **G.ARUL MURUGAN, J.**]

The appellant had preferred the intra-court appeal challenging the order dated 23.02.2011 in W.P.No.7931 of 2006(T).

2. The short facts to be noted in the appeal is that M/s.Asianet Satellite Communication Limited [hereinafter referred to as “ASCL”] the appellant herein is a service provider company in television network. The



Export Import Policy [in short “EXIM policy”] for the period 1992-

provided for an Export Promotion Capital Goods Scheme [in short “EPCG Scheme”] under Chapter VI A for the service sector. As per the scheme, the appellant was entitled for either concessional import or total exemption from payment of duty corresponding to the export obligation.

3. On their application, the Director General of Foreign Trade [in short “DGFT”] had issued the EPCG licence on 23.12.1993 in favour of the appellant for import of cable TV equipments valued at Rs.9,79,51,255/- at the concessional rate of duty. The licence fixed an export obligation on the appellant at US\$ 1,24,18,543 to be achieved within a period of 5 years from the date of issuance of the licence and towards the security for due performance of the export obligation, the appellant had furnished a bank guarantee to the tune of Rs.3,90,55,765/-.

4. Even though as per the EPCG licence, the appellant was permitted to import equipments to the value of Rs.9,79,51,255/-, the appellant had actually imported equipments worth only Rs.6,14,39,613/-. Taking that into account, the DGFT by order dated 28.12.1998 had reduced the value of licence from Rs.9,79,51,255/- to Rs.6,14,39,613/- and correspondingly the export obligation also was reduced from US\$



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1,24,18,542 to US\$ 77,89,491. The period of export obligation was also extended by one year. As such, though the period of 5 years as per the EPCG licence expired on 23.12.1998, the export obligation period stood extended by one year from 23.12.1998 to 23.12.1999.

5. There had been at least two extensions for fulfilling the export obligations issued by the DGFT and admittedly the appellant company had not availed the extension by fulfilling the conditions thereunder. As the appellant failed to fulfil the export obligation under the licence, the Director of Revenue Intelligence (DRI) seized the capital goods imported by the appellant under the EPCG Scheme on 29.05.2000. The seizure was challenged before the Kerala High Court in O.P.No.12798 of 2000. As the DGFT proceeded to invoke the bank guarantee, the appellant had filed another petition in O.P. No.15605 of 2000 before the Kerala High Court. The OP was admitted and by order dated 05.06.2000, the invocation of bank guarantee was stayed.

6. Pursuant to which, the Customs Department had issued show cause notices dated 30.06.2000 to the appellant as to why the differential duty for the goods imported should not be realised. As against the show cause notices, the appellant had approached the first respondent Settlement



Commission. In the meantime by order dated 28.11.2000, O.P. No.15605

2000 was disposed of by the Kerala High Court recording that since the issue is pending before the Settlement Commission, no coercive proceedings need be taken but the bank guarantee should be kept alive.

7. The Settlement Commission by admission order dated 26.12.2000 had directed the appellant to pay the admitted duty liability and based on which the appellant had paid a sum of Rs.2,69,45,640/- on 27.02.2001. Before the Commission, the appellant had filed the statement of exports along with Foreign Exchange realised till 31.03.2001 and DGFT had asked the appellant to send consolidated statement as per Appendix 10C on 03.07.2001 which had also been complied by the appellant by sending a reply on 22.08.2001.

8. There had been further communications from the appellant to DGFT which were all relied upon before the Settlement Commission and ultimately the first respondent Settlement Commission by its final order dated 13.08.2002 has fixed the duty liability of the appellant at Rs.4,63,46,499/- and after deducting a sum of Rs.2,69,45,639/- paid in compliance of the admission order, the balance duty payable was Rs.1,94,00,860/-. The Commission had also granted immunity from the



payment of fine, penalty, prosecution and payment of interest and further directed that the seized capital goods shall be released.

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9. The Settlement Commission had come to the conclusion, that the appellant had achieved export obligation only at 14% based on the export performance up to 30.06.1998. The Settlement Commission had rejected the request to consider the earnings up to 22.12.1999 holding that the extension for export obligation period had been repeatedly rejected by DGFT.

10. Challenging the orders of the Settlement Commission, the Customs Department had preferred writ petition before this Court in W.P.No.29008 of 2003 and the appellant had preferred O.P.No.27493 of 2002 before the Kerala High Court with other consequential reliefs. Based on the orders of the Hon'ble Supreme Court dated 13.01.2006 in Transfer Petition (Civil) No.65 of 2005, O.P.No.27493 of 2002 was transferred from the file of the Kerala High Court to the file of this Court and renumbered as W.P.No.7931 of 2006(T).

11. Both the writ petitions were heard together and the writ court, by a common order dated 23.02.2011, had dismissed both the writ petitions



mainly on the ground that the Commission had arrived at the conclusion considering all the available materials and when the request for extension of export obligation had been rejected by the DGFT, the Commission had rightly not gone beyond the same and in such circumstances no mandamus could be issued contrary to the provisions of the statute. Assailing the order in the writ petition, the appellant alone had preferred the above writ appeal.

12. Mr.Hari Radhakrishnan, learned counsel for the appellant admitting that the export obligation as per the EPCG licence could not be complied with fully, mainly contended that though originally the licence was granted only for a period of 5 years which had expired on 23.12.1998, however while reducing the value of import licence and the export obligation, the licence has been extended for a period of one year from 23.12.1998 to 22.12.1999 and the Commission as well as the learned single Judge had not considered the export realised for the extended period by mistakenly observing that the request for extension had been repeatedly rejected, which would be applicable only for the period beyond 22.12.1999.

13. He further contended that when admittedly the appellant was held to be entitled to render the service either in India or abroad as per the EPCG licence in question based on the EXIM policy, the records submitted



by the appellant to establish the payment of customers through the N accounts at least through 3 banks before the Commission along with the bank certificates and auditor certificate had not been taken note of.

14. The learned counsel further relying on the documents including the communications submitted by them to the DGFT submitted that though 14% of the export obligation had been admitted, they are claiming for exemption of duty only up to 30% i.e., for the export obligation achieved up to the extended period till 22.12.1999, so that the corresponding liability could get reduced. He made it clear that they are not making claim beyond this extended period and sought for indulgence of this Court.

15. Per contra, Mr.Rajnish Pathiyil, learned Senior Panel Counsel for the respondents 1, 3 to 6 contended that admittedly when the appellant had not fulfilled the export obligation as per the EPCG licence, they are not entitled for any concessional duty and they are liable to pay duty for the entire imported goods. However since already the exports realised to the extent of 14% had been taken note of and benefit has been granted, the appellant is bound to pay the differential duty as directed by the Commission. He further contended that when DGFT had granted opportunities for extending the period, the appellant had not come forward



to opt the same and when the extension of the licence stood rejected, t

Commission and the writ court had rightly taken note of the same and the findings arrived at are perfectly justified and needs no interference and sought for dismissal of the writ appeal.

16. Heard the rival submissions and perused the materials available on record.

17. The facts are not in dispute that the appellant who is a service provider in TV networks had been issued with EPCG licence by the DGFT based on the EXIM policy 1992-97. As per the EPCG licence, the appellant was entitled to import capital goods valued at Rs.9,79,51,255/- for concessional duty. The appellant was imposed with an export obligation of US\$ 1,24,18,543 to be achieved within a period of 5 years from the date of issuance of the licence i.e. On 23.12.1993.

18. It is also not in dispute that since the appellant only imported goods to a value of Rs.6,14,39,613/-, the DGFT by proceedings dated 28.12.1998 had reduced the value of licence from Rs.9,79,51,255/- to Rs.6,14,39,613/- and also the corresponding export obligation was reduced from US\$ 1,24,18,542 to US\$ 77,89,491. While reducing the value of

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licence, the period for achieving the export obligation was also extended to a further period of one year from 23.12.1998 to 22.12.1999.

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19. The relevant portion of the aforesaid order is extracted hereunder:-

“R.No.18/723/AM'94/KPCG-II/172

Dated 28.12.98

To
M/s.Asianet Satellite,
Communications Ltd.,
Centre Plaza, Azhuthacaud,
Trivandrum - 685 014 (Kerala).

Sub: Reduction in the value of licence No.P/CG/2131490/
Dated 23.12.98

Gentleman,

With reference to your letter dated 11.07.98 on the subject mentioned above, I am directed to convey the approval of KPCG Committee for the following amendments deemed to have been made against the subject licence:-

- i) Reduction in the value of licence from
Rs.9,79,51,255/- to Rs.6,14,39,613/-*
- ii) Reduction in the export obligation
US\$ 1,24,18,542 to US\$ 77,89,491.00*

2. The import licence furnished by you is returned herewith unamended as the same has since expired. You are therefore advised to keep this letter always attached with the import licence and may be furnished at the time of redumption of RG/LUT.

3. The KPCG Committee at its meeting held on 14.12.98, also decided to extend the export obligation period by one year from the date of expiry of original export obligation period (i.e. from 23.12.98 to 22.12.99).”

20. Though the export obligation was reduced and also the time period for achieving the obligation was extended till 22.12.1999, still



admittedly the appellant was not able to fulfil the export obligation contemplated under the EPCG licence. In view of the non-fulfillment of the export obligation, the DRI had seized the imported goods, which resulted in the appellant initiating proceedings before the Kerala High Court. Further as the DGFT sought to invoke the bank guarantee, the appellant had also initiated another writ petition to resist the same.

21. In view of those proceedings, the DGFT had issued show cause notices to the appellant for realising the differential duty towards the non fulfilment of export obligation. Challenging the show cause notices, the appellant had filed application before the first respondent Settlement Commission under Section 127B of the Customs Act, 1962 [hereinafter referred to as “the Act”]. In view of the issues being raised before the Settlement Commission, the proceedings initiated by the appellant before the Kerala High Court came to be closed, by only directing the Department not to take coercive proceedings and also the appellant to keep the bank guarantee alive.

22. Before the Settlement Commission, the appellant had filed documents to establish that they had achieved export obligations up to 30% within the extended period of licence i.e., till 22.12.1999. The appellant had



also sent communications to the DGFT by requesting to provide 1 certificate in respect of the export obligations fulfilled by them. The DGFT by their communication dated 03.07.2001 had asked the appellant to submit a consolidated statement as per Appendix 10C of the correct Hand Book of Procedures along with the certificates in original from the concerned banks for the entire exports effected from 01.04.1993 to 31.03.2001, in order to intimate the export obligation fulfillment to the Commission. The appellant had also replied to the same enclosing the necessary documents as requested.

23. The Commission by their communication dated 19.07.2001 had intimated the appellant stating that even though the appellant claimed to have achieved 50% of the export obligation, the same was verified with the DGFT authorities and by letter dated 15.06.2001 they have communicated that the export obligation fulfilment upto 30.06.1998 is about US\$ 10,89,580 i.e. 14% approximately.

24. The above said letter is extracted hereunder:-

"C.No.VIII/10/24/2001 SC

19.07.2001

To

M/s.Asianet Satellite Communications (p) Ltd.

III Floor, Centre Plaza,

Vazhuthacaud,

Thiruvananthapuram-695 014.

(By Speed Post)

Sirs,

Sub:- Customs - Settlement application filed under Section 127 B of Customs Act, 1962-certain information called for Reg.

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Please refer to the settlement applications filed before this bench and the admission order vide C.No. VIII/10/3-6/2000 SC Dt.26.12.2000 and order C.No. VIII/10/3-6/2000 SC dated 19.7.2001 of Additional Bench for further investigation of the case by the Commissioner (Investigation).

It has been stated in the said applications that 50% of export obligation has been achieved.

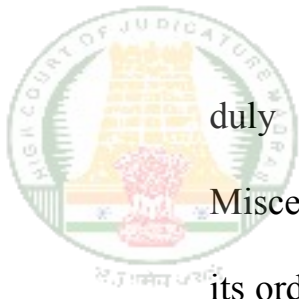
This aspect was verified with DGFT authorities and the DGFT vide their letter dt. 15.6.2001 had stated that the Export obligation fulfillment is about US \$ 1089580 ie., 14% (approximately) as per the export statement available with them (upto 30.6.98)

You are requested to furnish the export invoices, bank realisation certificates invoice wise and any other documentary proof for the fulfillment of export obligation to substantiate your claim in respect of imports through all the four ports of import.

The information may be furnished with in 10 days so as to expedite the settlement of the case.”

25. Pursuant to the several communications sent by the appellant to the DGFT, by proceedings dated 26.04.2002 DGFT had called for the details of earnings from the NRE accounts towards NRI subscriptions for 10 years in the cable network in Kerala. DGFT had further stated that the details furnished by the appellant in respect of some earnings do not specifically indicate whether those are from NRE accounts and as such the appellant was requested to furnish a break up of foreign exchange earnings category-wise as certified by the Chartered Accountant.

26. To be noted, earlier the Commission by their admission order dated 05.03.2001 had directed the appellant to pay a sum of Rs.2,69,45,640/- being the admitted amount towards differential duty which the appellant had



duly complied with. Further when the appellant had taken out t

Miscellaneous Petitions to implead the DGFT as a party, the Commission by its order dated 30.04.2002 had recorded that it was premature at that stage to implead the DGFT and had directed the appellant to approach the DGFT to obtain a certificate or clarification to certify the additional quantity of exports which are being claimed up to December 1999. The Commission had also directed the jurisdictional Commissioner of Customs, Chennai in respect of the letter dated 24.08.2000 certifying the fulfilment of 14% of the export obligation.

27. The appellant by their representation dated 13.05.2002 had furnished details to the DGFT to the effect that US\$ 37,18,916 had been received from the NRI subscription through NRE bank accounts along with the auditor certificate. In spite of further representations, as nothing was forthcoming, the appellant had filed 3 bank certificates from Federal Bank, Indian Overseas Bank and State Bank of Travancore along with Appendix-10C duly signed by the Chartered Accountant for the export earnings upto 22.12.1999 before the Commission. Since no certificate was received from the DGFT, the Commission by their final order dated 13.08.2002 held that the payment in freely convertible currency for service rendered in India or



abroad is covered by the EPCG licence based on the erstwhile para 46C the EXIM policy 1992-97.

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28. The Commission in para 10.2.4 of their order, by placing reliance on the communication of the DGFT dated 05.10.2000, held that the export obligation upto 14% has been achieved by the appellant for the period upto 30.06.1998 and request made by the appellant to consider the earnings up to 22.12.1999 was rejected on the ground that the request for extension had already been rejected. The same is as extracted under:-

“10.2.4. The applicant has stated that the DGFT was still considering their request. However, the matter cannot be kept pending for an unduly long time defeating the very objective of the Settlement mechanism. While the applicant has not submitted any such certificate, DGFT in their letter 20/316/94/EPCG111/1246, dt. 5.10.2000 to DC, Tuticorin has stated that the applicant has achieved 14% (approximately) of the export. This has been reiterated in their letter no.20/316/94/EPCG111/565, dt.15.6.2001 to a specific query from this office. Even though there are letters from DGFT entertaining doubts on whether the activities undertaken by the applicant amounted to exports; this letter dt. 15.6.2001, or the earlier one dt. 5.10.2000 have not been withdrawn by DGFT. The Bench is therefore, constrained to hold the export obligation achievement as 14% only. Even though these letters have computed the export performance up to 30.6.1998 only, as seen from the annexure to Form 10C submitted by the applicant to DGFT in their letter dt. 28.8.2001, the subsequent earnings are in Indian Rupees only, as seen from the break-up figures given by the Advocate in his letter dated 18th July, 2002 and not freely convertible currency. Though the advocate has requested to take the earnings subsequent to 22.12.1999 also when export obligation period expired as they had kept the bank guarantee alive, as required under PN No.3 (RE-01/1997-2002, dt. 31.03.2001), this 10.4 Question (iv):

Interest: Except, Commissioner of Customs & Central Excise, Cochin, the other three respondents have vehemently urged that in terms of EXIM Policy, LUT/Bond and the Hand book of Procedures, the applicant has to bear the interest for the delayed payment of duty. In addition, at the time of final hearing on 5-7-2002, the representative of



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the Commissioner of Customs, Sea Port, Chennai submitted that by virtue of substitution of Para (iv) in Notification No.160/92-Cus. Dated 20-4-92 by clause 109 (1) read with 8th Schedule of the Finance Bill, 2001, the provisions therein have retrospective effect i.e., from 20-4-92 and since the applicant had failed to avail the extension for export under PN 5/99 dated 6-4-99 issued by DGFT, the applicant has to pay interest at the rate of 24% in terms of para 8 of PN 3/(RE 01)/1997-2002 dated 31-3-2001 issued by DGFT."

29. From the above, it is clear that the Commission had only taken note of the communication of the DGFT dated 05.10.2000 in coming to the conclusion that the appellant had achieved 14% of export obligation upto 30.06.1998. Admittedly, when the period of licence has been extended upto 22.12.1999, the export earnings achieved upto this period had not been taken note of.

30. When the DGFT had particularly sought for the details of export earnings upto the period 22.12.1999 along with the bank certificates and Appendix 10C attested by the Chartered Accountant and the same has also been furnished by the appellant with all particulars, there had been no further development and when these details were also filed before the Commission, the same had not been considered by the Commission only on the ground that the request for extension made by the appellant had been rejected. Before this Court, the appellant had filed a consolidated statement



of exports and the receipts in foreign currency for the period from 01.04.1993 to 20.12.1999.

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31. On perusal it could be seen that it is only a self serving document prepared by the appellant and we are not inclined to rely on this self serving document to appreciate the contentions made by the appellant. However, copies of 3 Bank certificates all dated 25.09.2000 issued by Federal Bank Limited, Indian Overseas Bank and State Bank of Travancore, pertaining to the remittances received for the period upto 22.12.1999 has been filed. The certificate issued by the State Bank of Travancore precisely states that the remittances had been received from various NRE accounts into the account of the appellant. But the certificate of Indian Overseas Bank states that they have collected and credited Rs.1,63,84,165/- from various NRE customers for the period from 03.06.1999 to 20.12.1999 which is equivalent to US\$ 3,56,170. The certificate issued by Federal Bank also certifies that for the period upto 20.12.1999 they have credited an amount of Rs.4,21,550/- which is approximately equivalent to US\$ 10,036.90.

32. From the above certificates, the information is not clear and specific as to whether the remittances have been made from NRE accounts to the appellant account to consider it as export revenue, as one certificate



simply refers that it has been received from NRE customers. However t

Appendix 10C certified by the Chartered Account in respect of the export obligation achieved till 20.12.1999 has also been filed.

33. When admittedly the EPCG licence has been extended for the period upto 20.12.1999 and also the appellant had received remittances from the NRE customers for cable subscriptions and when the export achieved upto 1998 had alone been taken into account, necessarily the remittances received by the appellant towards export obligation which according to the appellant has been achieved 30% has to be considered, as their obligation towards the payment of duty will proportionately reduce.

34. Though normally we would be reluctant to remand the matter at this considerable length of time, still, since from the certificates issued by Banks filed as indicated above, at least in one of the certificates issued by the Bank it is clearly stated that the remittances had been made by the NRE customers in to the appellant account, it would only be appropriate in the interest of justice to remand the matter back to the first respondent Settlement Commission to enable the appellant to file the bank statements which would establish the remittances received from the NRE accounts to the appellant account for the cable subscription towards realisation of the export obligation.



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35. This would require filing of the bank statements alone which has to be looked into and verified to arrive at the conclusion regarding the actual remittance received by the appellant in these 3 banks as certified by the Bank and the Appendix 10C. As both the Commission as well as the writ court had not considered this aspect and had simply concluded the issue holding that there has not been any extension after 1998 which is factually incorrect, the portion of the order insofar as fixing the export obligation to have been achieved at 14% alone is set aside and the matter is remanded back to the file of the first respondent Settlement Commission only for the limited purpose of ascertaining the actual export obligation achieved by the appellant by the remittances received by them from the NRE accounts towards cable subscription charges in the 3 banks mentioned supra.

36. Based on the ultimate decision to be arrived at by the Commission, fixing the export obligation achieved, the proportionate duty for the unfulfilled export obligation shall be paid by the appellant as directed by the Commission, failing which the DGFT will be entitled to realise the bank guarantee. The bank guarantee shall be kept alive till the proceedings are concluded before the first respondent Settlement Commission and ultimately acted upon. In view of the pendency of the issues for a

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considerable length of time, the entire exercise shall be completed within period of 3 months from the date of receipt of copy of this order.

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37. With these directions, the Writ Appeal stands *partly allowed*.

There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

[A.S.M.J.] [G.A.M.J.]
19.02.2025

Speaking order

Index : Yes

Neutral Citation : Yes

sri



To

- 1.The Customs and Central Excise Settlement Commission,
Narmada Block, Custom House,
No.60, Rajaji Salai,
Chennai - 600 001.
Represented by its Secretary
- 2.The Director General of Foreign Trade,
Udyog Bhavan, New Delhi.
- 3.The Commissioner of Central Excise & Customs,
Kochi - 1.
- 4.The Commissioner of Customs,
Airport, Chennai - 600 027.
- 5.Commissioner of Customs,
Seaport, Chennai - 600 001.
- 6.The Deputy Commissioner of Customs,
Tuticorin.
- 7.The Senior Manager,
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W.A.No.683 of



Dr. ANITA SUMANTH,
AND
G.ARUL MURUGAN, J.

sri

Pre-Delivery Judgment made in
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and M.P.No.1 of 2011

19.02.2025