

(1998) 11 MAD CK 0136

In the Madras High Court

Case No : Writ Petition No's. 6784 of 1996 and 9840 of 1998

Salem Stainless Steel Suppliers

APPELLANT

Vs

Commissioner of Cus.

RESPONDENT

Date of Decision : 05-11-1998

Acts Referred:

Citation : (1999) 106 ELT 303

Hon'ble Judges : Jagadeesan, J

Bench : Single Bench

Advocate : R. Thiagarajan, for M. Muthappan, for the Appellant; V.M.G. Vardarajan, Addl. Central Government Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Jagadeesan, J.—The petitioner as well as the respondents are common in both the writ petitions. The petitioner has purchased quantity based advance licence bearing No. 0325984, dated 16-8-1994 from one Amar Enterprises, Bombay. The said licence was issued by the Joint Director General of Foreign Trade, Bombay for the import of non-magnetic stainless steel sheets/coil made of AISI-304. He also purchased another licence bearing No. PK 0545079, dated 24-1-1995 from M/s. Rajan Overseas Private Ltd., Delhi-26 which was issued by the office of the Joint Director General of Foreign Trade, New Delhi for the import of non-magnetic stainless steel sheets/coil made of AISI-304. Both the licences relate to the policy year 1994-1995. The licences were issued under the Duty Exemption Entitlement Scheme. As per the Import-Export Policy 1992-1997 such licences are transferable on the licensee fulfilling the export obligation and getting necessary endorsement as to transferability from the Licencing Authority. The original licence holders in both the licences, after performing their export obligation, got the necessary endorsement of transferability and transferred the same in favour of the petitioner. By virtue of such transfer, the petitioner became the holder of valid licence to import the items described therein. The petitioner has also obtained necessary transfer of release advice from the Customs

Authorities at Bombay since the Port of Registration was indicated as Bombay, to enable the petitioner to import and clear the goods through Madras Port.

2. The petitioner pursuant to the transfer of licences in his favour, imported 4 cases of stainless steel coil from Singapore, weighing about 28,068 Kgs. The petitioner had bonded the goods imported on 7-9-1995, since there is no immediate requirement of use of the entire quantity. Subsequently the petitioner wanted to get the goods released in part for immediate use. They filed Bill of Entry on 2-3-1996 for clearance of 12,235 kgs contained in two cases. Along with the Bill of Entry, necessary documents, including the original licences transferred in favour of the petitioner were also filed.

3. The Customs Authorities raised query on 8-3-1996 asking the petitioner to clarify that the thickness of the goods imported are 2.00 mm and 3.15 mm; whereas the thickness of the goods is not mentioned in either of the advance licence. On 18-3-1996 the petitioner sent a reply, bringing to the notice of the Assistant Commissioner of Customs that the licence in question do not specify the thickness or guage of the items to be imported but only the chemical composition and that the goods imported satisfy and answer the chemical composition. The Deputy Commissioner of Customs - Grade VII, after perusal of the explanation submitted by the petitioner, has ordered that the nexus has to be established. Following this endorsement, the Deputy Commissioner, the Assessing Officer, has made an endorsement in the Bill of Entry that since the importer was unable to prove the nexus, the importer has to either produce the valid advance licence or pay duty on import has made an endorsement on 4-4-1996. Thereafter the petitioner sent a letter dated 8-4-1996, informing the

Deputy Commissioner of Customs that nexus has to be established only with reference to the chemical composition and not with regard to the thickness, as demanded by the authorities. Though the petitioner has asked for personal hearing in the said letter, he has not received any reply till the filing of the writ petition in spite of two further reminders, dated 6-5-1996 and 22-5-1996. Hence the writ petitions had been filed to quash the endorsement and the decision of the authorities to sell the goods and consequently direct the respondents to assess the Bill of Entry in accordance with law.

4. The third respondent has sworn to the counter affidavit filed on behalf of other respondents also. It is stated in the counter affidavit that a statutory appeal has been provided against the impugned endorsement and as such the writ petition is not maintainable. It is further stated that the imported materials must confirm to the materials that have been exported as in this case in the matter of thickness of stainless steel sheet. If only the petitioner has exported the utensils made out of stainless steel sheets of the thickness that are now imported by him, he will be entitled to have the duty exemption benefits. It is not the case of the petitioner that he had exported 2.5 mm and 3.15 mm thickness of stainless steel sheet utensils so as to be entitled to import stainless steel sheet of the same thickness. Hence the petitioner is bound to establish the nexus between

the import and export products regarding the value based advance licence.

5. As per the import and export policy upto 31st March, 1993, the Ministry of Commerce, Government of India issues General Notes of Engineering Products. In Note No. 2, the thickness has been mentioned under the specification. Subsequently, upto March, 1994 the policy was revised and under Note No. 2 of the General Note, there was further clarification in which for some of the exports of steel products whether semifinished/finished the criteria of conformity was restricted to only chemical composition and for the other items of steel thickness was insisted. Subsequently upto March, 1995 it was further clarified under Note No. 1 of General Note explaining the forms of steel products whether finished or semifinished. On 29-6-1995 under public notice the word "thickness" appearing in Note No. 1 to General Note was deleted. By taking advantage of the deletion, the petitioner, by letter dated 18-3-1996 have stated that there is no need to verify the thickness of the material as the word "thickness" appearing in Note No. 1 of General Note has been deleted on 29-6-1995. On this ground the petitioner wanted clearance of the goods without insisting the thickness.

6. It is further stated in the counter affidavit that the stainless steel utensils are one of the major exports and almost all the exporters, including the petitioner exports stainless steel utensils of thickness ranging from 0.3 mm x 0.9 mm. The petitioner purchased the licence from the original licence holders. When the licence was issued to the original licence holders, the thickness specification was insisted. Therefore the petitioner who is the transferee of the licence has stepped into the shoes of the original licence holder and is not entitled for the benefit of the provisions of the public notice dated 29-6-1995. Hence the respondents are within their jurisdiction in insisting on the thickness of the goods. Moreover, when the petitioner claims the clearance on the basis of duty exemption entitlement certificate, he has to establish the nexus and since that has not been established by the petitioner, the endorsement made by the officials is quite legal.

7. Mr. R. Thiagarajan, the learned senior Counsel for the petitioner contended that there is no dispute that the licence is transferable on the original licensee fulfilling the export obligation. The original licence holder fulfilled his export obligation, got the endorsement of transfer from the licensing authority. The petitioner is the purchaser of those licences after it changed hands. Under the policy the petitioner can either himself import the material under the licence or he can sell the licence. In the original licence there is no specification of the thickness and hence the authorities has to satisfy with regard to the conformity of the chemical composition. Moreover, the nexus has to be established only in respect of the original licensee and it cannot be insisted with regard to the transferees. Hence the endorsement made by the officials are without any jurisdiction.

8. On the contrary, the learned Counsel for the respondents contended that the petitioner has claimed the benefits of the subsequent notification wherein the chemical composition can be taken into consideration. The petitioners, being

importers, are bound to establish the nexus and without doing so they cannot clear the goods.

9. I carefully considered the contention of both the counsel. The petitioner is only a purchaser of the import licence from the original licensee. The original importer has imported the material goods as per the original licence and complied with the obligation of the export. In the original licence there is no specification of the thickness of the goods to be imported. When the licence is coupled with the obligation of export, then the exporting material should be in conformity with the material imported. In this case, the original licensee admittedly has discharged the export obligation and obtained a discharge endorsement and sold the licence. When once the obligation of export contemplated in the original licence had been discharged and the discharge endorsement has been made, thereafter the original licensee can import the materials with obligation to export or transfer the licence to third parties after the licence is endorsed about the export-discharge certificate. The nexus need not be established because the nexus would arise only when the obligation of export exists. The petitioners, as purchasers of the licence after the discharge of the obligation of exports, are not bound to establish the nexus.

10. It is clear from a Division Bench judgment of the Bombay High Court reported in *Bussa Overseas and Properties (Private) Limited and another Vs. Union of India and another*, wherein it has been held as follows :

"Thus, strictly speaking, it is not quite correct to say that the object of the scheme is only to provide to the Registered Exporters, to some extent, by way of import replenishment, the essential raw materials required in the manufacture of products exported. The REP licences being freely transferable can be and are sold by the Registered Exporters and they make profit out of it. The object of the Scheme, to some extent, is thus diluted. Therefore, it can be reasonably inferred that the object of the Scheme is not merely to provide a percentage of some of or all the raw materials used by the Registered Exporters in the products exported but also to augment their income by way of sale of REP licences issued in their favour....There is no merit in the arguments advanced on behalf of the department in this regard. The reason is not far to seek. REP licences are primarily issued with a view to replenish a percentage of all or some of the raw materials used in the manufacture of products exported. The Registered Exporters in whose favour these licences are granted, are obliged to ensure that they apply for such raw material or raw materials only as are used by them in the products exported. However, even though Ethyl Alcohol for which these REP licences are granted is a generic term comprehending within it different kinds of Ethyl Alcohol put to many and different uses, the licences are issued simpliciter for Ethyl Alcohol without restricting its meaning or scope in the licences in any manner. In this connection, it may be noted that whenever the Licensing Authorities are empowered to and consider it necessary to specify the kind of commodity with reference to the use to which it is to be put to, that is mentioned

in the licence itself. But in these licences nothing of the kind is mentioned. Under the circumstance, it is not possible to accept the contention of the Customs Authorities that though the imported item is covered by the description "Ethyl Alcohol", it cannot be imported under these licences as it is not used as raw material in the product exported by the Registered Exporters. This becomes further clear when it is kept in view that all powers in this regard vest in the Licensing Authority who in terms of Para 8 of Appendix 17 is empowered to ensure that the REP licences are issued for the items which are used by the Registered Exporter in the manufacture of products they export. In case a licence is wrongly issued for an item, he has the power to cancel the licence. In case the licence has already been used before irregularity or mistake comes to his notice, the Licensing Authority can take appropriate steps against the Registered Exporter. All this, to our mind, shows that whether a licence is issued for a particular item properly is something between the Licensing Authority and Registered Exporter. But once the licence is issued and the Registered Exporter or the transferee of it imports the goods, so far as they are concerned they will be entitled to import such goods which answer the description of the goods mentioned in the licence unless the licence is cancelled or suspended etc. Admittedly, REP licences involved in the present case have not been cancelled by the licensing authority. Accordingly we do not agree with the Customs Authorities that from the fact that these are REP licences, it must be assumed that the items for which the licences are issued are further qualified that the goods imported should be such as are used in the manufacture of products exported by the Registered Exporter."

From the above said principle, laid down by the Hon^{ble} Judges it is very clear that when once the export obligation had been discharged. It is not for the customs authorities to insist for the nexus. If any import is in contravention of the licence, it is for the licensing authority to take action and not for the customs authorities. If the customs authorities finds that there is a contravention of the licence, they have to bring it to the notice of the licensing authorities in order to take suitable action. In this case the licence has not been cancelled and under the valid licence the goods have been imported. When the obligation of export do not exist, it is not open to the authorities to insist on the petitioner to establish the nexus. On this short ground the writ petitions have to be allowed.

11. Accordingly the writ petitions are allowed. There will be no order as to costs.