



Interpretation of the term ‘Group Company’ under the Foreign Trade Policy

Tax Alert
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Tata Teleservices Limited (‘TTSL’) and Tata Teleservices (Maharashtra) Limited (‘TTML’) vs. Union of India & Others¹ – Bombay High Court

In writ petitions filed by Economic Laws Practice for the Petitioner-Companies before the Hon’ble Bombay High Court, the issue was the eligibility of the Petitioner-Companies to utilise the exports of Group Companies to fulfill part of its Export Obligation (‘EO’) under Export promotion Capital Goods Scheme (‘EPCG Scheme’) as envisaged under the Foreign Trade Policy (‘FTP’).

Adopting a narrow interpretation of the phrase “Group Company” as defined under Para 9.28 of the FTP, the said utilization was rejected by the Director General of Foreign Trade (‘DGFT’). Consequently, Writ Petitions were filed in the High Court of Bombay by the Petitioner-Companies challenging the decisions taken by DGFT and its officers, which purports to deny the Petitioner-Companies the facilitation / benefit statutorily secured under the EPCG Scheme of the FTP.

FACTS

1. The Petitioner-Companies are engaged in the business of providing telecommunication services and are the holders of licences under the EPCG Scheme. The Petitioner-Companies have made imports of capital goods under its EPCG licences and has availed the benefit of the concessional rate of duty.
2. Per a specific provision introduced in the FTP with effect from 28-1-2004, it became permissible to satisfy one’s export obligation by using the exports of a Group Company. The relevant provision in this regard is reproduced below:

“5.4 Alternatively, export obligation may also be fulfilled by exports of other good(s) manufactured or service(s) provided by the same firm/company or group company/ managed hotel which has the EPCG licence.”

3. Post 2008-09, this facility was restricted, and a maximum of 50% of the export obligation could be fulfilled by exports of a group company.
4. During the period in question, the FTP provided a definition of the term “Group Companies”, which reads 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 percent, 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. As per the above provision, the following factors are required to be satisfied to constitute Group Companies eligible for the benefits of sharing of exports under EPCG:
 - (i) 26% voting rights, whether **direct or indirect** or right to appoint more than 50% of the board of directors (BoD); **and**
 - (ii) Existence at least 2 years prior to date of application under any FTP schemes.
6. Given the facilitation as provided under paragraph 5.4 of the FTP read with paragraph 9.28 of the FTP, TTSL approached the DGFT in 2009-10, requesting that the excess exports of their “Group Company”, Tinsplate Company of India Limited (‘TCIL’) be considered for the purposes of calculating the EO required to be fulfilled. Similarly, TTML had approached the DGFT, requesting that the excess exports of their “Group Company”, M/s Tata Consultancy Services Limited (‘TCS’) be considered for the purposes of calculating the EO.
7. TTML, TTSL, TCS and TCIL have common holding company viz Tata Sons Limited. It was submitted that (1) TTSL and TCIL, and (2) TTML and TCS, were Group Companies as they have direct or indirect holding of more than 26% in other enterprise.
8. However, the DGFT rejected the utilization of exports of the Group Companies by the Petitioner-Companies without giving any

¹ Writ Petition No.233 and 237 of 2013

reasons, by simply stating that the Petitioner-Companies and TCIL/TCS were not “Group Companies” under paragraph 9.28 of the FTP/ and inter-alia held that only a linear enterprise (Tata Sons in the present case) which directly or indirectly is in a position to exercise 26% or more of voting rights in the Petitioner-Companies, can be called a “Group Company”, in terms of the definition in FTP, and not otherwise

9. Owing to lack of alternate efficacious remedy, the Petitioner-Companies filed writ petitions before the Bombay High Court, challenging the minutes of PIC by which their applications were rejected, and utilization of exports of Group Companies towards fulfillment of EO under the EPCG Scheme was sought to be denied.

JUDGEMENT

The Hon’ble Court disposed off the writ petition, and *inter-alia* held that the term “Group Company” as defined contemplates a group of two or more companies, who are holding 26% or more in other enterprises, and all such companies will form a group. Therefore (1) TTSL and TCIL, and (2) TTML and TC, having common holding company, Tata Sons Limited, who holds more than 26% in each of the enterprises, will therefore be considered as Group Company

(The detailed orders are pending, and the above points are based on the dictation of the bench)

ELP COMMENTS

This judgment of the Bombay High Court is the first definitive pronouncement on the issue of interpretation of the phrase “Group Company” as defined under the FTP and eligibility of utilization of exports of “Group Company” for the purpose of fulfillment of EO by an EPCG license holder.

By way of this judgment the phrase “Group Company” has been given a wide interpretation so as to include any company within the “group” so long as the company holds 26% or more voting rights, whether directly or indirectly.

The decision of the Bombay High Court is also in consonance with the intent and purpose of the EPCG scheme which is to accelerate exports from India. Accordingly, every interpretation of the provisions of the FTP ought to be made in a manner to subserve and promote the objective of removing the difficulties of the exporter, more so with an intention of granting facilitation and flexibility in relation to the fulfilment of EO.

Based on the aforesaid judgement, the companies having common holding companies should analyze the availability of various benefits such as Served From India Scheme, EPCG (past periods) etc

ELP’S ROLE

ELP had been involved in the matter from the beginning. The team devised the strategy to be adopted, drafted petition and pleadings, briefed the senior counsel and appeared before the Hon’ble Bombay High Court.

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