

**(2012) 07 DEL CK 0403**

**In the Delhi High Court**

**Case No : Writ Petition (C) No.1330 of 1986**

M/s. R.K. Machine Tools (P) Ltd. and Anr

APPELLANT

Vs

Union of India and Ors

RESPONDENT

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**Date of Decision : 09-07-2012**

**Acts Referred:**

Constitution of India, 1950 — Article 226

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 20

**Citation :** (2012) 8 AD 253 : (2012) 4 BC 18 : (2012) 191 DLT 461 : (2012) 131 DRJ 208

**Hon'ble Judges :** Anil Kumar, J

**Bench :** Single Bench

**Advocate :** V.N. Koura and Ms. P.K. Benipal, for the Appellant; Jatan Singh, Central Govt. Standing Counsel and Mr. Tushar Singh, for the Respondent

**Final Decision :** Disposed Off

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## **Judgement**

Anil Kumar, J.—The petitioner, M/s. RK machine tools, has sought the quashing of the order dated 14th May, 1986 passed by Respondent No.2, the Chief Controller of Imports and Exports, New Delhi and a declaration that "deemed exports" as defined in the Government notifications covers the cases of advance licenses in the same manner as they cover the case of duty replenishment licenses in the facts and circumstances of the petitioner. The brief facts as contended by the petitioners are that the petitioner No.1 is a company duly registered under the Indian Companies Act and is also a member of the Engineering Export Promotion Council since 1974, while petitioner no. 2, is a shareholder and one of the directors of petitioner no.1.

2. Petitioner No.1 was manufacturing and trading company of Northern India and Asia and was engaged in the business of making metallic goods, including defense equipment, machine tools, textile machinery, stainless steel utensils etc. for over two decades.

3. According to the petitioner by letter dated 2nd August 1981, an order was

placed for the supply of stainless steel utensils and cutlery of special specifications of the value of Rs1,38,02,000/- by M/s V. K. Topline of 40, Thomas Street, Manchester, England and in order to execute the supply order the petitioners had applied to respondent no.2 for the grant of an "advance license" under the Duty Exemption Scheme as detailed in the Revised Import Policy for the year 1981- 82, for the import of 425 metric tons of stainless steel of the CIF value of the Rs 90, 86,560/-. The intent of the petitioners was to export the utensils made out of the imported stainless steel against foreign currency with a view to fulfill the export obligation arising out of the grant of the advance license. However, despite fulfilling all the requirements for the grant of the advance license, the respondents had issued an import license to the petitioner on 5th January, 1982 for only half the quantity applied for by the petitioners i.e. license was given for the import of 212.8 metric tonnes of stainless steel or the CIF value of Rs. 45,43,280/- only. One of the conditions for the issuance of the advance license was that a bank guarantee for the sum of Rs 90, 86,500/- was to be given by petitioner no.1 and also that the goods exported against the Advance License were to be utilized in accordance with the provisions of the customs notifications, as amended from time to time. It was further stipulated that in case the petitioner failed to export the utensils manufactured out of the imported steel, then it would be liable to pay to the customs authorities the amount of duty which otherwise would have been payable on the imported material of which the corresponding export was not made. The petitioners were, however, not liable to pay any duty on the stainless steel imported by them against the above-mentioned license for the manufacture of utensils etc. if such utensils/cutlery of the value of Rs. 45,43,289/- were actually exported and consequently, foreign-exchange was earned by the country. The petitioners however, clarified that they imported only 180 metric tons of stainless steel of the CIF value of Rs.35, 50,192.70/-, against the quantity of 212.8 metric tons of CIF value of Rs. 45,43,280/- allowed under the advance license and thus, as per the entry in Appendix 5 to Schedule 19 of the Import Export policy, for 1 Kg of the finished product to be exported, the actual user was permitted to import 1.33 KG of steel, which meant that 33% in wastage was permitted. The quantity allowed for the purposes of duty exemption was fixed at 1 to 1.125. According to the petitioner on applying the same principle, the petitioner was required to export only 135 metric tons of finished goods as against the import of 180 MT of steel. The export liability under the license, as well as, under the scheme was confined to and corresponded to the extent of the raw material actually imported for the manufacture of the exportable goods. Therefore, the export liability of the petitioners against the advance license coupled with the admitted quantum of actual import of the raw material automatically stood reduced to the maximum quantity of exportable goods which was expected to be manufactured out of the actually imported quantum of raw material. According to the petitioner the Maximum foreign exchange expected to be earned by the export of utensils manufactured out of 135.34 metric tons, could not exceed Rs 53.24 lakhs after providing for the statutory permissible wastage in the process of manufacture.

4. After the receipt of the imported material the petitioners commenced the process of manufacturing the stainless steel utensils as per the specifications given by the foreign importer. The petitioners had also sent a letter dated 1st October, 1982 to M/s V & K Topline, requesting them to arrange for the Letters of Credit and/or bank draft for about Rs. 8 lakhs to enable the petitioners to ship the goods as soon as possible. However, conflict had crept between the President and the Managing Directors of M/s V & K Topline, England, which was communicated to the petitioners by letter dated 15th October, 1982, due to which reason it was requested that the shipment of the goods be delayed by a few months, and assurance was also given stating that the commitment given by them would be fulfilled. Subsequently, however, by a letter dated 18th November, 1982 the order placed with the petitioner was cancelled and a request was made to dispose of the goods to some other party or to at least delay the supplies till May, 1983. According to the petitioner since the goods were manufactured as per the special specifications laid down by M/s V & K Topline, it was not acceptable to any other foreign exporter in bulk and thus the petitioners were constrained to fulfill their export obligation by resorting to the officially recognized method of effecting "deemed exports" of the entire lot of the utensils manufactured by them, out of the quantity of the stainless steel which was actually imported. Therefore, the petitioners sold the said goods to foreign tourists on temporary visits to India, against the foreign exchange paid by them, through M/s. Deepamani, Bombay, which is a registered foreign exchange dealer, duly licensed by the Reserve bank of India. As a result of this measure, the Petitioner No.1 was able to earn foreign exchange of Rs.59,32,271.75/- for the country, by the sale of 157.09 metric tons of steel against the official expectations of earning foreign exchange of Rs. 53,24,000/-

5. After effecting the exports from July 1983 to February/March 1984 the petitioner, by letter dated 19th March, 1984 addressed to respondent no.3, explained the above mentioned problems encountered by the petitioners and the consequent measures undertaken by them and also sought the release of the bank guarantee on account of the petitioner having discharged its export obligation in terms of entry 131 read with Para 157 of the policy. The respondents, however, by letter dated 21st September, 1984 refused to accept the sale made to foreign tourists as fulfillment of export obligation against the advance license and the petitioner was, therefore, asked to deposit a sum of Rs.86,15,590/- towards customs duty on the raw material imported by the petitioner with 18% interest. According to the petitioner this amount specified by the respondents is erroneously calculated, as it was based on the assumption that the total maximum licensed quantity of 212.8 metric tons was imported by the petitioner, inspite of the fact that the duty exemption entitlement certificate dated 21st January, 1982 clearly provided for duty exemption benefit on import of 180 metric tons only. It is the case of the petitioner that even if it is presumed that the petitioner had failed to export the utensils made from 180 metric tons of stainless steel, then also the maximum liability could not exceed the amount

payable on import of 180 metric tons or such lesser quantity to the extent of which exports were not affected. Thereafter, the petitioner wrote a letter dated 5th October, 1984 seeking a personal hearing with regard to the exparte order passed by respondent no.3 by letter dated 21st September, 1984.

6. However, an abeyance order dated 13th December, 1984 was issued by respondent no.3 under clause 8B of the Import (Control) Order 1955 by which the petitioner company was ordered to be "kept in abeyance" for a period of six months, and along with the said order a show cause notice dated 1st January, 1985 was also sent to the petitioner.

7. Despite the question of fulfillment/non fulfillment of the export obligation by the petitioner being not answered and the petitioners' representation dated 5th October, 1984 pending against the said ex-parte order, a demand dated 30th January, 1985 against the petitioner for a sum of Rs.88,55,966.58 with 18% interest was issued by respondent no.4, Collector of Customs, on the ground that the material imported by the petitioner has become dutiable, on account of non furnishing of any proof of fulfillment of the export obligation. Thereafter a written statement was filed in response to the show cause notice dated 1st January, 1985 issued to the petitioner and the counsel for the petitioners also appeared before respondent no.3 on 18th January, 1985 and submitted that the export effected by the petitioner falls under the category of "deemed export". According to the petitioner the respondent was also satisfied regarding the aspect of "deemed export" however, the only objection raised at the time, was with respect to the fact that no entries were made in the DEEC of the exports effected by the petitioners. On account of this objection, a clarification was also sought by the petitioners by a letter dated 24th January, 1985 on the objection raised by respondents no.4, who, by official letter dated 28th January, 1985 informed the petitioner that "no entries are required to be made in the DEEC book relating to "Deemed exports" to foreign tourists against foreign exchange. The petitioner communicated the letter dated 28th January, 1985 to the respondents, however, by letter dated 28th February, 1985 respondent no.2 stated that sales of good to foreign tourists cannot be accepted towards the discharge of export obligation. Aggrieved by the decision conveyed by letter dated 28th February, 1985 the petitioners filed applications dated 16th March, 1985, 6th June, 1985 and 12th February, 1986, reiterating the legal position and asking for a clear interpretation of the relevant rules on the points of issue. However, by order dated 14th May, 1986 the respondents concluded that the sale of goods to the foreign tourists could not be accepted towards the discharge of the export obligation against advance license.

8. Aggrieved by the order dated 14th May, 1986 the petitioners have approached this Court under its writ jurisdiction. According to the petitioners the expression "in the domestic market" was used for the first time in the impugned order and that the same is misconceived as the foreign tourists cannot be deemed to be a part of the domestic market. The petitioners have challenged the impugned order

dated 14th May, 1986 and the abeyance order 13th December, 1984 on the ground that the same is capricious, discriminatory, illegal, vague, arbitrary and suffers from errors apparent on the face of the record. It is also contended that the said orders were passed in violation of the principles of natural justice. The petitioners have urged that the that the expression "deemed export" by sale to foreign tourists against foreign exchange through recognized Reserve Bank of India agents, is covered under both the REP License, as well as, the advance duty free licenses, and that there is no distinction between the two as both relate to fulfillment of export obligation. According to the petitioners the fact that there was no distinction between REP Licenses and Advance Licenses is also clear from the fact that they are inter-changeable and in this regard reliance is placed on Para 79(10) on Pg. 20 of the Hand Book of Import Export Procedure (1981-1982). It is submitted that since the objective of the policy was to earn valuable foreign exchange for the country, which was a rare commodity at the time, there was no rational basis for discriminating in the matter of fulfilling export obligations in respect of Advance Licenses between physical exports and deemed exports, both of which fulfill the same objective, namely sale of goods against the payment of foreign exchange. The petitioner had also placed reliance on the decision of Supreme Court in the case of M/s Liberty Oil Mills and Others vs. Union of India and Others (Civil Appeal No. 274 of 1984), wherein the Apex Court had interpreted clause 8(B) of the Import(Control) Order, 1955 and contended that without extending the period of abeyance, the respondents are treating the petitioner as under abeyance, which was not in existence at the time, thereby, leading to serious public injury, as substantial amount of foreign exchange is being lost and a large number of workers of the petitioner's are being rendered liable to retrenchment. It was also submitted that after filing the writ petition before this Court, the petitioner supplied 190,18" Shaper machines to Vocational Training Project, which was aided by the World Bank. Under the 1992-97 EXIM Policy, a supply of equipment to World Bank aided projects fell within the ambit of "deemed exports". According to the petitioners supplied were made from the period of 9th July, 1993 to 18th July, 1995 and a total amount of Rs. 14,06,000/- was refundable towards Terminal Excise Duty, for which order have to be passed by the DGFT. The petitioner also executed two other orders dated 10th July, 1995 for 108 Sharper 450 mm machines and 147 Slotters Machines, and against the said supplies, the petitioner entitled to receive a refund towards Terminal Excise Duty of Rs. 17,15,500/-, which also has not been paid to it due to the pendency of the present writ petition. Therefore, the petitioner has prayed for directions to the respondents to release the amount towards the Terminal Excise Duty, which has been withheld due to the pendency of the writ petition and also the quashing of the impugned orders passed by the Chief Controller of Imports and Exports by order dated 14th May, 1986.

9. The respondents have refuted the pleas and contentions raised by the petitioners by filing a Counter affidavit dated 24th July, 2006 of Sh.Vijay Kumar Gupta, Joint Director General of Foreign Trade, Ministry of Commerce and

Industry at Ludhiana presently at Delhi. According to the respondents Para 149 and para 150, read with Appendix 19 of the Import Policy for the year 1981-82 covers the cases of Advance Licenses and Para 157 of the Import policy covers the scheme for "Sale to Foreign Tourists". The learned counsel for the respondents has further contended that the "Import Replenishment Scheme" for registered exporters and "Advance License Scheme" are independent of each other as in the former the replenishment is made after the exports are effected, whereas, under the duty exemption scheme the advance licenses are issued to import duty free inputs required to manufacture the item to be exported to the overseas buyers, as per the export obligation fixed under the said scheme and the petitioner in the present case had specifically opted for the advance license under the duty exemption scheme. The respondent further contended that in any case duty exemption scheme was not available in the case of sale to foreign tourists and that it was available only for the physical export of goods outside the country, and thus the petitioners have failed to substantiate how they have fulfilled the export obligation attached to the advance license given to them. It is submitted that that since the license was granted to the petitioner under 1981-82 Import Policy under Para 149, Appendix 19, therefore, the conditions prescribed in Appendix 19 would be applicable. It was further urged that since the scheme of "Special Imprest License", i.e. Import allowed outside the duty exemption Scheme, was applicable in the case of supplies to projects in India against contracts entered with IBRD/IDA, Bilateral, Multilateral external assistance, ONGC, OIL, GAIL, these supplies were treated as deemed exports, however, this does not mean that sales to foreign tourists would also be "deemed exports" automatically covered under the duty exemption scheme for advance licenses, when the said scheme specifically provides for import of duty-free material required for the manufacture and the export of the said goods outside the country.

10. The learned counsel for the respondents has contended that "Deemed Exports", "Tourist sale" as well as "advance license" are all separately defined and that the exporter had the option to opt for any scheme as per his requirement and since the petitioners opted for the duty exemption scheme under the advance license and enjoyed the benefits under the said scheme, such as high premium on imported inputs they cannot take the plea of discrimination now. It is also pointed out that the petitioners were required to export goods physically out of the country, whereas, they have simply diverted the imported raw material and sold the same to the foreign tourist to show it as export, which cannot be allowed, as it is against the provisions of the Import Policy under which the petitioners had obtained the advance license. It is also pointed out that as per the provisions of Appendix 19 of the Duty Exemption Scheme read with the notification dated 9th June, 1978 from the Ministry of Finance (Department of Revenue Customs, Government of India) as per GSR 117(F) the exempt material of any portion thereof shall not be sold or otherwise transferred to any other person or utilized or disposed of in any other manner, without the previous

permission of the committee (advance licensing committee) before whom the application under the scheme was placed for obtaining the advance license. Thus, as per the respondents the petitioners were required to first seek the permission of the advance licensing committee before selling the steel utensils to the foreign tourists.

11. It is further submitted that along with the advance licenses, DEEC (Duty Exemption Entitlement Certificate) are also issued in which the particulars of the item of import, their quantities, CIF value and the particulars of the resultant product, their quantities, and FOB value are mentioned and that after every import and export actually made, the particulars in respect of the same are entered in the DEEC by the custom authorities and after the completion of all the import and exports in DEEC Books are duly made, the DEEC certificates are then audited by the customs departments, and only then the bank guarantee/legal undertaking furnished by the exporter is redeemed. According to the respondents the petitioners failed to submit the DEEC books for the Import and Export, duly authenticated by the Customs, which is a basic requirement of duty-free advance license, as the petitioner was required to maintain proper accountability of the duty-free imported raw materials by way of physical export of the said utensils. The respondents have further alleged that the petitioners by selling the goods to foreign tourist have acted without any authority of law and has therefore misutilised the license, by availing premium on the imported raw materials, and escaping the customs duty imposable on the imported raw material and diverted the goods to the local market for making undue profits, and at the same time, defrauded the government by not fulfilling the export obligation, and thereby contravened the provisions of the IMPEX Act and Customs Act.

12. The Respondent also submitted that the petitioner, instead of approaching this court, should have in the normal course filed the reply to the show cause notice and represented before the adjudicating authority. The respondent have justified the abeyance order dated 13th December, 1984 vide order number 33/84 -85/ASR under The Import (Control) Order, 1955 on the ground that the same was passed in public interest as the petitioner did not export any of the goods, and instead they sold the same to the foreign tourists in the domestic market to give it a color of export which is in violation of the provisions of the duty exemption scheme. According to respondent it is a case of fraudulently availing high premium on duty-free imported inputs and abusing the legal process for 25 years by delaying the payment of custom duty with interest.

13. The petitioners, thereafter, have filed a rejoinder dated 7th August, 2006 against the pleas and contentions raised by the respondent by contending inter alia that it is the respondents who have delayed the proceeding, as they filed their counter affidavit for the first time after the expiry of almost 20 years. It is also pointed out that the allegations of misutilizing the license are baseless and unsubstantiated as there is nothing on the record to establish the allegation that

the petitioner had dishonestly sold the stainless steel imported by the petitioner at a premium, by not utilizing the same. The petitioner has further contended that even though an Advance License for 212.8 Metric Tons was allowed, the petitioner had only imported 180 Metric Tons for the value of Rs.33,54,392. Thus, the petitioner had no intention to misutilize the said license. It is also reiterated that the petitioners had sold the utensils to the foreign tourists against foreign exchange and that no sale was made in the domestic market as alleged by the respondents and that since the sale was made to foreign tourists, there was no need to make entries regarding the same in the DEEC Book from the custom authorities. It was also argued that since the petitioners had completed their export obligation, therefore, the action taken under clause 8-B of the Import (Control) Order, 1955, was uncalled for. It is further emphasized that even though an export obligation of Rs. 53,00,000/- had been imposed on the petitioners, they had managed to earn foreign exchange worth 59,30,000/- by selling the steel utensils to the foreign tourists, and therefore, they had diligently discharged their export obligations, for which reason they should not be penalized on the illegal and discriminatory ground that "deemed exports" is not covered under the advance licenses. It is also urged that since sales were made to foreign tourists there was no requirement to maintain entries of the same in the DEEC Books and get them verified by the custom authorities, which was clarified by the respondents themselves by letter dated 28th January, 1985. In any case it is submitted that the petitioners had maintained detailed account of the imported raw material, as well as, its utilization by sale to foreign tourists. The interpretation given by the respondents to the relevant clauses, as well as, the procedure contained in the Import & Export Policy was denied by the petitioners and it was asserted that the respondents have merely tried to confuse the Court, with complete disregard to the intent of the said provisions, which was to earn foreign exchange as per export obligation. The allegation of availing huge premiums on imported raw material was also denied by the petitioners and it was urged that the petitioner no.1 is a reputable company and that it has never entered into any illegal activities and that the respondents themselves have failed to substantiate these allegations by way of documentary proof.

14. This Court has heard the learned counsel for the parties, and examined the writ petition, reply of the respondents and the documents filed by the parties and the provisions of the Import Policy April 1981-March 1982 and the Handbook of Import-Export Procedures 1981-1982. It is clear from the pleas and contentions that the main issue that needs to be adjudicated in the present matter is whether or not "deemed exports" by sale of goods to foreign tourists will be covered under the scheme of Advance License especially in the present facts and circumstances of the petitioners. The learned counsel for the respondents has contended that sale to foreign tourists cannot be accepted as exports for the fulfillment of export obligation against an advance license which requires that physical export of the goods takes place outside the country. According to the respondents "deemed exports" is covered only under the REP Licenses. While on

the other hand the learned counsel for the petitioners contended that since the objective is clearly to earn foreign exchange, the concept of an export would also include "deemed exports", namely, sale of goods to foreign tourists within India against valuable foreign exchange earned for the country especially in the present facts and circumstances as the order of the petitioners to export the goods was cancelled on account of differences between the officials of importer firm in UK. Reliance has also been placed on Para 175 (i) under Chapter 18 which states that "Deemed Exports" referred to in Para 131 will count on par with other exports.

15. "Deemed exports" is explained only in Para 131 of Chapter 17 of the Import Policy 1981-82 titled as "Import Policy for Registered Exporters", under the sub-heading of Eligibility which stipulates that sale to foreign tourists of the items specified in para 157 would qualify as "deemed exports". Para 131 and 157 are reproduced as follows:

131. The Following types of "deemed exports" will also qualify:-

- (a) Sales to foreign tourists of the items specified in para 157 hereunder.
- (b) Supplies made to IBRD/IDA aided projects in India where such supplies are made under the procedure of international competitive bidding:
- (c) Supplies made in India to United Nations Organisations or under the Aid Programmes of United Nations and other multi-national agencies, at international prices and paid for in free foreign exchange;
- (d) Sales to foreign shipping companies, where payment is received in foreign exchange or in Indian Rupees obtained from the exchange of foreign currency;
- (e) Supplies of fitment items (of Capital Goods nature) to Indian shipyards building ocean-going ships;
- (f) Other supplies made in India against international competitive bidding where the payment is received in free foreign exchange.

Sales to foreign Tourist

157. Sales to foreign tourists in respect of the following goods will qualify for import replenishment under the import policy for Registered Exporters:

- (a) Gem and Jewellery,
- (b) Handicrafts,
- (c) Leather goods, namely, footwear, handbags, belts, purses, etc.
- (d) Carpets, Rugs, and druggist and namdahs,
- (e) Cotton Sarees, Cotton dress materials, Cotton table linen, bed spreads, bed covers, Cotton stoles, scarves, shawls and Cotton furnishing material,

- (f) Ready-made garments,
- (g) Silk fabrics and made-up articles, including furnishing material,
- (h) Consumer electronics items,
- (i) Disc records,
- (j) Books/stationery, and
- (k) Stainless steel utensils/cutlery.

16. Thus, it is clear on examining the said provisions, that there is no such stipulation that "deemed exports" by sale to foreign tourists would only be covered under REP Licenses and not Advance Licenses or any other licenses, as has been asserted by the learned counsel for the respondents. Para 157 merely specifies that sale to foreign tourists in respect of the certain goods which would qualify for import replenishment under the Import Policy for Registered Exporters. It is thus apparent that under the Import Policy, Registered Exporters have the option of either availing an REP License, Advance License, or an Imprest License. It is also cannot be disputed that the petitioner no.1. is a certified registered user, and consequently he is covered under the provisions of Chapter 17 titled as "Import Policy for Registered Exporters" of the Import policy April 1981-March 1982. Thus, the plea of the respondents that deemed exports, applies only to REP Licenses is not borne from the provisions of the Import Policy. According to the respondents the REP licenses are completely different from Advance Licenses and that deemed exports only allow for import replenishment and not the benefit of duty free imports. To test this plea it is imperative to carefully examine the provisions pertaining to the said licenses.

17. The term "Advance Licenses" is explained in Para 149 of the Import Policy 1981-1982 and it refers to the cases where import is allowed under the duty exemption scheme, whereas, the "Imprest License" is issued outside the duty exemption scheme. Both Advance License and Imprest License are intended to supply imported inputs for export production and thus it bears a suitable export obligation which needs to be fulfilled. The details of the duty exemption scheme and the procedure for issuance of advance licenses are given in Appendix 19.

18. While in the case of REP Licenses/ import replenishment license is issued for the purpose of replenishment of imported items against which exports are already made and the details regarding the issuance of the REP License is given in Appendix 17.

19. Thus it is apparent that an advance license is granted, prior to the export, and it is issued for the import of inputs/raw materials without the payment of basic customs duty. Such imports are subject to the fulfillment of time bound export obligations. While on the other hand in cases of REP licenses, the registered exporter, first carries out the export of the manufactured products and then claims replenishment of the duty imposed on the import of raw material

utilized in the manufacture of the exported products. Therefore, it is clear that the criterion in both the licenses is to claim duty free import of certain raw materials, which are utilized for the manufacture of exportable goods.

20. While in the case of Advance License the raw materials are imported duty free i.e. before the export is made, with regard to REP Licenses, reimbursement of the duty imposed on the imported goods is sought after the export is made, and this is where the difference between the two schemes ends. Since it is clear that these licenses were designed to encourage exports with a view to bring in valuable Foreign exchange into the country. Thus the substantive intent behind the two schemes is the same, even though the procedural technicalities might differ, due to the difference in the stages at which they are applicable. That the two schemes are similar in their substantive intent is also clear from the fact that REP Licenses are inter-changeable or convertible to Advance Licenses. This is evident from the contents of Para 10, Pg 20 of the Handbook of Import Export Procedures 1981-1982 which states that in incase of applying for a fresh license under the scheme, it will also be open to the exporter to get any of the following types of licenses, which includes Import Replenishment (REP) Licenses, converted into advance license under the scheme, provided the items to be imported are covered by the license. The learned counsel for the respondents, however, has heavily relied on the subsequent endorsement in Para 10 stating that for conversion of the other licenses to advance license, the exporter will be required to follow the same procedure as if he were to apply for a fresh advance license, to contend that this clearly proves that the two licenses are entirely different. However, this court does not accept such inference as drawn by the learned counsel for respondents, since clearly this condition has been stipulated in view of the fact that in the case of advance license, exemption on the imported goods is sought before the export of the same is effected, therefore there is a requirement to attach an export obligation to the same, which is not required in the case of REP Licenses, since the same is availed after the export is carried out and thus the exemption would commensurate with the same. In the present case since the petitioners had applied for the advance license, they were well aware of the export obligation attached to the same, which they duly sought to discharge by making sales to foreign tourists, which as discussed above is a recognized measure under "deemed exports".

21. Thus as reasoned hereinbefore "deemed exports" cannot and should not be restricted to REP Licenses only if the prime objective is to earn foreign exchange which is also the objective under the Advance Licenses as well. Since the main objective of both the licenses is to earn foreign exchange, which is achieved even when sales are made to foreign tourists, the plea of the respondents that deemed exports can be done only in case of REP license cannot be accepted. It is also pertinent to note that under Chapter 18 in Para 175(i) it is specified that deemed exports referred to in Para 131 will be considered on par with other exports. Learned counsel for the respondents has tried to contend that Chapter 18 applies to Export Houses and as such it would be applicable to registered

exporters only. However, such a plea defies any logic and is without any rationale, since regardless of whether it is an Export House or a Registered Exporter, the meaning of export cannot be changed to apply differently on either, especially since even in the case of Export Houses there are three licenses provided i.e. Advance License, REP License and Imprest License as is in the case of Registered Exports. Thus a careful consideration of all the provisions reveal that "deemed exports" are to be considered as exports, for the purposes of Advance Licenses as well.

22. It is also important to note that it was envisioned by the policy makers themselves that there may be certain anomalies or discrimination arising in the application of the said Policy, which in such cases would be ironed out/ and or remedied, for which Para 167 of the Import Policy 1981-82 gave the Government the power to appropriately deal with the Policy relaxations on a case to case basis. Para 167 is reproduced as follows:

#### Relaxation of Policy

167. Cases for relaxation of the existing policy where it creates genuine hardship or where a strict application of the existing policy is likely to affect the export effort adversely will be considered by CCI&E on merits.

23. In the present facts and circumstances it is not disputed that the petitioner had obtained an advance license for 212.8 Metric Tons of the CIF value of Rs. 45,43,280/-, against which the petitioner had actually imported only 180 Metric Tons of the stainless steel of the CIF value of Rs. 35,50,192.70/-. Thereafter, on account of conflict between the President and the Managing Director of the Foreign importer, which couldn't be resolved in the near future, the export order on the basis of which the advance license was obtained had been terminated. However, the petitioners had already utilized the imported stainless steel and made the products of the unique specifications demanded by the Foreign Company, due to which reason they were faced with the predicament of finding another purchaser for the said goods. These turn of events were verified by the Enforcement officer of the Respondent No.2, as well, as he had sent a letter dated 23rd December, 1982 to the importers in England to verify and confirm whether the order placed by them on the petitioners was in fact a genuine one or not. Pursuant to this, a letter dated 7th January, 1983 was also sent to the said Enforcement Officer by M/s V & K Topline, whereby they confirmed to the respondents that the order placed with the petitioners was indeed a genuine one. Thus the respondents were well aware of the genuine problem faced by the petitioner, and understandably the petitioners were stuck with a huge consignment of steel utensils made to the unique specifications demanded by the Foreign Company, for which reason the petitioners found no other buyers in the Foreign Market.

Ultimately the petitioners were left with no other alternative but to fulfill their export obligation by selling the said utensils to foreign tourists within the

country, which as already discussed above, is a recognized method of effecting "deemed exports". As a consequence of this the petitioner managed to earn foreign exchange to the tune of Rs. 59,32,271.75 by the sale of 157.09 metric tons of stainless steel utensils against the official expectation of earning foreign exchange worth Rs. 53,24,000/-.

24. The petitioners had also maintained detail records of all the sales made to the foreign tourists, which was done through M/s Deepamani, Bombay, a registered foreign exchange dealer duly licensed by the Reserve Bank of India. The entire sale proceeds of the manufactured material in foreign exchange was, thereafter, collected by the said authorized dealer and put into scheduled banks. Thereafter the details of the amounts of foreign exchange, the currencies in which it was received by them and the persons and parties from which it was received with their passport numbers, etc. and other relevant details in the prescribed performa was duly furnished by the petitioners, while requesting the release of the bond executed by them. The petitioners have also appended with the writ petition the formal certificates from the respective bankers, of having received the corresponding foreign currency from M/s Deepamani, Bombay, giving the details of the currency, the amount and the rupee equivalent thereof. Thus, in the present case it is clear that the hardship suffered by the petitioner was bonafide, which was verified by the respondents as well, and that inspite of the dire circumstances, the petitioners sought to dispose of their export obligations by making genuine sales to foreign tourists and getting consideration for sale in foreign exchange which was the primary and main objective of the scheme.

25. The respondents have failed to negate the veracity of the documents appended to the writ petition in proof of the foreign exchange earned by the petitioner, or establish any illegality to the documentary proof given by them. Their only stand at every stage has been that the sale made to the foreign tourists who paid the consideration in foreign exchange cannot be accepted as exports for the fulfillment of export obligation against advance license. In the facts and circumstances, however, the respondents have failed to establish as to how when the petitioners had earned the foreign exchange of Rs. 59,30,000/- against the estimated export obligation of Rs. 53,00,000/-, they have not fulfilled their export obligation.

26. The learned counsel for the respondents has also taken up another technical plea that the DEEC books specifying Import and Export, which were required to be duly authenticated by the Customs, and which is a basic requirement of duty-free advance license, as the petitioner was required to maintain proper accountability of the duty-free imported raw materials by way of physical export of the said utensils, was not done by the petitioners. However, the petitioners have stated that since no actual exports were made the same were not endorsed in the DEEC, and instead the petitioners had maintained all the records of the sale made to the foreign tourists and the respective foreign exchange earned

from them, which was also explained in detail to the respondents, with the required documentary proof supporting the same, while requesting the release of the bond. The respondents too had themselves clarified by letter dated 28th January, 1985 that no entries were required to be made in the DEEC Book relating to "deemed exports" to foreign tourists against foreign exchange. Thus solely on account of not maintaining the DEEC Book and getting them verified by Customs, it cannot be concluded that the petitioner has not fulfilled their export obligation, especially in light of the ample documentary proof supplied by them with regard to the deemed exports effected by them and the foreign exchange of Rs. 59, 50,072.45/- being earned by the petitioners.

27. In the facts and circumstances it is clear that the respondents have turned a blind eye to the genuine problem faced by the petitioners, the real cause for the termination of the export order, and the subsequent foreign exchange earned by the petitioner, beyond the export obligations attached to the advance license has not been denied. Thus solely on the technical ground that the petitioners had not sought the permission of the competent authority before affecting the deemed exports, and that the DEEC Books were not maintained, such strict mechanical application of the provisions of Import and Export Policy in the facts and circumstances cannot be accepted, when the substantive intent behind the issuance of the advance license has been achieved by the petitioners. In these circumstances imposition of any penalty on the petitioners will be iniquitous and not justifiable considering the objective of the policy.

28. It is the Courts duty to harmonize the procedure with the substantive intent of the legal provisions, in order to negate arbitrariness or discrimination. Procedures cannot negate the substantive intent of the policies and cannot be restricted to become mere technicalities. Procedures have to be construed in a manner as to promote and achieve the object of the policy, rather than allow it to destroy substantive intent of it.

29. In *Pasupuleti Venkateswarlu Vs. The Motor and General Traders*, it was observed by the Apex Court that procedure is the handmaid and not the mistress of the judicial process and that

equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice subject of course, to the absence of other disentitling factors or just circumstances.

30. In *Mangalore Chemicals & Fertilizers v. Deputy Commissioner of Commercial Taxes* (1991) 83 STC 234 the Supreme Court had enunciated the principle that a distinction between the provisions of a statute which are of substantive character and were built-in with certain specific objectives of the policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. The Apex Court also observed that the stringency and mandatory nature of statutory provisions must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter

one way or the other. While some conditions might be substantive, mandatory and based on considerations of policy others may merely belong to the area of procedure and thus it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve.

31. In *Union of India (UOI) and Others Vs. Suksha International and Nutan Gems and Another*, the respondents M/s Suksha International was granted an Imprest License for the import of "uncut" and "unset" diamonds with corresponding export obligations. Upon due fulfillment of its export obligations the respondents had become entitled to revalidation and endorsement for import of OGL items of the Imprest for which reason the respondents applied under Para 185(4) of AM-83 policy. However, this claim of the respondent was rejected by order dated 21st September, 1983. The respondents had approached the High Court after which they were allowed revalidation and endorsement under Para 185(4). The petitioners approached the Supreme Court on the ground that under the Import-Export Policy, 1982-83 the registered export houses were entitled for revalidation and endorsement of OGL items under Para 185(4) subject to the express limitation in Clause (7). The Supreme Court after careful consideration held that Para 185(4) was intended to provide certain incentives to the export houses which, upon grant of Imprest License, fulfill their countervailing obligations in the matter of export commitments. Thus the provision was a beneficial one. It was observed that even though clauses (4) and (7) on plain wording presented certain constructional difficulties, however, on a harmonious construction it was decided to hold that Para 185(4) of the policy would not be attracted to the case of Export Houses which are granted Imprest License, since a restrictive view would otherwise curtail the scope of the beneficial provision.

32. Even though the facts of the said case are completely different from the facts of the present case however, the fact that the Apex Court had resorted to a more harmonious construction of the provisions of the Import Policy, rather than a restrictive view on the ground of procedural compliance, is in principle very pertinent to the facts of the present case. In the circumstances it is apparent that the petitioners had a bona fide hardship, which they tried to overcome and meet the requirement of export liability by effecting deemed exports and did earn the requisite foreign exchange, though not in the manner as had been envisaged by the respondents. The allegation that the petitioners earned huge premium has remained unsubstantiated and it is rather a reckless allegations made by the respondents without any factual and legal basis. Thus solely on the ground that permission was not sought before making the sale to the foreign tourists from the competent authority, especially since the respondents were very much aware of the fact that the foreign importer had cancelled the export order, and that all documentary proof was provided to substantiate the foreign exchange ultimately earned by the petitioners, it cannot be held that the petitioners had not discharged their export obligation and the petitioners are thus liable to pay the duty demanded by the impugned order.

33. From the above discussion it is evident that the Petitioner had produced sufficient materials to substantiate their claim that the deemed export obligation had in fact been fulfilled. It is a matter of record that though the license for import was for more material, however, the petitioners imported the material which was required and after the goods imported were used in making the products required for export, did try to export, however, on cancellation of export order, sold the goods through recognized export house and earned the foreign exchange which was also remitted to the authorized bank with proof of all the sale transactions. However, these facts have been completely ignored by the respondents in the impugned order and therefore it deserves to be set aside.

34. The respondents have further alleged that the petitioner by selling the goods to foreign tourist have acted without the authority of law and have misutilized the license, by availing premium on the imported raw materials, escaping customs duty and thereafter diverting the goods to the local market for making undue profits at the same time. Thus it is urged that the petitioners have defrauded the government by not fulfilling the export obligation, and thereby contravened the provisions of the IMPEX Act and Customs Act. However, this is a bald plea by the respondents without any factual and legal basis. The respondents rather have admitted that the RBI had accepted the foreign exchange received from the sale to the tourist with full and complete account. There is no doubt that the petitioners had indeed made the sale of the finished goods through the authorized export house, made from the duty free imported goods, to the foreign tourists, and sale was for foreign exchange. The respondents are rather unable to show factually and legally as to how the petitioners have defrauded the government or quantified any loss caused to the Government by the alleged misutilization of the advance license.

35. It is curious to note that order dated 30th January, 1985 imposes a duty of Rs. 88,55,966.58 with 18% interest on the petitioners, which has been challenged by the petitioners on the ground that it appears to have been calculated on the assumption that the petitioners had actually imported the total maximum licensed quantity of 212.8 Metric Tons instead of the actual import of 180 Metric Tons. However, despite specific assertion by the petitioners, the respondents have failed to explain the calculation or the basis on which the said amount was imposed on the petitioners, as duty to be paid in view of non-fulfillment of export obligation. In any case since it has been established that the export obligation of the advance license had been fulfilled by the petitioners, therefore, the order dated 30th January, 1985 deserves to be set aside.

36. The Respondents have also submitted that the petitioner, instead of approaching this court, should have in a normal course filed the reply to the show cause notice and represented before the adjudicating authority, and that thus this Court ought to refrain itself from interfering under Article 226 of the Indian Constitution. However, from the record it is clear that the petitioner had replied to the show cause notice issued against him, along with many

applications, however, ultimately respondent no. 2 had passed the order dated 14th May, 1986 holding that the petitioner had not complied with the export obligation and thus was liable for the payment of custom duty of Rs. 88,55,966.58 with 18% interest without giving a reasonable opportunity to the petitioners and in violation of principles of natural justice.

37. Even though alternative remedy might have been available to the petitioner, however, it cannot be accepted that on this sole ground the writ petition deserves to be dismissed after so many years in the facts and circumstances of the case. This aspect has been considered by the Courts in a number of cases a few of which are as follows.

38. In *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, it was held by the Supreme Court that rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In appropriate case, inspite of availability of alternative remedy, the High Court may still exercise its jurisdiction in at least three contingencies; i) where the petition seeks enforcement of any of the fundamental rights; ii) where there is a failure of principles of natural justice; or iii) where the orders or proceedings are wholly without jurisdiction or the vires of an act is challenged.

39. The writ petition was filed by the petitioners in the year 1986 and the reply to the writ petition was filed by the respondents almost after two decades. After the passage of such considerable period, the writ petition should not be dismissed on the ground that alternative remedy is available to the petitioners. In *Estate Officer and Manager (Recoveries), A.P. Industrial Infrastructure Corporation Limited and Others Vs. Recovery Officer, Debts Recovery Tribunal and Others*, the Court had declined to dismiss the writ petition which was filed challenging the sale proclamation of property by the Debts Recovery Tribunal on the ground that alternative remedy of appeal u/s 20 of the Recovery of Debts Due to Banks Act was available to the petitioners, after 5 years of admission of writ petition by the High Court. The Supreme Court had held that there are at least two well recognized exceptions to the doctrine with regard to the exhaustion of statutory remedy. It was held that doctrine has no application in a case where impugned order has been made in violation of principles of natural justice. Moreover, in a case where the Court having admitted the writ petition and having put the parties to trial normally cannot refuse to exercise its jurisdiction and dismiss the writ petition on the ground of availability of an alternative remedy. In para 69 and 70 at page 211, the Court had held as under;-

69. We are not impressed by the submission. It is a true and very well established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court under Article 226 of the Constitution of India. It is equally well settled that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. It may be one of the factors that may have to be taken into consideration in the matter

of granting writs. It is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law. The Court in exceptional cases can always issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted. There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires, it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs. In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice.

70. It is not possible to dismiss the petitions under Article 226 of the Constitution of India as not maintainable on the ground of there being an alternative remedy available in cases where the Court has entertained and admitted the writ petition and was heard on merits. It is a different matter altogether when the Court in exercise of its discretion refused to interfere even at the threshold on the ground of availability of an alternative and efficacious remedy. But in a case where the Court having admitted the writ petition and having put the parties to trial normally cannot refuse to exercise its jurisdiction and dismiss the writ petition on the ground of availability of an alternative remedy. It is a matter always well within the discretion of the Court and that discretion is required to be exercised in a judicial and judicious manner. It is equally a well settled proposition of law that where the order is illegal and invalid as being contrary to law, a petition at the instance of person adversely affected by it would lie to the High Court under Article 226 of the Constitution and such a petition cannot normally be rejected on the ground that an appeal lies to the authorities specified under an enactment. It needs no restatement at our hands that the Court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Article 226 of the Constitution where the party invoking the jurisdiction has an adequate, alternative and efficacious remedy. The availability of alternative remedies does not oust the jurisdiction of this Court. (See for the proposition: *Municipal Council, Khurai and Another Vs. Kamal Kumar and Another*, *Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar*, *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , and *Ram and Shyam Company Vs. State of Haryana and Others*,

40. Similarly, in the case of *Ram and Shyam Company Vs. State of Haryana and Others*, it was held that an appeal in all cases cannot be said to provide in all situation an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits. In *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, , it was held in a case where demand of tax was not backed by valid law, the petitioner would have a right to move the Supreme Court for enforcement of fundamental rights. In light of the prepositions laid down by the various Courts it cannot be held that the writ petition will be barred, as alternative remedy is available to the petitioners. 42. In any case the

petitioners have taken an alternative plea also that they became entitled to the REP License for 50% of the deemed export of Rs. 59,50,072.45. The petitioners were therefore, entitled to exemption from the duty on goods of a value of approx. Rs. 29,75,362 against which the petitioner has imported goods of value Rs. 33,53,228.60. Therefore the petitioner is at the most liable to pay duty of 220% on the differential amount of Rs. 3,78,192.35, which amounts to a duty of Rs. 8,32,023.17 only. However, since this Court has already held that the petitioners had met their export liability, the petitioners shall not be liable for this amount, in case their liability is construed in this manner.

42. The petitioner has further contended that they are entitled to the refund of the duty draw back on the Deemed exports on the World Bank Contract between 1993 and 1997. The petitioner has urged that this payment too has not been released because of the pendency of the present dispute and thus it is prayed that the amount may be released after adjusting the same against any amount payable by the Petitioner, and then the balance ought to be released. Thus, for the forgoing reasons the impugned order dated 14th May, 1986 is set aside and the writ petition is allowed. The petitioners shall also be entitled for release of their bank guarantee of Rs.90,86,500 in the facts and circumstances. Therefore, the respondents are directed to release the bank guarantee of Rs. 90, 86,500/- of the petitioners within four weeks. With these directions, the writ petition is disposed of. The petitioners shall also be entitled for a costs of Rs.20,000/- in the facts and circumstances. Costs be paid within four weeks.