

(2014) 10 MAD CK 0127

In the Madras High Court

Case No : Writ Petition Nos. 23259 and 31308 of 2012 and MP. No. 1 of 2012

Citilights Properties Pvt. Ltd.

APPELLANT

Vs

The Commissioner of Central Excise

RESPONDENT

Date of Decision : 08-10-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 111, 112, 112(b), 58

Citation : (2015) 316 ELT 427

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Judgement

V. Ramasubramanian, J.—The company by name Citilights Properties Private Limited entered into an agreement with the owners of a vast extent of land located at No. 23, Old Mahabalipuram Road, Navalur Post for the development of an information technology park complex, in the year 2005. The project was launched in July 2005 and was supposed to have a total built up area of 7,91,024 sq.ft, out of which, the salable area was 6,03,045 sq.ft. As per the development agreement, the petitioner was entitled to 74% of the undivided share of the land and they were obliged to develop the park and hand over 26% of the constructed area to the land owners.

2. On 30.9.2005, the petitioner entered into an agreement with a company by name Pacifica Infrastructure Company Private Limited, for the development of the software technology park and the transfer of 74% of the share of the petitioner to the said company, on the understanding that the transferee company had to fund the development of the park. Thereafter, the petitioner made an application in November 2005 to the Chairman of the Inter Ministerial Standing Committee through the office of the Director of Software Technology Park of India, Chennai, for setting up an information technology park under the STP Scheme.

3. The petitioner also entered into two agreements dated 7.12.2005 and

25.1.2006 with Pacifica Infrastructure Company Private Limited and another company by name E-lights Technopark Private Limited for the effective funding and implementation of the project.

4. On 17.10.2006, the Inter Ministerial Standing Committee granted in-principle approval for the setting up of the infrastructure facility under the STP Scheme in "Freedom IT Campus". The Government of India, in turn, granted permission by a communication dated 22.10.2006 in terms of the Foreign Trade Policy, 2004-2009. As per the letter of permission so granted, the petitioner was entitled to import capital goods worth Rs.2500 lakhs, by availing the benefits of Notification No. 153/93 dated 13.8.1993. But, the goods and services were to be used for the purpose of export of software and IT services by the STP Units located within the infrastructure facility at the park. The permission for import of items was valid for a period of two years from the date of issue of the letter of permission.

5. On 31.1.2007, the petitioner entered into an agreement with the Software Technology Park of India, binding itself to the obligations and conditions of the letter of permission and a green card was issued to the petitioner on 31.1.2007. In pursuance of the above, the premises was declared as a private bonded warehouse by the Department of Central Excise. Therefore, the petitioner caused import of capital goods availing the benefit of the exemption Notification.

6. Thereafter, the petitioner handed over Block-1 of the IT Park to the two transferee companies such as E-lights Technopark Private Limited and Pacifica Infrastructure Company Private Limited in March 2008. After two years, the special purpose vehicle - one of the transferee companies namely E-lights Technopark Private Limited applied on 30.3.2010 to the Software Technology Parks of India for approval of name transfer and green card to itself. But, the Preventive Unit of the Commissionerate of Central Excise initiated an investigation into the affairs of the petitioner. On 22.10.2010, the Officers of the Investigation Unit detained the capital goods contained in the premises. Thereafter, the petitioner was called upon to produce all documents. The Officers of the petitioner were also summoned and a statement was recorded on 11.2.2011.

7. After completion of the investigation, the Commissioner of Central Excise, Chennai-34 issued a show cause notice bearing No. 18/2011 dated 18.4.2011, alleging various irregularities and calling upon the petitioner as well as the special purpose vehicle and the other transferee company to show cause as to why the benefit of the exemption Notification should not be denied to the goods imported and cleared and why the capital goods imported and sold should not be confiscated, apart from the levy of penalty.

8. Challenging the said show cause notice, the petitioner filed the first writ petition in W.P. No.23259 of 2012. On 27.8.2012, this Court ordered notice and also granted an interim stay of further proceedings. The order of interim stay

continues till date.

9. During the pendency of the above writ petition, the application made by the petitioner on 10.6.2010 to the Software Technology Parks of India and the application made by the special purpose vehicle, which purchased the ISP facility for renewal and extension of the letter of permission for the period of two years were forwarded to the Inter Ministerial Standing Committee. Originally, the applications were not entertained by the Inter Ministerial Standing Committee. But, again the applications were forwarded by the Software Technology Parks of India on 14.3.2012, indicating that the licence for the facility had expired. Therefore, the case was taken up by Inter Ministerial Standing Committee in its meeting held on 5.7.2012. In the meeting, the Committee approved the letter of permission for a further period of four years from its expiry i.e. 21.12.2008. The minutes of the meeting were also communicated by a letter dated 24.7.2012 of the Department of Electronics and Information Technology of the Ministry of Communications and Information Technology. Upon receipt of a copy of the minutes of the meeting, the petitioner submitted a supporting document to the Director of Software Technology Parks of India. But thereafter nothing had happened.

10. Therefore, the petitioner has come up with the second writ petition namely W.P. No.31308 of 2012 seeking the issue of a Writ of Mandamus to direct the Software Technology Parks of India to give effect to the orders of the second respondent dated 24.7.2012 in accordance with the decision taken by the Inter Ministerial Standing Committee in its meeting held on 5.7.2012. In this writ petition, notice was ordered on 22.11.2012. Thereafter, both the writ petitions were clubbed together.

11. I have heard Mr.B.Kumar, learned Senior Counsel appearing for the writ petitioners, Mr.T.Chandrasekaran, learned Standing Counsel for the Department of Central Excise, Mrs.R.Maheswari, learned Senior Central Government Standing Counsel for the Software Technology Parks of India and Mr.G.Balasubramaniam, learned counsel for the impleaded party, which is one of the transferee companies.

12. At the outset, it should be pointed out that what is challenged in the first writ petition is only a show cause notice issued by the Competent Authority for the withdrawal of benefit of two exemption Notifications and for the confiscation of the capital goods imported by the petitioner under Section 111(O) of the Customs Act, 1962.

13. The jurisdiction of this Court to interfere at the stage of show cause notice is extremely limited and circumscribed. Unless the show cause notice is found to be without jurisdiction, this Court shall not interfere with a show cause notice under Article 226.

14. Keeping the above fundamental principle in mind, if we have a look at the pleadings, it is clear that the show cause notice is not actually challenged on the

ground of want of jurisdiction. The petitioner attempts to project the show cause notice as one that has been issued without jurisdiction, by contending that once the transfer of the letter of permission is permitted by the Software Technology Parks of India, the Commissioner of Central Excise would not have jurisdiction to proceed against the petitioner.

15. But, the above contention is fundamentally flawed. A look at the impugned show cause notice shows that the same had not been issued only as against the petitioner herein. The show cause notice has been issued also against both the transferees namely E-lights Technopark Private Limited and Pacifica Infrastructure Company Private Limited. The show cause notice fixes responsibility not only upon the petitioner, but also seeks to levy penalty upon the transferees in terms of Section 112(b) of the Customs Act, 1962. The transferees have no qualms about giving a reply to the show cause notice and facing an adjudication on merits and in accordance with law. Therefore, I do not think that merely because a transfer of the letter of permission is permitted, the Commissioner of Central Excise forfeited his jurisdiction to initiate proceedings under Sections 111 and 112 of the Customs Act, 1962.

16. Admittedly, the petitioner is only an infrastructure service provider. The very proposal presented by the petitioner in their letter dated 26.11.2005 was to develop, operate and maintain an information technology park. But, even before the submission of the said proposal, the petitioner entered into an agreement with Pacifica Infrastructure Company Private Limited on 30.9.2005 itself for the transfer of their 74% undivided interest in the land and building. Subsequently, the petitioner also entered into one more agreement on 7.12.2005 with Pacific Infrastructure Company Private Limited and another agreement dated 25.1.2006 with E-lights Technopark Private Limited. I do not know how, after entering into an agreement for the transfer of the property rights, the petitioner could have submitted a proposal.

17. The first letter of approval of the Government for setting up of infrastructure facility for STP Units under the STP Scheme was conveyed by the Government only on 22.12.2006. It is under this approval that the petitioner was permitted to import goods valued at Rs.2,500 lakhs as per the Customs Notification dated 13.8.1993. By this time, the petitioner had already transferred their rights in favour of two companies. There is nothing on record to show that the petitioner informed the Government of India about the transfer to the two companies. In fact, the letter of approval requires the petitioner to furnish progress reports for the implementation of the project on a quarterly basis. This condition could have never been complied with by the petitioner in view of the agreements that they had already entered into with the transferees.

18. As rightly pointed out by the respondents, what was granted to the petitioner was a licence to have a private bonded warehouse under Section 58 of the Customs Act, 1962. That is why the general bond in Form B-17 was actually executed by the petitioner. This is a general bond required to be executed by

100% export oriented units. If the petitioner had already transferred their rights as well as obligations to third parties, the general bond executed by the petitioner on 29.12.2006 was actually meaningless.

19. The licence bearing licence No. 01/2007 issued to the petitioner by the Assistant Commissioner of Central Excise on 16.1.2007 makes it clear that the licence was not transferable to any person and that it will be in force for a period upto 21.12.2008. The Annexure to the said licence in licence No. 01/2007 contained several conditions, one of which was that the licensee should not even suspend or discontinue the manufacturing process or other operations. The Assistant Commissioner of Central Excise was also conferred with the power under Clause 17 of the Annexure to the licence, to take action for cancellation of sanction, in the event of a breach of the terms and conditions.

20. The In-Bond Manufacturing Sanction Order dated 16.1.2007 also permitted only the petitioner to make use of the imported capital goods, etc., at the private bonded warehouse. There were several obligations incorporated therein that could have been complied with only by the petitioner.

21. Relying upon Paragraph 6.15 of Foreign Trade Policy, 2004-2009, it is contended by Mr.B.Kumar, learned Senior Counsel appearing for the petitioners that in case an export oriented unit is unable to utilize the goods and services imported or procured from the domestic tariff area, it can be transferred to another export oriented unit. Therefore, it is his contention that transfer, per se, was not prohibited by the Foreign Trade Policy. He also drew my attention to Paragraph 6.18 of the Foreign Trade Policy wherein the export oriented units were given the option to go out of the scheme with the approval of the Development Commissioner.

22. But, I do not know as to why the petitioner cannot raise all these objections in response to the impugned show cause notice, if transfer is permitted. If the liability to levy penalty would arise only as against the transferees, the petitioner can always take up this issue in reply to the show cause notice.

23. As a matter of fact, the impugned show cause notice has three consequences for the noticees. They are (i) declaration that the imported goods are not entitled to the exemption Notification; (ii) confiscation; and (iii) levy of penalty. If the petitioner had already transferred the capital goods to the special purpose vehicle and the other company, the declaration as well as the confiscation would naturally fall upon the goods, in respect of which, the petitioner has ceased to be the owner. Therefore, the petitioner will be left with only one issue namely levy of penalty. The petitioner can always give a reply to the show cause notice and point out that they are not responsible.

24. It is relevant to point out that disputes have arisen between the petitioner and the transferee companies and they have already invoked arbitration proceedings. Therefore, even if the first respondent passes an order holding the petitioner or the transferees jointly or severally liable, the petitioner can always

seek appropriate remedies against the transferees in the said arbitration proceedings.

25. It is one thing to say that the impugned show cause notice is not maintainable against the transferor as well as the transferees. It is another thing to say that the show cause notice can be maintained only as against the transferees. If the case of the petitioner is that the show cause notice is maintainable only as against the transferees, the same is not an issue of jurisdiction that would enable this Court to entertain the first writ petition.

26. Realising this difficulty, the petitioner has taken an additional ground namely that without the approval of the Director of the Software Technology Parks of India, a show cause notice cannot be issued. To buttress this contention, the petitioner relies upon circular No. 12/2008 dated 24.7.2008.

27. A careful look at circular No. 12/2008 - Customs dated 24.7.2008 would show that several changes and amendments were made to the Foreign Trade Policy, 2004-2009 and Hand Book of Procedure relating to Export Oriented Units under two schemes known as Export Oriented Undertaking Scheme and Gem and Jewellery Export Promotions Scheme. The procedural changes incorporated to the Hand Book of Procedure and the Foreign Trade Policy were sought to be explained by the said circular. Paragraph 6 of the said circular shows that there was a previous Board's circular in Circular No. 21/95 dated 10.3.1995, under which, a demand of duty can be confirmed only after a definite conclusion regarding non fulfillment of export obligations was arrived at by the Development Commissioner.

28. But, the said circular dated 10.3.1995 was obviously causing inordinate delay in effecting duty recovery. Therefore, the issue was reviewed in consultation with the Department of Commerce. As per the said decision, the Development Commissioner was to take a final decision after the block of five years, with respect to fulfillment of export obligation. But, the decision is to be taken as far as possible within six months, but positively within one year. Paragraph 6 of the circular dated 24.7.2008 requires reproduction and hence, it is reproduced as follows :

"In terms of Board's circular No. 21/95 - Cus dated 10.3.1995 (F.No.307/2/91-FTT), demand of duty can be confirmed only after a definite conclusion regarding non fulfillment of export obligation is arrived at by the Development Commissioner.

The requirement of a definite conclusion by the Development Commissioner before Customs/Central Excise Authorities can initiate action, at times, causes inordinate delay in effecting duty recovery from a unit in the event of non fulfillment of export obligation as no action can be initiated till a conclusion is arrived at by the Development Commissioner. C & AG in Chapter I of Audit Report No. 7 of 2007 (Indirect Taxes - Performance Audit) on "Hundred percent Export Oriented Units" has observed adversely on the delay in recovery of duty

from the defaulting EOUs.

This issue has been reviewed in consultation with the Department of Commerce. It has been decided that after the block of 5 years, final decision would be taken by the Development Commissioner with respect to fulfillment of export obligation as far as possible within 6 months but positively within one year. An amendment to this effect has also been made in Para 3(ii) of Part (A) of Appendix 14-I-G to HBP.

Thus, duty, if any, may be demanded in the event of default in achieving NFE from a unit after a block of 5 years in accordance with the conclusion arrived at by the Development Commissioner/Director, STPI within a period of six months after the expiry of 5 years block period. In the cases where no such final decision is received from the Development Commissioner/Director, STPI within a period of six months, the matter may be taken up immediately by the jurisdictional Customs/Central Excise Authorities with these authorities so that a decision regarding status of achievement of positive NFE is not delayed beyond one year and action could be initiated for recovery of duty from the defaulting units without any further delay.

The Board's circular No. 21/95 - Cus dated 10.3.1995 stands modified to the above extent."

29. A careful look at the above circular would show that the circular deals with an entirely different contingency. Whenever a unit fails to achieve the target fixed (non fulfillment of export obligation), after a block of five years, the Development Commissioner would take a final decision within a period of six months after the expiry of five years. Based upon the said final decision, the Customs/Central Excise Authorities have to take action for recovery of duty.

30. But, the said circular has no application to cases of this nature. In this case, we are not concerned with the shortfall in the achievement of target. We are concerned with serious allegations made in the show cause notice. Therefore, what applies to a genuine exporter under the circular bearing No. 12/2008, cannot be used as a shield by the petitioner. Hence, the first writ petition challenging the show case notice is liable to be dismissed.

31. As a matter of fact, there is one more reason as to why the first writ petition deserves to be dismissed. The show cause notice impugned therein is dated 18.4.2011. The petitioner kept on dillydallying for a period of more than a year seeking time to submit objections. It is only in August 2012, after a gap of about 16 months of dillydallying, that the petitioner came up with the first writ petition. Therefore, there are no bona fides in the challenge made by the petitioner to the show cause notice.

32. The issue can also be looked at from a different angle. The first respondent issued the impugned show cause notice to the petitioner as well as the transferees. In the event of the first respondent fixing the responsibility jointly

and severally upon all of them, the petitioner can always proceed against the transferees in accordance with the terms and conditions of the contract that they have with the transferees. Since the exemption was granted only to the petitioner on condition that the petitioner fulfills an export obligation, the petitioner cannot turn around and say that the transferees are the beneficiaries of the exemption and that the responsibility to fulfill export obligation should be fixed only upon the transferees. Therefore, the first writ petition deserves to be dismissed.

33. Accordingly, W.P. No.23259 of 2012 is dismissed. No costs. Consequently, the above MP is also dismissed.

34. However, if an order of confiscation and imposition of penalty is passed against the petitioner, it is always open to them to proceed against the transferees, subject to the defenses available to the transferees, in a manner known to law. The mutual rights and obligations between the petitioner and their transferees can be worked out in those collateral proceedings, after the Commissioner of Central Excise passes an order pursuant to the impugned show cause notice.

35. Coming to the second writ petition, it is seen that the prayer therein is for a Mandamus to direct the first respondent to act as per the decision taken by the Inter Ministerial Standing Committee. But unfortunately, the fact that the petitioner had transferred their property rights within two months prior to the date of filing of an application for approval, does not appear to have been taken note of by the Inter Ministerial Standing Committee. Unless it is shown that all the facts that have now come to light, were before the Inter Ministerial Standing Committee and that the Inter Ministerial Standing Committee took a conscious decision on the basis of those facts, I would not issue a Mandamus.

36. Moreover, as rightly pointed out by the respondents, the original letter of permission expired on 21.12.2008. An application for extension was made only after two years of the expiry. Therefore, I do not know how far the decision of the Inter Ministerial Standing Committee was valid and enforceable.

37. In view of the above, the second writ petition also deserves to be dismissed. Accordingly, W.P. No.31308 of 2012 is also dismissed. No costs.