(2016) 01 KAR CK 0152

In the Karnataka High Court

Case No : Writ Petition No. 31835 of 2013 (T-TAR)

Rajesh Exports Ltd. APPELLANT

Vs

Chairman, C.B.E. and C. RESPONDENT

Date of Decision : 11-01-2016

Acts Referred:

Citation : (2016) 335 ELT 3

Hon'ble Judges : Ram Mohan Reddy, J.

Bench : Single Bench

Advocate : S/Shri Kiran S. Javali with Chandrashekara K, Advocates, for the Petitioner; S/Shri Prabhuling K. Navadgi, ASG with Y. Hariprasad, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Ram Mohan Reddy, J.—Petitioner, an importer, manufacturer and exporter of gold jewellery, claims to have imported gold dore bars with impurity from M/s. Perth Mint, Australia, supplied by gold mines situated in Australia and on import, satisfied condition Nos. 34(a), 34(b) and 34(c) of Notification No. 12/2012, dated 17-3-2012, Annexure-A, took it to its refinery at Uttarakhand during the year 2012-13. A certain amount of gold dore bars when imported and received at Delhi Customs, the 2nd respondent/"Proper Officer", for the purpose of The Customs Act, 1962, accepted the self-declaration and cleared the import, extending the benefit of concessional rates of customs duty and at the refinery of the petitioner, the gold was purified, in other words, the impurities were removed and converted into pure gold and traded at different places in the country including its manufacturing unit at Bengaluru for the manufacture of jewellery.

2. It is asserted that import of gold dore bars with impurity, attracts concessional rate of customs duty and on its refinement and put into manufacture for jewellery, attracts excise duty, in other words, customs duty concession is extended only to gold dore bars. According to the petitioner, it is not for the first time during 2012-13 such imports were effected but in fact, for several years in

the past imports were done, prior to Notification No. 12/2012, dated 17-3-2012, from M/s. Perth Mint, Australia, and other parts of the world. It is further asserted that Perth Mint is a Government Company established by the Government of Australia, although the contract for the supply of the impure gold bar is with the petitioner and not as between the two governments of India and Australia.

3. Respondent No. 2/Proper Officer, having cleared the import of gold dore bars during 2012-13, having undergone refinement/purification, the 2nd respondent, there afterwards, is said to have sought certain clarification from the Ministry of Central Board of Excise and Customs, Government of India, respondent No. 1, who, it is said, by letter dated 15-4-2013, Annexure-D.

4. In the light of the aforesaid observation at paragraph 2 of the letter of the Director (Tax Research Unit), Government of India, Ministry of Finance, Department of Revenue, the 2nd respondent sought clarification regarding import of gold dore bars under Custom Notification No. 12/2012 by letter dated 29-5-2013, Annexure-E, calling upon the petitioner to submit packing list from the mining company in respect of "all past imports of gold dore bars imported from Perth Mint, Australia, so that the same may be compared and correlated with the packaging list issued by Perth Mint", to which, petitioner responded by communication dated 3-6-2013, Annexure-F, informing that it would not be possible for the petitioner to submit packing list of the mining company, because, the supplier, Perth Mint, is legally barred by Australian Law from furnishing the packing list of the mining company and further that the transaction between petitioner and the mining company stood completed and had no authority over the supplier to demand the packing list of the mining company, while asserting that the packing list of the Perth Mint, since furnished with each shipment certifying each list to be in accordance with the packing list of the mining company which produced the goods, it is legally barred from disclosing the name of the mining company and requested the 2nd respondent to accept the same which complies with condition Nos. 34(b) and 34(c) of the notification.

5. The 2nd respondent, not being satisfied with the reply, by communication dated 18-6-2013, Annexure-G, reiterated its earlier demand to furnish the requisite documents sought for in its letter, Annexure-E and failing to do so within the time stipulated, a presumption would be drawn that the petitioner is unable to produce the requisite document for co-relation and comparison. Hence this petition for the following reliefs :

"a. Issue a writ of certiorari or any other appropriate writ, order or direction and quash letter dated 18-6-2013 issued by the respondent No. 2 bearing

C.No.VIII(12)/I and G/Gr.III/Ch-71/Misc.34/2011/1565/18/6/13 (Annexure-G) as illegal and void ab initio.

b. Issue a writ of mandamus or any other appropriate writ, order or direction declaring that condition No. 34(b) and 34(c) of Notification No. 12/2012-

Customs, dated 17-3-2012 (Annexure-A) has stood complied by virtue of packing list and assay certificate of The Perth Mint.

c. Grant such other relief or reliefs as deemed fit and proper in the circumstances of the case in the interest of justice and equity.

d. Award costs."

6. Petition is opposed by filing statement of objections of the respondents though the affidavit accompanying statement of objections is by the 2nd respondent and in addition reference is only to respondent No. 2 in the statement of objections, inter alia, contending that the Central Government granted exemption from payment of duty in excess of "BCD NIL and CVD @ 2% ad valorem, for imports upto 20-1-2013 and in excess of BCD NIL and CVD @ 4% for imports w.e.f. 21-1-2013 on gold dore bars having gold content not exceeding 95% vide Sl. No. 318 of Notification No. 12/2012, dated 17-3-2012, subject to fulfilment of condition Nos. 5 and 34 of the said notification by the importer. Condition No. 5 and 34(d) it is said are post-import conditions while condition Nos. 34(a), 34(b) and 34(c) of the notification are pre-import conditions required to be fulfilled by the importer at the time of import and further that the onus to establish/prove fulfilment of the said conditions lies on the importer claiming exemption. It is said, condition No. 34 reads thus :

"Condition No. 34 :

(a) Gold dore bars are directly shipped from the country in which they were produced and each bar has a weight of 5 kg or above;

(b) Gold dore bars are imported in accordance with the packing list issued by the mining company by whom they were produced;

(c) Importer produces before the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, an assay certificate issued by the mining company or the laboratory attached to it, giving detailed precious metal content in the dore bar;

(d) Gold dore bars are imported by the actual user for the purpose of refining and manufacture of standard gold bars of purity 99.5% and above."

7. Exemption notifications are said to have been issued under the delegated legislative power to be strictly interpreted requiring the importer to satisfy the department over compliance with the conditions envisaged under Notification No. 12/2012 and that the onus is not upon the Customs Department. Failure on the part of the importer, it is said, is non-compliance with the terms of the notification and hence, would be dis entitled to the benefit of exemption. It is asserted that petitioner imported gold dore bars at Air Cargo Complex, New Delhi, seeking benefit of exemption from duty under Notification No. 12/2012, dated 17-3-2012 before the Customs Authorities at New Delhi self-certifying compliance with condition Nos. 34(a), 34(b) and 34(c) of the notification which,

upon verification of documents, 2nd respondent felt it proper to seek clarification from Central Board of Excise and Customs, headed by the 1st respondent over admissibility of such documents for grant of exemption benefit.

8. It is stated that the Directorate of Revenue Intelligence, Ahmedabad Zonal Unit also initiated an inquiry against the petitioner on the basis of intelligence gathered that the petitioner was availing the benefits of exemption Notification No. 12/2012 in violation of mandatory condition Nos. 34(a), 34(b) and 34(c) on the premise that :

(i) none of the consignments of gold dore bars, imported by them were accompanied with the packing list issued by the mining company by whom they were produced so as to demonstrate before the Customs authorities that the gold dore bars imported by them were in accordance with packing list issued by mining company by whom they were produced; and

(ii) gold dore bars imported by them were not accompanied with assay certificates, which were issued by the mining company by whom they were produced or the laboratory attached to it.

9. At paragraph 2.6, it is stated that the Central Board of Excise and Customs issued clarification vide letter F.No. 354/4/2012-TRU (Part-I), dated 15-4-2013 as follows :

"2?.. it is noted that the Perth Mint has prepared the packing list in accordance with the packing list issued by the mining company. You may, therefore, obtain the packing list issued by the mining company, and compare and correlate it with the packing list issued by the Perth Mint so as to satisfy yourself about the fulfilment of condition No. 34(b) of the notification.

3. As regards the assay certificate issued by the Perth Mint giving detailed precious metal content in the dore bar, it is noted that the Mint is 100% owned and guaranteed by the Government of Western Australia and established under an Act of Parliament (the Gold Corporation Act, 1987). The Perth Mint has also clarified that this is a laboratory attached to/appointed by the mining company. As per condition No. 34(c) of the notification, an assay certificate issued by the laboratory attached to the mining company can be accepted."

10. Following the inquiry by the Directorate of Revenue Intelligence, petitioner was issued with show cause notice dated 15-7-2013 to state as to why benefit of exemption availed by them in violation of condition No. 34(a), 34(b) and 34(c) of the impugned notification should not be denied and duty short-paid by them should not be demanded and recovered, Annexure-R 1.

11. It was further asserted that petition invoking Article 226 of the Constitution was not maintainable, in view of territorial jurisdiction of this Court. That contention, in great elaboration from pages 51 to 60 is asserted making reference to orders in Special Leave Application Nos. 3282/1999 and 3279/1999 which was transferred to the High Court of Madras at Chennai for disposal and

other judgments. It is further contended that petition was not maintainable since petitioner has an alternative and efficacious remedy in the light of the show cause notice on the issue relying upon several reported opinion of the Apex Court.

12. At paragraph 5, the 2nd respondent extracted the statement of Chairman of the petitioner-Company more appropriately over the Perth Mint, Australia, having failed to set out in its assay certificate that it was a laboratory attached to the mining company, a condition required to be satisfied under the notification, at the time of import. At paragraph 5.1, the 2nd respondent asserts that the only evidence submitted to establish the import of gold dore bars was a shipment from Australia in which country it was produced, based upon the self-certification by the Perth Mint which was the consignor of the goods which in the opinion of respondent No. 2, in the absence of other supporting evidence, fell short of meeting statutory condition No. 34(a) of the exemption notification.

13. At paragraph 5.2, respondent No. 2 stated that Chambers of Commerce and Industry (C.C.I.) of Western Australia (Inc.) (C.C.I.)''s suo motu certification was not clear as to in what context, with what authority and for what purpose the certificate was issued. In the light of the statement in the certificate that "Perth Mint is prevented from disclosing information including documentation pertaining to their customers to unrelated parties under terms contained in the Gold Corporation Act, 1987" with further statement "we are not legally permitted to disclose the name of a gold mine and we therefore do not include any reference to the name of the Australian Mine which has produced these gold dore bars", the 2nd respondent opined that petitioner cannot claim that the mines related to the Perth Mint and therefore, certificate was of no use in the view of two different packing list of mining company, hence the certification lost significance.

14. At paragraph 5.3, it is stated that condition No. 34(b) of the notification stipulates that gold dore bars should be imported in accordance with the packing list issued by the mining company by whom they were produced, in response to which importer has produced list of goods in accordance with packing list issued by the Australian Mining Company by whom they were produced, prepared by Perth Mint which merely certify that they had received gold dore bars from the mining company in Australia. With the above stated total gross weight and estimated purity for assay and that as required in the process of assaying they have melted the gold dore bars supplied, have taken testing samples from the melt, recast the gold dore bars and have prepared this packing list as per the gross weight and purity in accordance with the packing list issued by the mining company. According to the 2nd respondent, the self-certificate was not found in similar list of goods'' submitted for import prior to 3-10-2012, as also in respect of at least three consignments wherein ''packing list'' found was totally different. Hence two types of ''packing lists'', different from each other, not in accordance with the ''packing list'' of the mining company, nothing more than handwritten chits, in the opinion of the 2nd respondent made it difficult to believe that the ''list of goods'' containing properly printed tables is in accordance with

handwritten chits of the mining companies. It is further stated that there was an admission by the Perth Mint that gold dore bars received from the mining companies were melted and recast leaving those below 5 kgs, before Perth Mint sent them as consignor.

15. At paragraph 5.4, the 2nd respondent asserts that merely supply of ''packing list'', a self-certification by Perth Mint, the consignor, unsupported by evidence makes it impossible to accept the same on face value unless supported by "some supporting evidence". It is pointed out that Central Board of Excise and Customs in their letter dated 15-4-2013 opined that for testing whether the condition was met or not, the 2nd respondent may obtain the ''packing list'' issued by the mining company, compare and co-relate with the ''packing list'' issued by the Perth Mint. Therefore, it is stated, statutory condition No. 34(b) of the Notification No. 12/2012 leaves no ambiguity and requires the importer to establish that the gold dore bars imported by them were according to the packing list issued by the mining company. Alternatively, the 2nd respondent states, that the mining company has to state that the impugned ''list of goods'' issued by Perth Mint are in accordance with their packing list, which, when found incorrect the self-claim of the Perth Mint, falls short of meeting the requirements of the notification. At paragraph 6, while making reference to condition No. 34(c) of the notification, it is stated, the best evidence that the petitioner has come up with is a self-claim by Perth Mint that they are a laboratory attached to/ appointed by the mining companies with not an iota of evidence in support. The 2nd respondent has extracted the claims put forth by Perth Mint thus :

"(i) Perth Mint merely claims to be having ''very close contractual relationship with all gold mining companies in Australia'';

(ii) Perth Mint claims to be "a London Bullion Market Association accredited laboratory and as appointed by the Australian mining company"

(iii) Perth Mint claims to be a laboratory "attached to/appointed by the mining company"

(iv) All gold dore currently being mined in Australia by commercial mining companies is supplied under contract to the Perth Mint and must be assayed by the Perth Mint under conditions contained in long term agreements between the Perth Mint and the mining companies. The Perth mint and out laboratory is required to conduct an assay to LBMA standards on the gold dore bars produced by these mining companies and so the Perth Mint and out laboratory are appointed/attached through contract to these mining companies."

16. At paragraph 6.1, the 2nd respondent concluded that the aforesaid statements of Perth Mint establishes that it is not a laboratory attached to the mining company. At paragraph 6.2, respondent No. 2 compares as an example thus "if exemption is available to say green T-Shirt and an importer says in its declaration that its T-Shirts are green/red, then the exemption will be granted to only green T-Shirts and not to all" drawing an analogy to import of gold dore

bars arid an assay certificate issued by Perth Mint, 2nd respondent concluded that it was for the Perth Mint to establish that it is attached to/or appointed by mining company so as to enable the petitioner to claim exemption, since the onus is upon the importer.

17. Although 2nd respondent extracted paragraph 3 of the letter dated 15-4-2013 Annexure-E of the C.B.E. and C., nevertheless observed that in terms of the notification, exemption can be granted only if the laboratory is attached to the mining company.

18. At paragraph 6.4, it is stated that admittedly Perth Mint is a Government owned laboratory/refinery established under an Australian Parliament, and any mining company can enter into a contract with them and get its goods tested by paying a fee. Thus, according to 2nd respondent Perth Mint is a laboratory attached to the mining company. Although Perth Mint claims to be appointed by the mining company for such assaying, an analogy is sought to be put-forth by stating that if Government of India owned a laboratory, it cannot be said that the said laboratory was attached to every company who gets its goods tested there. Therefore, 2nd respondent concluded that Perth Mint though claims to be "attached to/appointed by" the mining company, the ambiguity is unacceptable for granting exemption under the notification.

19. At paragraph 6.5 a reference is made to condition No. 34(c) of the Notification reiterating the question of Perth Mint being attached as a laboratory to the mining company and declining to accept the ''list of goods'' prepared by the Perth Mint.

20. At paragraph 6.8, the 2nd respondent noticed that the statements made by the petitioner relating to engraving of serial number and weight as required by Sl. No. 323 of the Notification, it was difficult to accept the plea that Perth Mint was the manufacturer or did refine the impure gold dore bars and therefore, petitioner failed to satisfy condition No. 34(c) of the Notification.

21. At paragraph 7, the 2nd respondent observed that M/s. MMTC PAMP (I) Limited imported gold dore bars directly from an Australian mine, i.e., BCD Resources NL, Australia situated at No. 1, Rifle Range Road, Beaconsfield, TAS 7270, Australia, wherein the ''packing list'' and ''assaying certificate'' was issued by mine itself and therefore, declined to accept the plea of the petitioner that the Assay certificate issued by Perth Mint was true and further that the non-disclosure of the mining companies by the Perth Mint is incorrect. It is in this context the 2nd respondent declined to accept the certificate issued by Perth Mint although it was admittedly a Government laboratory/refinery.

22. At paragraph 9, it is stated that pure refined gold bars is exempted from duty except rate of Basic customs duty by virtue of Sl. No. 323 of Notification No. 12/2012, dated 17-3-2012 as amended and not as normal rate as contended by the petitioner, while rates of duty on pure gold bars vis-a-vis impure gold bars are totally distinct products eligible at concessional rates subject to fulfilment of

exemption notification.

23. Petitioner filed a rejoinder to the statement of objections while not disputing the fact of import of the gold dore bars, and the clarification issued by way of a response to the communication of the 2nd respondent and the conditions required to be satisfied under the Notification No. 12/2012. As regards the writ jurisdiction, it is asserted that this Court had the jurisdiction to maintain the petition. It is unnecessary to traverse the various averments with regard to maintainability of the petition as asserted by the petitioner. It is asserted that the requirements of the Notification No. 12/2012 does not restrict a self-certification, while, in fact, acknowledges such a clarification and therefore, the Assay certificate of Perth Mint cannot be faulted with and be termed as "mere self-certificate", Perth Mint being an Australian Government concern is a credible entity in the world. It is said that there is no requirement of disclosing the names of the Mines in Australia where gold dore bars are produced for the purpose of establishing their origin, since adequately established by the certificate issued by the Perth Mint and Chambers of Commerce and Industry, Australia. The Chamber of Commerce, it is said, is a trade body that issues certificate for Australian import, hence Perth Mint was able to confidentially produce the certificate to the Officers of the Chambers of Commerce who inspected the records in detail and issued the confirmation letter. It is in these circumstances, it is further stated that the 2nd respondent ought not to have undermined or negated the confirmation letter of Chamber of Commerce and Industry, since acceptable anywhere in the world. According to the petitioner, documents called as "packing list" and "list of goods" are different. The packing list is for the security of the carrier of the consignment describing the entire container handed over to the Security Carrier and the list of goods is a document, which according to the mining company contains details of goods and contents of each gold dore bars. It is asserted that it was baseless and unnecessary for the 2nd respondent to raise such basic points of understanding and point a finger at the significance of the certificate of Chamber of Commerce, demonstrating the futile attempt of the respondent to desperately disown the certificate of Chamber of Commerce.

24. The rejoinder to paragraph 5.3 of the statement of objections, it is stated that condition No. 34(b) states that the "goods are imported accordance with the packing list issued by the mining company" and therefore, there was a requirement of issuing a ''packing list'' of the mining company, the condition would have read "the goods are imported with the packing list issued by the mining company". The difference between the two is use of the words "in accordance". According to the petitioner there was a deliberate need to do away with the requirement of the ''packing list'' of the mining company by specifically providing that the goods imported are not along with and ''in accordance'' with the ''packing list'' issued by the mining company. Therefore, it was asserted that the ''packing list'' of the mining company is not a pre-requisite for import. Condition No. 34(c) if read would indicate that an Assay certificate of the mining company is required and the conscious omission of the words "in accordance"

makes it mandatory for an Assay certificate of the mining company, which certificate could be either issued by the mining company or a laboratory attached to the mining company.

25. As regards the different versions in various Assay certificates issued by the Perth Mint, it is stated that the version;, are clarified by a comprehensive certificate, Annexure-H, issued by Perth Mint, which reads thus :

"To whom it may concern

In relation to our shipment references WAMD001 to WAMD056, dated from 2nd July, 2012 to 14th February, 2013 containing gold dore bars, we hereby confirm that :

1. Every gold core bar exported by us for transportation to India was produced in Australia and was shipped from Australia. Further, each of the gold dore bars exported by us and transported to India had a gross weight in excess of 5 kgs.

2. Every shipment of gold dore bars exported by us for transportation to India was in accordance with the packing list of the mining company with reference to the gross weight and purity as stated by the mining company.

3. Every shipment of gold dore bars exported by us and transported to India was accompanied by an Assay Certificate which detailed the exact content of precious metals in each bar. The Perth Mint and out laboratory is ''attached'' to the mining companies (which supplied the dore that has then been exported) through contracts in place between the Perth Mint and the mining companies."

26. The analogy drawn by respondent No. 2 in paragraph 6.6 in its statement of objections, it is said, is baseless and has no application to the facts and circumstances of the case of the petitioner.

27. The allegation in paragraph 7 of the statement of objections that BCD Resources NL, a mining company which issued the packing list/Assay certificate in favour of M/s. MMTC PAMP (I) Limited which had imported gold dore bars under the bill of entry No. 8424513, dated 6-11-2012 at Air Cargo Complex, Delhi, at paragraph 41 of the rejoinder, it is stated that the said mine in Australia was no longer in existence and closed much before the date of entry (learned counsel for the petitioner makes reference to the material retrieved from the internet, annexed as document No. (b) to the memo dated 15-10-2015 indicating that the final mining at Tasmania Mine was completed on 25-6-2012 and that processing of all underground ore completed by 9-7-2013). The assertion of the 2nd respondent that there was "printed format" and "handwritten chit", in rejoinder, it is stated is of no significance having regard to the fact that BCD Resources NL, a mining company in Australia had closed down its business. It is lastly stated that if regard is had to the further certificate issued by Perth Mint, Annexure-H read with the letter of confirmation, Annexure-J of the Chamber of Commerce, Australia and the clarification issued by the 1st respondent in its letter Annexure-D, petitioner had fulfilled conditions 34(a),

34(b) and 34(c) of the Notification No. 12/2012, dated 17-3-2012 for import of gold dore bars. The certificate of origin, Annexure-K and the list of goods Annexure-B, as also the assay certificate Annexure-C, it is asserted, forms a formidable basis of assessment and clearance of the imported goods for own consumption. The fact that the gold dore bars imported did weigh more than 5 kgs is a foregone conclusion in the light of its admission and therefore, the import of said gold dore bars by the petitioner from Australia weighing more than 5 kgs, thus complied with condition No. 34(a) of the Notification.

28. On 27-11-2014 this Court having considered the pleadings of the parties and after hearing, noticed that during the pendency of the petition, a show cause notice was issued to the petitioner and therefore, keeping open all contentions of the petitioner to be urged before the competent authority who had issued the show cause notice, petition was adjourned for eight weeks.

29. During the pendency of the petition, on 27-11-2014 this Court having directed passing orders in the enquiry/investigation, it is stated that the same was completed with reference to three show cause notices dated 15-7-2013, 8-8-2013 and 9-12-2013 culminating in an order dated 27-11-2014 called in question in W.P. No. 31835/2013 and in which the order was quashed.

30. On 18-3-2015 a learned single judge dismissed the petition as not maintainable without expressing any opinion on the merit of the case, which, when carried in W.A. 1482/2015, the Division Bench, by order dated 10-7-2015 allowed the appeal, set aside the order, remitted the proceeding for fresh consideration, observing that it was difficult to uphold the view of the learned single judge that this court had no territorial jurisdiction to entertain the petition.

31. On 19-8-2015 the following order was passed :

"Learned counsel for petitioner submits that the lis is over clause 34(b) of the notification dated 17th March, 2012, Annexure-A in relation to "in accordance with the packing list" issued by the Mining Company by whom the Gold Dore Bars were produced. According to the learned counsel the supplier, Perth Mint prepared the packing list whence the Gold Dore Bars were imported and assay certificate issued by that mining company was accepted by the Commissioner for Customs as compliance of clause 34(c), nevertheless, was not accepted for purpose of clause 34(b).

Sri Prabhuling Navadagi, learned Additional Solicitor General, submits that post the impugned letter, Annexure-D, several proceedings have taken place, whence, petitioner was issued with a show cause notice, calling upon him to furnish the packing list of the mining company, to which petitioner responded, seeking copies of certain documents which the respondents are willing to make over and in that regard, would file an affidavit so as to finally decide the lis.

In order to extend an opportunity of fail hearing to the respondents, so as, to enable it to file an affidavit over the details of the certified copies of records which would be made available to the petitioner and those which will not be made available to petitioner and not used against the petitioner.

List on 31-8-2015."

There afterwards an affidavit was filed by the respondent on 31-8-2015 and 16-11-2015, it was observed that the enquiry commenced by the Commissioner of Customs (Import), Air Cargo Complex (Import), New Delhi, observed to be concluded by 30th November, 2015 by providing the petitioner with all the documents sought for, while on 19-11-2015, the following order was passed :

"I.A. No. 2/2015 is filed by the writ petitioner for a direction to the respondents that the documents of the petitioner are in the direction of compliance with condition No. 34(a), (b) and (c) of the Notification No. 12/12 in the matter of import of Gold Dore Bars from Perth Mint and the same be allowed.

2. According to the applicant the order dated 7-11-2014, directed completion of the adjudication pursuant to the show cause notices, which when considered, on 16-11-2015 an order was passed directing completion of adjudication before 30-11-2015. It is further assertion of the applicant that orders dated 7-11-2014 and 27-11-2014 of this Court relating to the adjudication pursuant to the show cause notices stood concluded and complied by original order passed of the 2nd respondent, which when challenged in W.P. No. 2509/2015 was set aside by order dated 5-2-2015.

3. The proceedings pursuant to the show cause notices, it is said, is separate and distinct, in which, the petitioner is ready and willing to co-operate. The relief in the writ petition being separate and unconnected with the show cause notices, adjudication over the reliefs be considered at the earliest. In addition, it is stated that the request for early hearing of the petition is due to imports having come to a standstill and the refinery of the petitioner closed as raw material is not availability leading to joblessness of persons as well as financial stringency. The applicant further submits that there is compliance with conditions 34(a), (b) and (c) and the clarification Annexure ''D'' is sufficient for the authorities to take a decision over compliance with the aforesaid clauses. The action of the respondents it is submitted is deliberate to stop legitimate imports by petitioner. It is lastly stated that the imports of the petitioner not allowed due to Annexure ''G'' letter it is imperative that directions be issued holding that there is compliance with the aforesaid conditions by the petitioner and permit the petitioner to import Gold Dore Bars from Perth Mint.

4. It is no doubt true that in the order dated 16-11-2015, while making reference to the proceedings pursuant to the show cause notices, the submission of the learned Additional Solicitor General that copies of documents sought for by the petitioner would be made available hence the authority was directed to conclude the proceedings by 30-11-2015.

5. Today, learned counsel for the petitioner-applicant submitted in the morning

session that there is non-compliance with the order dated 16-11-2015 in not making available copies of all the documents sought for, to which the learned Additional Solicitor General submitted that he would take instructions, hence proceeding was adjourned to the afternoon session. In the afternoon, learned Additional Solicitor General files a Memo enclosing copies of the documents referred to in the memo, copy of which, is acknowledged by the learned counsel for the petitioner-applicant.

6. In the facts and circumstances, it is apparent that there is overlapping of enquiry by the authorities. On the one hand, pursuant to Annexure ''D'' clarification of the Director (TRU) to the Commissioner (I and G) stating that the Commissioner having recorded satisfaction of compliance with the clauses 34(a), (b) and. (c) nevertheless, on 15-4-2013 Annexure ''G'' letter calls upon the petitioner, on 18-6-2013, to submit packing list from the "mining company" in respect of all past imports of Gold Dore Bars imported from Perth Mint, Australia within a week and failure to produce the document, it would be presumed that the petitioner is unable to produce the same for requisite "correlation and comparison". Since the Commissioner (I and G) when satisfied with the petitioner''s compliance with clauses 34(a), (b) and (c) in the matter of import of Gold Dore Bars from Perth Mint an undertaking of Government of Australia, the question of calling upon the petitioner to furnish packing list from Mining Company, which the Perth Mint declined to furnish, did not arise. It is on the said basis petition is filed to quash Annexure ''G'' letter and to declare that condition Nos. 34(b) and 34(c) of the notification Annexure ''A'' is complied with, accepting the ''packing list'' and Assay certificate issued by Perth Mint.

7. On the other hand, the Directorate of Revenue Intelligence initiated proceedings by issuing notices to show cause over non-fulfilment of condition No. 5 of notification No. 12/12, making reference to clause 34(a), (b) and (c) and in particular, that since imports of Gold Dore Bars were not accompanied by "packing list" issued by the "mining company" by whom they were produced, petitioner did not demonstrate before the custom authorities that Gold Dore Bars imported by it were in accordance with the packing list issued by the mining company by whom they were produced, so also that such imports were not accompanied by Assay certificates issued by the mining company by whom they were produced while those furnished were issued by the laboratory attached.

8. Thus, the issues arising for consideration before the Deputy Commissioner of Customs as indicated in Annexure ''G'' letter as well as the contents of the show cause notices of the Directorate of Revenue Intelligence apparently overlap each other. The effort of the learned counsel for the petitioner is to point out that a decision on Annexure ''G'' in the petition has a bearing on the decision to be rendered by the Directorate of Revenue Intelligence over the show cause notice, though, partially, nevertheless on a particular issue, while over other issues in the show cause notice may be proceeded with and petitioner is willing to co-operate in the adjudication.

9. Learned Additional Solicitor General submits that the explanation if submitted by the petitioner to the show cause notices on the basis of the documents made available by E-Mail on 17-11-2015 the hard copies of which made available today in Court, would be considered by the Directorate of Revenue intelligence.

10. At this stage, since the petitioner has not called in question the show cause notices, it is appropriate to direct the petitioner to file his explanation to the show cause notices on the basis of the hard copies made available to him today, through its learned counsel, and place a copy of the same before this Court by the next date of hearing, i.e., on 25-11-2015, on which date, further orders would be passed and if petitioner so desires to have the time extended for conclusion of adjudication over the show cause notices, may seek extension of time.

11. Although Sri Prabhuling Navadagi, learned Additional Solicitor General submits that the hearing was fixed for today at 11.00 a.m. in terms of the e-mail that was sent to the petitioner, nevertheless, since the learned counsel for the petitioner submits that no such e-mail was received by his client and it is for the first time at 2.30 p.m., it is made known of hearing of the matter at 11.00 a.m., it is but appropriate to direct the authorities to re-fix yet another date after 25-11-2015 for personal hearing.

Re-list for further orders on 25-11-2015."

and on 25-11-2015 the following order was passed :

"I.A. No. 3/2015 is filed for extension of time for concluding the proceeding initiated by Directorate of Revenue Intelligence, while, I.A. No. 4/2015 is for an order recording acceptance of respondents substantial compliance of clause 34 (a), 34(b) and 34(c) of the Notification No. 12/2012. On 16-11-2015, the competent authorities were directed to conclude the proceeding by 30-11-2015. It is the assertion of the petitioner that copies of all the documents sought for are not made available, as is stated in I.A. No. 3/2015. In that view of the matter, there is a need to modify the order dated 16-11-2015 and extend time to conclude the proceeding, a decision over which would be taken only after the response of respondent authorities over I.A. No. 3/2015 and I.A. No. 4/2015, I.A. No. 3/2015 is allowed.

Relist on 2-12-2015."

32. Learned Addl. Solicitor General filed a memo dated 2-12-2015 which runs thus :

"1. In the above petition the petitioner has prayed for (a) quashment of Annexure-G, letter issued by Respondent No. 2, dated 18-6-2013 (b). He has also for declaration that he has complied with condition No. 34(b) and (c) of Notification No. 12/2012.

2. Annexure-G is a letter addressed by Deputy Commissioner of Customs

requesting the Petitioner to submit Packing list from mining company within a week in respect of all past imports of Gold Dore bars imported from a Perth Mint in Australia.

3. During pendency of this petition, show cause notice has been issued to the petitioner by Commissioner of Customs dated 9-12-2013 bearing No VIII(HQ) 10/I and G/Adj/Rajesh Exports/145/2013. This is a statutory enquiry conducted under Section 18(2) of Customs Act, 1962.

4. The petitioner was furnished with the documents as sought by him in his letter dated 19-2-2015. The Petitioner has now filed interlocutory Application in I.A. No. 3/2015 seeking furnishing of other documents as explained in I.A. No. 3/2015. All the documents as sought in I.A. No. 3 has been furnished to the Petitioner through email dated 30-11-2015. A copy of the email communication is produced herewith and marked as Document No. 4.

5. In view of the Show cause notice issued to the Petitioner by the Respondent No. 2 and the Petitioner having filed an interim reply to the same, the present petition does not survive.

6. The Respondents undertake that they would not pursue Annexure-G, letter issued by Respondent No. 2, dated 18-6-2013, as the show cause notice has already been issued to the petitioner relying on the substance of the said letter. It is imperative on the part of the petitioner to submit the requisite documents in their reply to the Show Cause Notices. The enquiry/adjudication proceedings would be completed on the basis of reply submitted by the petitioner within the time to be stipulated by this Hon''ble High Court."

33. In the light of the affidavit dated 26-8-2015 filed on 29-8-2015 of Ms. Sailaja Ray Baruah, Commissioner of Customs (Import), New Delhi and the memo dated 2-12-2015 (supra) coupled with the submission of the learned Addl. Solicitor General for the respondents, the enquiry would be held by clubbing the three show cause notices dated 15-9-2014, 21-10-2014 and 26-11-2014, two of which were issued by the Directorate of Revenue Intelligence, Ahmedabad, to be heard and concluded by the 2nd respondent and that respondents undertake not to pursue Annexure-G letter dated 18-6-2013, it is needless to state that the first relief in the petition to quash Annexure ''G'' letter dated 18-6-2013 does survives no more.

34. The second relief in the petition over a declaration of compliance with conditions 34(a), (b) and (c) of the Notification No. 12/2012, it is seriously argued that petitioner is entitled to the relief in the light of the admission of the respondents that on the date when the imports were permitted there was implicit compliance with the aforesaid conditions of the notification and pursuant to the issue of show cause notice dated 9-12-2013 by the 2nd respondent, the petitioner would appear and put-forth its say, being an event subsequent to the import, seeking clarification from the petitioner. The submission is seriously opposed by learned ASG on the premise that a declaration of the nature sought

by the petitioner would scuttle the entire proceeding initiated under Section 28 read with Section 18 of the Customs Act, 1962 since the enquiry is over whether petitioner has complied with condition Nos. 34(a), (b) and (c), though it is post import of the gold dore bars.

35. The case put-forth by the petitioner and as resisted by the 2nd respondent and not by the 1st respondent since in the letter of the 1st respondent at paragraph 3, Annexure-D is said petitioners import of gold dore bars, were fully satisfied, since all the documents furnished by the petitioner recorded compliance with conditions 34(a), (b) and (c), thus entitled to exemption under the Notification. In the circumstances there is a need to answer the question as to whether on the date of import and permission granted by the Customs Authorities, whether condition Nos. 34(a), (b) and (c) of the Notification No. 12/2012, dated 17-3-2012 was complied with by the petitioner in its import of gold dore bars from the Perth Mint at Australia?

36. At the cost of repetition, it is useful to extract condition No. 34(a) of the Notification which reads :

"the goods are directly shift from the country in which they were produced and each bar has a weight of 5 kgs or above"

The requirement of this condition, in my opinion is three fold. Firstly, the country producing the gold dore bars must be made known and in the instant case, it is admittedly in Australia as is demonstrated by Annexure-B, list of goods and Annexure-C. Assay certificate issued by Perth Mint, as clarified in the letter Annexure-H and the certificate of the Chamber of Commerce, Australia, Annexure-J, as well as the certificate of origin, Annexure-K issued by the Perth Mint, Australia, certifying that gold dore bars imported by the petitioner are of Australian origin. Secondly, the requirement is that the shipping of the goods is from a country which produced the gold dore bars. Admittedly the gold dore bars were shipped from Australia as is noticeable from the Air Way Bill, Annexure-L certifying that goods were shipped from Perth; an Airport in Australia. Thirdly, relevant information necessary for compliance with said condition is that each of the gold dore bars should weigh more than 5 kgs and in the instant case, the weight of each gold dore bars, as disclosed in Annexure-B, ''list of goods'', demonstrates that they weighed more than 5 kgs.

37. Apparently the material on record establishes compliance with condition No. 34(a) of the Notification No. 12/2012.

38. Condition No. 34(b) reads thus :

"Goods are imported in accordance with packing list issued by the mining company by whom they were produced."

A reading of the aforesaid condition requires two fold compliance: firstly, goods must be imported, which the petitioner has done. Secondly, the goods should be in accordance with the ''packing list'' issued by the mining company by whom they were produced. If regard is had to Annexure-B, ''list of goods'', apparently goods were imported ''in accordance with'' the packing list issued by the mining company by whom the goods were produced, since assay certificate is issued by the Perth Mint, a government company constituted by the Government of Australia under the statute known as "Gold Corporation Act, 1987''. The words "in accordance" requires a literal interpretation and should not be confused with the use of words "along with goods''. Both of them would give different meanings. Learned counsel for the petitioner is correct in his submission that the words "in accordance" when inserted in the condition 34(b) in the Notification No. 12/2012, the requirement was to furnish the ''packing list'' and if so done, it cannot be said that there is non-compliance with condition No. 34(b). If the words "along with" is placed by removing the words "in accordance", then a different meaning could be attached to compliance of Section 34(b); that is the goods will have to be necessarily accompanied by ''packing list''. When such is not the intendment of the Notification, therefore, the 2nd respondent, at the time of acceptance of self-declaration of the petitioner of import of gold dore bars from Australia by producing the packing list, Annexure-B, and the assay certificate issued by Perth Mint, being satisfactory compliance with condition No. 34(b) of the Notification, permitted the import.

39. Condition No. 34(c) reads thus :

"34(c) the importer produces before the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, an assay certificate issued by the mining company or the laboratory attached to it, giving detailed precious metal content in the gold dore bar;"

Compliance of this condition can be broken down to three aspects. Firstly, there must be an assay certificate detailing the precious metal content in the imported gold dore bars. Admittedly, assay certificate is the document for importing the gold dore bars by the petitioner which also mentions the quantity of precious metal content in each of the said bars; secondly; the assay certificate should be issued by the mining company or the laboratory attached to it. In the instant case, Perth Mint, a Corporation constituted by the statute of the Australia Government certifying it as a laboratory attached to the mining company in Australia, ex facie, coupled with Annexure-H, letter of the Perth Mint clarifying that there is an embargo in the matter of furnishing the names of all the gold mines in Australia which produced gold dore bars, hence non furnishing of the name of the gold mine where the gold dore bars imported by the petitioner were, in fact, mined, in the circumstances is not within the control of the petitioner. Tile certification made by the statutory authority in the country of origin, i.e., Australia, necessarily requires acceptance by the Indian Authorities and if they find anything fraudulent in the issue of such a certificate, it is for the authorities to make necessary enquiry with the Perth Mint or Government of Australia and not call upon the petitioner to secure the name of the mine where the gold bars were produced. Lastly, assay certificate must be produced before the Customs

Officer by the importer. Admittedly, petitioner produced the assay certificate and the 2nd respondent accepted the same on the date when it came to the Airport, Cargo Division and was permitted to be released while granting exemption from duty under the relevant Notification. Therefore, in my opinion, ex facie, petitioner did comply with the requirements of condition No. 34(c) in the matter of import of gold dore bars from Australia and the mines from Australia.

40. It is also useful to notice that there is no dispute that petitioner is an importer of gold dore bars. Even in the past, i.e., prior to Notification No. 12/2012 all imports by the petitioner were permitted on satisfactory compliance of the conditions in Notification No. 21/2002 and thereafter wards under the Notification No. 12/2012. In that view of the matter too, as on the date of import, it cannot but be said that there is compliance of condition No. 34(c) of the Notification.

41. From the material on record, more appropriately the packing list, Annexure-6 and the assay certificate, Annexure-C of Perth Mint relating to import of gold dore bars mentioned therein, at the time of import, petitioner complied with condition Nos. 34(a), 34(b) and 34(c) of the Customs Notification No. 12/2012, dated 17-3-2012.

42. In that view of the matter, post import and permission by the 2nd respondent exempting from duty the said imports, action initiated by issuance of three show cause notices since not questioned in this petition, deserves to be taken to their logical end, which Sri Kiran S. Javali, learned counsel for the petitioner is not averse and the petitioner is willing to participate and advance all such pleas as are available.

43. In the result, this petition is allowed in part. In the view that is taken and the submission of the learned ASG, coupled with the memo and the affidavit noticed supra, there is no necessity to quash Annexure-G, while a declaration shall ensue that petitioner has complied with the requirements of condition No. 34(a), 34(b) and 34(c) of the Notification No. 12/2012 in respect of the packing list, Annexure-B and the assay certificate, Annexure-C, while reserving liberty to the 2nd respondent to continue and conclude the proceedings pursuant to the show cause notices dated 15-7-2013, 8-8-2013 and 9-12-2013. The 2nd respondent while considering the show cause notices and the replies, will be well advised to consider the effect of the doctrine of "substantial compliance and intended use" as observed by the Apex Court in case of Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and Others - (2011) 1 SCC 236 = 2010 (260) E.L.T. 3 (S.C.), while answering all the issues raised in the show cause notices.