

(2017) 02 MAD CK 0016
In the Madras High Court
Case No : 13538 of 2015

M/s. Jewels Magnum

APPELLANT

Vs

The Development Commissioner

RESPONDENT

Date of Decision : 24-02-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs
[Foreign Trade \(Development and Regulation\) Act, 1992](#), [Section 14](#), [Section 11](#)

Citation : (2017) 02 MAD CK 0016

Hon'ble Judges : B. Rajendran

Bench : SINGLE BENCH

Advocate : B. Rajendran

Judgement

1. The petitioner calls in question the legality and correctness of the order dated 20.04.2015 passed by the respondent, in and by which, the

respondent imposed penalty of Rs.61.76 Crores under Section 11 (2) of the Foreign Trade (Development & Regulation) Act, 1992 on the

petitioner for having violated the conditions of the Letter of Approval.

2. The case of the petitioner is that the petitioner firm is a partnership firm engaged in the business of import and export of gold jewellery and other

precious stones since 2006. For the purpose of importing and exporting such gold jewellery, the petitioner firm has obtained a Letter of Approval

(LoA) on 10.06.2008 issued by the Assistant Development Commissioner for manufacture of ""gold bangles and pendants"" at the petitioner's firm

situate inside the Madras Export Processing Zone (MEPZ), Special Economic Zone, Tambaram, Chennai. On the basis of such letter of approval,

the petitioner firm set up a manufacturing facility for gold jewellery and articles

and commenced export of gold medallions. According to the petitioner, gold medallions are nothing but pendants. In other words, the petitioner firm manufactured "gold medallions" which are technically called as pendants. Both the medallions and pendants are one and the same and they were used to hang on the neck. The respondent also permitted the petitioner to continue to export the gold articles inasmuch as all the pendants are not medallions but all medallions are pendants. Further, before export of the goods, they were physically examined by the customs authorities with respect to description, quantity, weight etc., and they have not raised any objection. In fact, the petitioner firm had successfully exported the gold jewel during the financial year 2008-2009, 2009-2010, 2010-2011 and 2011-2012 and during this period, there was no complaint or objection raised by the respondent with respect to violation of the conditions of LoA. However, on and from 31.03.2012, since the Government withdraw certain tax benefits to SEZ, the petitioner did not continue the business and the petitioner unit was lying idle. Subsequently, on 24.04.2013, the petitioner unit was closed and a letter to that effect was also submitted to the appropriate authority. The appropriate authority also granted permission on 28.06.2013 for closure of the unit and to exit the SEZ after paying all customs duty/VAT for durable and taxable items such as machineries and raw materials. The petitioner firm also, before exit, paid Rs.1,38,170/- towards payment of VAT for capital goods and raw materials. According to the petitioner, during the course of their business, the petitioner unit was also awarded "Certificate of Appreciation" by the respondent for achieving highest turnover in 2010-2011 in gem & jewellery sector.

3. According to the petitioner, while the facts are so as stated above, on 21.02.2014, the respondent issued a cause to clarify as to why action should not be taken against them for manufacture and export of certain products without their approval. On 07.03.2014, the petitioner firm sent their detailed reply denying such averments. Subsequently, a show cause notice dated 29.04.2014 was issued to the petitioner invoking Section 14 of the Foreign Trade (Development and Regulation) Act, 1982 (hereinafter called as the Act) contending that the petitioner had violated the conditions of LoA by exporting "Gold Medallions" as against the approved items

of "Gold Bangles and Pendants". The petitioner submitted their reply on 31.05.2014 denying having violated the conditions of LoA. Thereafter, the respondent issued a Corrigendum dated 14.08.2014 to the earlier notice by invoking Section 14 of the Act revising the averments contained in para No.7 of the earlier notice and replaced them with new averments. However, even before the petitioner could submit their reply to the corrigendum, the respondent passed an order dated 03.09.2014 imposing penalty. Challenging the order dated 03.09.2014, the petitioner filed WP No. 25765 of 2014 before this Court. By an order dated 11.02.2015, this Court set aside the order dated 03.09.2014 of the respondent on the ground of violation of principles of natural justice and remanded the matter back to the respondent for fresh consideration after affording an opportunity of hearing to the petitioner to submit a reply to the corrigendum dated 14.08.2014. Pursuant to such direction, the respondent called upon the petitioner to appear for an enquiry on 24.03.2015.

On that date, the petitioner appeared before the respondent and submitted a written submission contending that the respondent is not justified in imposing the penalty without following the Rules prescribed. During the personal hearing, it was specifically contended that the functional utility of medallion and pendant are one and the same and therefore the predominant and primary usage of the utility has to be taken into account apart from understanding the definitions given to those articles in the common parlance. Further, on that date, the petitioner also submitted affidavits obtained from goldsmith, jewellery dealer and Madras Jewellers & Diamond Merchants Association submitted on 26.03.2015 to prove that both pendant and medallion are one and the same. Notwithstanding such submissions, the respondent has passed the order dated 20.04.2015 imposing penalty on the petitioner firm, which is impugned in this writ petition.

4. The learned counsel for the petitioner would vehemently contend that as per Rule 54 (2) of the Special Economic Zone Rules, 2000, the respondent is bound to render a specific finding that there had been a violation of the conditions of LoA by the petitioner company. According to the learned counsel for the petitioner, in the present case, no such finding or conclusion has been arrived at by the respondent and it vitiates the impugned order imposing penalty. Such a conclusion has to be arrived after

affording an opportunity of hearing and thereafter, appropriate action has to be initiated. Even otherwise, penalty cannot be imposed directly unless it is specifically pointed that there is any violation of LoA or any other Rules in force. Even as per Section 11 (2) of the Act, it only provides for imposition of penalty when there is a violation of the Act and Rules in force. In the absence of any finding relating to such violation, the impugned order of the respondent imposing penalty cannot be legally sustained.

5. The learned counsel for the petitioner, by quoting Rule 54 (2) of the SEZ Rules, 2006 would contend that if the Unit has not achieved positive Net Foreign Exchange Earning or failed to abide by any conditions of the Letter of Approval or Bond-cum-Legal Undertaking, then, action can be initiated under the provisions of the Act. In this case, the petitioner has achieved their entire obligation for the entire period from 2009-2010 to 2011-2012. In fact, the petitioner firm had duly expedited and achieved the entire obligations as per the foreign trade policy including NFE earnings. Moreover, the value addition prescribed in Foreign Trade Policy is only 1.5% but the petitioner firm achieved value addition of 7% which was more than 400% of the prescribed value addition. Therefore, according to the learned counsel for the petitioner, the first limb of the condition imposed in Rule 54 (2) of the Rules is not attracted against the petitioner. As regards the next limb of the condition in Rule 54 (2), according to the respondent, the petitioner has committed violation of the conditions prescribed in the LoA inasmuch as the petitioner was granted permission for manufacture and export of "Gold Articles and Pendants" whereas, they have manufactured and exported articles in the nature of "Gold Medallions". The learned counsel for the petitioner would vehemently contend that there was no distinction or dissimilarities between "Medallion" and "Pendant" and both are same. In fact, there is no demarcation or classification made under the SEZ Rules or the Act with respect to the differentiation of "Medallions" and "Pendant". The respondent has failed and neglected to consider the functional utility of the "medallions" and by misreading the dictionary meaning, it was concluded that "medallions" and "pendant" are different. The learned counsel for the petitioner demonstrated that a pendant is round in shape called a "medallion" and a "pendant" which has a hook is called a "locker". To substantiate the

above, the petitioner also produced the affidavits obtained from the goldsmith, jewellery dealer and the Jewellers and Diamond Merchants

Association which were submitted before the respondent during the course of personal hearing. By placing reliance on the above, it was contended

that both "medallion" and "pendant" are one and the same. Further, it is contended that at the time of submitting the application for setting up the

unit in SEZ, it was clearly stated that the product to be manufactured is "gold jewellery and article" and description of the term was indicated as

"Pendant and Bangles". Therefore, according to the learned counsel for the petitioner, even if pendant and medallion will fall under different

criteria, as assumed by the respondent, they will be classified within the scope of "jewellery and article". the purpose for which manufacturing, the

petitioner's unit was established.

6. The learned counsel for the petitioner relied on the order dated 19.02.2016 passed in Income Tax Appeal Nos. 2311 and 2312 (MDS) of

2015 by the Income Tax Appellate Tribunal, Chennai Bench ""C"" in the appeal filed by the petitioner company itself wherein the Appellate Tribunal

has given a categorical finding that the words "Medallion" and "Pendant" have same meaning and usage in common parlance and therefore, merely

because the product manufactured by the assessee (petitioner herein) was described as medallion, it could not be said that there was any violation

of approval granted by the Development Commissioner, Special Economic Zone for manufacturing gold pendants. By placing reliance on the

above order passed by the Appellate Tribunal, the learned counsel for the petitioner would contend that "pendant" and "medallion" are one and

the same and it was also affirmed by the Tribunal in the appeal filed by the petitioner firm itself. Therefore, the learned counsel for the petitioner

would contend that the respondent proceeded on the basis that "pendant" and "medallion" have two distinct value addition and wastage norms and

consequently imposed penalty which is legally not sustainable.

7. The learned counsel for the petitioner further pointed out that even in the impugned order passed by the respondent, it was admitted that the

customs authorities and the office of the Development Commissioner have permitted the petitioner to export "medallion" despite the fact that the

item permitted for export was "pendant". However, it was claimed in the

impugned order that the petitioner ought not to have been permitted to export "medallion" and it was a mistake. Further, it was stated such an illegality cannot be perpetuated merely by citing certain precedence.

Further, it was stated that an oversight cannot be ignored just because the officials had earlier failed to notice the flaw. Therefore, it was concluded

by the respondent that by an administrative act, such a mistake committed earlier can be cured when it is brought to the notice of the respondent.

Thus, according to the learned counsel for the petitioner, there was no misdescription or misinformation furnished by the petitioner at the time of

exporting the "medallion" and it was also permitted by the authorities during the relevant point of time. While so, after closure of the manufacturing

unit and when the petitioner had stopped the exporting of the gold jewellery, the order of penalty came to be passed. According to the counsel for

the petitioner, after closure of the manufacturing unit of the petitioner, it is not open to the respondent to pass the impugned order and it was

passed without jurisdiction.

8. The learned counsel for the petitioner would further contend that in the impugned order, it was claimed by the respondent that though the

customs tariff does not differentiate between "pendant" and "medallion", in Para Nos. 4.A2 of the Handbook of Procedures of Foreign Policy it

was prescribed that wastage permitted for pendant is at 3.5% while for medallion, the permissible wastage is 0.25% and therefore it was

concluded that "medallion" are not "pendant" as per the Foreign Trade Policy. According to the petitioner, when the Income Tax Appellate

Tribunal has concluded that "pendant" and "medallion" are one and the same and the petitioner firm had not claimed any wastage as prescribed in

the Handbook of Procedure, such a conclusion arrived at by the respondent is erroneous especially when the petitioner has made a value addition

at 7% which is over and above the norms prescribed in the handbook of procedure.

9. The learned counsel for the petitioner also relied on the Corrigendum dated 14.08.2014 issued by the respondent to the show cause notice

dated 29.04.2014. In and by the said corrigendum dated 14.08.2014, the respondent has replaced the contents contained in the notice dated

29.04.2014 and supplemented a new paragraph. However, to meet out such

averments contained in the corrigendum dated 14.08.2014, the respondent has not provided an opportunity of hearing to the petitioner. Even before the petitioner could respond to the corrigendum, the respondent has passed the final order dated 03.09.2014, which was successfully challenged by the petitioner in the earlier writ petition. According to the learned counsel for the petitioner, in the corrigendum reliance was placed on Section 11 (2) of the Act read with Rule 54 (2) of SEZ Rules, 2008 which is not at all applicable to the present case to impose penalty. Therefore, it is contended that the respondent has exceeded the scope of the provisions contained in Section 11 (2) of the Act and consequently the impugned order imposing penalty is legally not sustainable.

10. Lastly, the learned counsel for the petitioner would contend that alternative remedy is always not a bar for invoking the jurisdiction of this Court under Article 226 of The Constitution of India. Even though there was an appeal remedy provided as against the order passed by the respondent, yet, filing of the present writ petition can be entertained by this Honourable Court to render substantial justice.

11. On the contrary, the learned Assistant Solicitor General appearing for the respondent, by placing reliance on the counter affidavit of the respondent, would vehemently contend that "pendant" and "medallion" have two distinct value addition and wastage norms. These products are not defined anywhere in the statute and they are different items in terms of the value addition and wastage norms. Therefore, the respondent has rightly concluded that the petitioner unit has violated the provisions of the Letter of Approval issued to them where it was specifically stated that that the petitioner unit is permitted to export "gold jewellery and articles" and it will not include "pendant". When this was brought to the notice of the respondent, after affording sufficient opportunity of hearing to the petitioner, the order was passed imposing penalty on them. According to the learned Assistant Solicitor General, the Act and Rules do not differentiate these two items namely "medallion" and "pendant" however, the handbook of procedure and foreign trade policy clearly describe that wastage permitted for "pendant" is at 3.5% while for medallion, the permissible wastage is 0.25% and therefore it was rightly concluded by the respondent that "medallion" are not "pendant" as per the Foreign

Trade Policy. When a specific finding was rendered as regards the violation committed by the petitioner, opportunity of hearing was given to them

to putforth their submission and thereafter, in exercise of power conferred under Section 13 of the Act, the respondent has imposed the penalty on

the petitioner and it calls for no interference by this Court. Even though the petitioner unit was permitted to export the "medallion" by mistake, the

respondent has come to a right conclusion that an oversight cannot be ignored just because the officials had earlier failed to notice the flaw and

such lapses cannot be allowed to perpetuate. In such view of the matter, the learned Assistant Solicitor justify the order dated 20.04.2015 passed

by the respondent, which is impugned in this writ petition.

12. As regards the jurisdiction of the respondent to impose penalty, it is contended that as per Section 11 (2) of the Act, when a person makes,

abets or attempts to make any export or import in contravention of any provisions of the Act and the Rules made thereunder, he shall be liable for

penalty. Further, the petitioner unit has carried out export of goods in contravention of Rule 54 of the SEZ Rules and thus rendered themselves

liable for penal action as per Section 11 (2) of the Act and as per the Notification No.S O 77 (E) dated 13.01.2000 issued by the Central

Government. In other words, the petitioner exported "gold medallions" which was not the product approved in the list of authorised operations in

the LoA. The LoA was issued to the petitioner only for manufacture and export of "pendant". However, the petitioner unit indulged in manufacture

of "medallions" which is in contravention to the conditions imposed in LoA. The petitioner cannot claim any right beyond the conditions stipulated

in LoA.

13. It is the vehement contentiion of the learned Assistant Solicitor General appearing for the respondent that the contention of the petitioner there

is no separate classification under Customs Tariff is not correct. In customs tariff, these two products are differentiated under Heading 71.13 which

deals with "articles of jewellery and parts thereof" or precious metal or metal clad with precious metal. As per the Customs Tariff under the

heading 71.13 (a),small objects of personal adomment (gem-set or not) such as rings, bracelets, necklaces, brooches, ear-rings, neck chains,

watch-chains and other ornamental chips, fobs, pendants (i.e., pins and clips,

cuff-links, dress-studs, buttons etc., religious or other crosses, medals and insignia, hat, ornament (pins, buckles, rings etc.,) ornaments for handbags, buckles and slides for belts, shoes etc., hair-slides, tiaras, dress combs and similar hair ornaments comes within the purview of articles of jewellery and parts thereof. It is clearly stated in 71.13 (b) that articles of personal use normally carried in the pocket, in the hand bag or on the person such as cigar or cigarette cases, snuff boxes, spectacle cases, power boxes, lipstick holders, pocket combs, cachou boxes, chain purses, rosaries, key rings. By placing reliance on the above categories contained in the Customs tariff, it is contended that medallions are large medals. A pendant on the other hand, is an object that is allowed to hang freely from something else. Hanging light fixtures too, for example are called "pendants". Thus, medallions can be made into a pendant and worn, but that would not be the case with all medallions and vice-versa. As per the customs tariff, medals and medallions (other than for personal adornment) are classified under Heading 71.14 which relates to articles of goldsmiths or silversmith wares and part thereof contains precious metal or metal clad. Therefore, it is contended by the learned Assistant Solicitor General that the medallions exported by the petitioner are manifestly different in terms of classification under the customs tariff. In this case, the petitioner was issued with LoA for manufacture and export of "pendants and bangles" which are classified under the category of Articles of Jewellery and parts thereof provided under Customs Tariff No.71.13, whereas, "medallions" are classified under customs tariff 71.14. Therefore, it is reiterated that medallions exported by the petitioner are manifestly different in terms of classification under the customs tariff and is in violation of LoA.

14. The learned Assistant Solicitor General for the respondent, in support of his contentions, has further brought to the notice of this Court the minutes of the meeting of the Unit Approval Committee in respect of MEPZ-SEZ held on 11.04.2014 wherein the violation committed by the petitioner as against the conditions laid down in LoA came up for discussion in item No.3.6 wherein it was stated that the Joint Commissioner of Income Tax, Coimbatore was also of the opinion that the investigations revealed that the petitioner unit has violated the LoA conditions and therefore it was suggested to initiate adjudication process as against the

petitioner. After complying with the principles of natural justice, on a thorough analysis of the documentary evidence placed including the written submissions made by the petitioner, the respondent has passed an order of adjudication in terms of the powers conferred on him under Section 21 (2) of SEZ Act, 2005 to impose the penalty and it does not call for any interference by this Court.

15. Even though in the counter affidavit filed by the respondent the plea of maintainability of the writ petition has not been mentioned, after the arguments of both sides were concluded, the learned Assistant Solicitor General filed an additional counter affidavit wherein it is stated that in the order dated 20.04.2015 of the respondent, which is challenged in this writ petition, it was clearly stated that if the petitioner is aggrieved by such an order, he can prefer an appeal in terms of the notification No. 21 (RE-2013)/2009-14 dated 13.06.2013 within a period of 45 days. In spite of such an appeal remedy provided as against the order passed by the respondent, for the reasons best known, the petitioner has invoked the jurisdiction of this Court under Article 226 of The Constitution of India. Therefore, the learned Assistant Solicitor General would vehemently contend that the writ petition is not maintainable and the petitioner has to prefer an appeal as provided in the impugned order. It is further stated in the additional counter affidavit of the respondent that as far as approval by the Unit Approval Committee is concerned, the committee, in the meeting held on 11.04.2014 has authorised the Development Commissioner of MEPZ-SEZ to adjudicate the unit under the provisions of Act and accordingly the respondent has passed the order of adjudication imposing the penalty.

16. I heard the learned counsel on both sides and perused the materials placed for consideration. The petitioner was given Letter of Approval (LoA) on 10.02.2008 for manufacture of "gold bangles and pendants" within MEPZ-SEZ, Chennai. On the basis of such approval, the petitioner firm continued to manufacture "gold medallions" and exported the same. Subsequently, since the Government withdrawn the income tax concessions hitherto conferred to the persons like the petitioner who carry out the manufacturing activities inside MEPZ-SEZ, on and from 31.03.2012, the export activities carried on by the petitioner have come to a

close. While so, on 21.02.2014, a show cause notice was issued to the petitioner to show as to why action should not be taken against them for having violated the terms of the LoA. The petitioner submitted a reply on 07.03.2014 denying the allegations. Thereafter, the matter was placed before the Unit Approval Committee in the meeting held on 11.04.2014 and the committee unanimously decided to examine and investigate the violation committed by the petitioner as against the conditions laid down in LoA. It is on the basis of such approval, a further notice dated 29.04.2014 was issued to the petitioner for which also the petitioner submitted a detailed explanation on 31.05.2014. The petitioner was also given a personal hearing on 23.08.2014 during which the petitioner demonstrated that they have exported the items strictly in accordance with the Letter of Approval issued to them. Thereafter, a corrigendum was issued by the respondent on 14.08.2014 substituting paragraph No.7 in the notice dated 29.07.2014. Even before the petitioner could submit a reply, the respondent passed a final order on 03.09.2014. Assailing the same, the petitioner filed WP No. 25765 of 2014 and this Court, by order dated 11.02.2015 set aside the final order dated 03.09.2014 of the respondent on the ground of violation of principles of natural justice and remanded the matter back to the respondent for fresh consideration. Pursuant to the order of remand, the respondent issued a letter dated 04.03.2015 calling upon the petitioner to appear for a personal hearing on 24.03.2015. On 24.03.2015, the representative of the petitioner firm appeared and submitted a written submission. In the written submission, it was stated that the functional utility of the "medallion" and "pendant" are one and the same as per the definitions to those commodity in the common parlance and the predominant and primary usage of the commodity has to be taken note of. Notwithstanding such reply, the order dated 24.04.2015 has been passed by the respondent imposing penalty on the petitioner and it is questioned in this writ petition.

17. In the light of the above factual background, the main point arise for consideration before this Court is whether the petitioner has violated the terms and conditions of the LoA and whether the commodity "medallion" and "pendant" are one and the same. In this context, the Dictionary meaning of the word "Pendant" and "Medallion" can be considered. While

pendant is termed as a piece of jewellery that hangs from a necklace chain, medallion is also termed as a piece of jewellery in the shape of a medal worn as pendant. Therefore, it is clear that there is no distinction or difference between the meaning given to the commodities "pendant" and "medallion".

18. The learned counsel appearing for the petitioner placed strong reliance on the order dated 19.02.2016 passed by the Income Tax Appellate

Tribunal, Chennai Bench ""C"" in the appeal filed by the petitioner company itself in Income Tax Appeal Nos. 2311 and 2312 (MDS) of 2015. In

the said order, the Appellate Tribunal while considering the claim of the petitioner firm relating to deduction under Section 10AA of the Income

Tax Act, has given a categorical finding that the words "Medallion" and "Pendant" have same meaning and usage in common parlance and

therefore, merely because the product manufactured by the assessee (petitioner herein) was described as medallion, it could not be said that there

was any violation of approval granted by the Development Commissioner, Special Economic Zone for manufacturing gold pendants. In Para No. 9

of the order, the Appellate Tribunal held as follows:-

9. We have carefully gone through the orders of the lower authorities below. The CIT (Appeals) found that what was manufactured by the

assessee is 24 Carat gold medallion. The CIT (Appeals) has also found that the gifts presented on special occasions would be considered as

medallions which are not meant as ornaments but would be treated as treasure of momentos or items of valuable investment. The question arise for

consideration is; Is there any difference between pendant and medallion? The meaning of the word "pendant" and "medallion" has to be construed

in the Indian context. Normally, the pendant would be worn as an ornament along with chain or necklace. The pendent in common parlance may

also be called as medallion. The medallion has to be worn as an ornament along with chain or necklace. Similarly, pendant is also to be worn as

ornament along with chain or necklace. Therefore, the Tribunal is of the considered view that the words "pendant" and "medallion" have the same

meaning and usage in common parlance. By taking into consideration of the usage of pendant or medallion, this Tribunal is of the considered

opinion that the pendant and medallion have the same characteristics and value

in the common parlance. When the assessee claims that it is manufacturing pendants and the same was exported, merely because the foreign nationals call this as medallion, it does not mean that what was manufactured by the assessee is only medallion. The product manufactured by the assessee even though called as "medallion", it is pendant in the Indian context. It is an ornament worn by hanging in the chain or necklace. It is common knowledge that the award/medal conferred on special and ceremonial occasions would be normally known as "medallions". It does not mean that the medallions could not be worn as ornament/jewellery in the normal course. In our opinion, the pendant and medallion can be used as ornament jewellery along with chain and necklace. At the best, one may say that pendant and medallion are nothing but a designer jewellery to be worn along with chain or necklace. By taking into consideration of the utility of the medallions, this Tribunal is of the considered opinion that medallion is also a pendant. Therefore, merely because the product manufactured by the assessee was described as medallion, it cannot be said that there was any violation of approval granted by the Development Commissioner, Special Economic Zone. Irrespective of nomenclature used by the assessee or the Special Economic Zone, this Tribunal is of the considered opinion that what was manufactured by the assessee is pendant. Therefore, there is no violation of conditions imposed by the Development Commissioner.

19. It is evident from the order passed by the Appellate Tribunal that the very same issue as to whether "pendant" and "medallion" are one and the same came up for consideration before the Tribunal at the instance of the petitioner and the Tribunal gave a categorical finding that both the commodity are one and the same with respect to their usage in common parlance. Therefore also, it can be safely concluded that what was manufactured and exported by the petitioner is "medallion" and it can also be called as "pendant" in the common trade parlance and consequently, there is no violation of the LoA issued to the petitioner. Even according to the respondent, nowhere in the Act or Rules, there is any whisper made to the differences between the two commodities.

20. The learned counsel for the petitioner also brought to the notice of this Court a letter dated 12.03.2014 addressed by the Customs Department

to the Assistant Development Commissioner of MEPZ, SEZ. In the letter dated 12.03.2014, it was stated as follows:-

As per the Oxford Dictionary, the term "pendant" is described as a piece of jewellery that hangs from a chain worn round the neck and the

medallion is a piece of jewellery in the shape of a medal, worn as a pendant. The description of these items by the Oxford English Dictionary

substantiates the inclusiveness of medallions under the term pendants. It appears that medallions are also pendants in round shape. Hence, there

does not appear to be any violation of LoA.

21. It is evident that the Customs Department, which is one of the wings of the respondent Department, has clarified and reiterated that medallions

are also pendants and therefore, the petitioner has not committed any violation of LoA. Further, in the reply dated 11.05.2014 of the petitioner to

the show cause notice dated 29.04.2014 of the respondent, it was specifically reiterated by the petitioner that from the date of inception, they were

manufacturing one and the same product and exporting it. Further it was pointed out that as pendants and medallions are one and the same and

refer to one product, they never realised the need for obtaining any special permission for "broad banding". It was further pointed out that if the

above words had really meant different products literally or otherwise, the Customs Authorities would have stopped the very first export

consignment and would have brought the issue to the attention of MEPZ authorities. Thus, the petitioner has also brought to the notice of the

respondent regarding the fact that they have been exporting the products from the date of its inception and the customs department has not

objected to it. Even in the impugned order, the respondent would only contend that it was a mistake committed by the authorities in according

approval for export of the items in contravention of the terms and conditions of LoA and such violation cannot be allowed to be continued.

However, there is no records made available before this Court to suggest that the respondent has taken any action against the person who was

instrumental or negligent in discharge of the duty and who permitted the export of the products by the petitioner. This is more so that three years

after the petitioner wound up the business owing to withdrawal of tax concessions by the Government, such an alleged violation on the part of the

petitioner came to be noticed by the respondent. In such circumstances also, it can safely be concluded that the very basis on which the impugned

order came to be passed by the respondent has no force and consequently it has to be set aside.

22. The respondent would contend that "pendant" and "medallion" have two distinct value addition and wastage norms. Even though these

products are not defined anywhere in the statute and they are different items in terms of the value addition and wastage norms, in the Handbook of

Procedure describe it is prescribed that wastage permitted for pendant is at 3.5% while for medallion, whereas the permissible wastage for

"medallion" is 0.25% and therefore "medallion" are not "pendant" as per the Foreign Trade Policy. In this context, the petitioner would contend

that the value addition prescribed in Foreign Trade Policy is only 1.5% but they have achieved value addition of 7% which was more than 400% of

the prescribed value addition. I find force in such submission of the learned counsel for the petitioner. When the petitioner has admittedly achieved

7% of value addition which is more than the prescribed value addition in the Foreign Trade Policy, it cannot be gainsaid that the guidelines

contained in Handbook of Procedure can be applied in the case of petitioner. Even otherwise, when statute does not admittedly prescribe any

difference of both the commodity in terms of the value addition and wastage norms, the reliance placed on the Handbook of Procedure, which only

prescribes certain guidelines to be followed, to impose penalty on the petitioner, is legally not sustainable. The handbook of procedure only

prescribes norms for value addition. As per clause 4A 2 and 2.1 of the Handbook of Procedure relied on by the respondent, the wastage norms

and value addition norms relates to plain jewellery to have a maximum wastage of 3.5% while in the case of medallions it is permitted upto 0.25%.

When the petitioner has admittedly achieved 7% of value addition, even the invocation of the guidelines contained in the handbook of procedure

will not confer any jurisdiction to the respondent to impose the penalty on the petitioner. These aspects have not been taken note of by the

respondent while passing the impugned order imposing penalty on the petitioner and therefore the impugned order cannot be sustained.

23. As regards the plea of alternative remedy raised by the learned Assistant Solicitor General, it is no doubt true that in the impugned order,

reference was made to the availability of alternative relief before the appellate authority. However, the petitioner has filed the present writ petition invoking the jurisdiction conferred upon this Court under Article 226 of The Constitution of India. It is needless to mention that even though alternative remedy is available, yet, it is always not a bar to the petitioner to approach this Court or on that ground, this Court need not refuse to entertain the writ petition. In the decision of the Honourable Supreme Court in the case of Mani Subrat Jain etc., vs. State of Haryana and others reported in AIR 1977 SC 276 it was held that when there is judicially enforceable right as well as legally protected right, then a person suffering from a legal grievance can seek for a Mandamus under Article 226 of The Constitution of India. Further, the Honourable Supreme Court in the case of (Baburam Prakash Chandra Maheswari vs. Antarim Zila Parishad) reported in AIR 1964 SC 556 held that existence of alternative remedy is always not a bar for filing a writ petition where it is alleged that the Court or Tribunal acted against the provisions of law and in violation of principles of natural justice.

24. The learned Assistant Solicitor General appearing for the respondent relied on the decision of this Court passed in WP Nos. 33741 and 33742 of 2016 dated 30.09.2016 in the case of (M/s. Visal Lubtech Corporation and another vs. The Additional Commissioner of Customs) to buttress his submission as regards maintainability of this writ petition. In the said decision, the petitioner challenged an order passed by the Enquiry Officer to cross-examine the witness. However, a separate order was passed by the disciplinary authority rejecting the request of the petitioner therein to cross-examine the witness, but such order was not challenged by the petitioner therein. In such circumstances, this Court held that the writ petition is not maintainable when the petitioner did not challenge the consequential order passed by the respondent. The said decision rendered by this Court, which was relied on by the learned Assistant Solicitor General appearing for the respondent, cannot lend support to his case.

25. The fact remains that there was an appellate remedy but without availing it, the petitioner has approached this Court. Merely because the petitioner failed to avail the alternative remedy available, this Court cannot refuse to entertain this writ petition as alternative remedy is always not a

bar and this Court, in exercise of it's power under Article 226 of The Constitution can always entertain a writ petition depending upon the facts

and circumstance of each case. While so, I hold that merely because the petitioner failed to avail the alternative remedy, it will not be a ground to

dismiss the writ petition at the threshold.

26. The learned counsel appearing for the petitioner relied on the decision of a Division Bench of the Delhi High Court passed in WP (C) No. 577

of 2013 on 23.01.2017 wherein the petitioner therein had exported consignment by declaring them as ""ladies leather sandals"" and claimed customs

duty drawback. The respondent, by considering the consignment exported by the petitioner as "chappals" and not as "sandals" denied the

petitioner therein the customs duty drawback. The Division Bench, after considering the rival submissions, held in para No.8 as follows:-

8. The facts discussed above would show that the petitioner is a manufacturer of footwear; the subject articles are concededly women's

footwear. The opinion given in favour of the petitioner, by the Council, was of an export body; it was however doubted. As is apparent from the

pleadings and the submissions that the trigger of suspicion that the petitioner had wrongly described the article, was because the article did not

possess a strap at the back. Whatever be the reason, once the Council made it's determination, based on inspection of the sample, and given that

the opinion was based on objective material, there ought to have been something more for the FDDI to conclude that ""We therefore conclude that

provided articles Fall under the category of chappal covered under Sl.No.64.10""....

9. The respondents, in our opinion, acted upon prejudice and a preconceived notion that ladies sandals cannot be without a back strap. To hold

so, there ought to have been some evidence of commercial purpose, the fact that the Council - a Central Government body, which routinely deals

with these issues in the context of export, had, based on evidence and instructions of the Government furnished an opinion that the goods were

sandals and not chappals was deemed insufficient. Apart from these, the court wonders whether any of the experts in this case was a women, the

ultimate customers. In such cases, the commercial parlance test would predominate.....

27. It is evident from the order passed by the Division Bench of the Delhi High Court that when expert body has given an opinion that there is no distinction between chappals and sandals merely because there was no back strap, it cannot be said that the petitioner therein is not entitled to customs duty drawback. Applying the analogy made by the Division Bench of the Delhi High Court to this case, in this case also, as mentioned supra, the Specified Officer of the Customs department, in their letter dated 12.03.2014 clarified that medallions and pendants are one and the same and in spite of the same, the respondent has come to a conclusion contrary to such clarification made by the Customs Department without any basis.

28. The learned counsel for the petitioner relied on the Full Bench decision of this Court in the case of (State of Tamil Nadu vs. Nu-tread Tyres)

(2002) 142 STC 256 (Madras) wherein the Full Bench of this Court has held that the person who makes a declaration must do so with full

knowledge that the declaration so made by him is not correct or he made such declaration knowing it to be false. It was held by the Full Bench of

this Court that in such case, the authorities must satisfy themselves that there appears an element of mensrea on the part of the assessee to make

false representation or misdeclaration with full knowledge to evade customs duty or other charges to the exchequer. In the absence of the same,

the authorities are not justified in imposing penalty. Further it was held that when there are two views are plausible, in the matter as to whether the

goods purchased are covered by the registration certificate or not, the mere issue of a C form certificate by the assessee without any further

material will not lead to the conclusion that the assessee has made false representation and the question whether the assessee acted under the

honest belief or not is a question of fact. By applying the ratio laid down by the Full Bench of this Court to the facts of this case, in this case, the

petitioner manufactured and exported medallions on the basis of the Letter of Approval given to them. Such goods exported by the petitioner was

accepted and approved by the respondent without any demur. Moreover, the respondent themselves have given certificate of appreciation to the

petitioner firm for achieving highest export turnover in the year 2010-2011 in gem and jewellery sector. Such a certificate could not have been

issued by the respondent without examining the manner in which the export process has been commenced and completed by the petitioner,

whether the petitioner has violated any of the terms and conditions of LoA and other factors which might have weighed the respondent for issuing

such a certificate of appreciation. Such certificate will also throw much light on the fact that the petitioner has not made any misrepresentation or

misdeclaration to cheat the exchequer or there is any mens rea on the part of the petitioner to do so. In such view of the matter, in the absence of

any ill-intention or mens rea on the part of the petitioner to gain unlawfully by exporting goods which are not permitted to be exported by them as

per the LoA, as has been held by the Full Bench of this Court, the respondent is not justified in imposing penalty.

29. For all the reasons mentioned above, this Court is of the considered view that the impugned order of the respondent deserves to be set aside

and accordingly it is set aside. Consequently, the writ petition is allowed. No costs.