

# KARNATAKA HIGH COURT

Bharat Fritz Werner Ltd

Vs.

The Commissioner of Commercial Taxes

W.P. No. 11019 of 1990 c/w W.P. Nos. 23931 and 23932 of 1990

(S. Rajendra Babu, J.)

08.10.1991

## ORDER

### **S. Rajendra Babu, J.**

1. The petitioners in these cases, who are manufacturers and exporters of goods, are entitled to import replenishment license (hereinafter referred to as "the REP license") under the Import-Export Regulations framed under the Imports and Exports (Control) Act, 1947, which facilitates import of goods that are necessary for and to go into the manufacture of items which are exported.

2. Applications for issue of REP license are made by manufacturers exporters under certain schemes pursuant to procedures laid down thereunder and issued by the Controller of Imports and Exports, depending on the export performance of the manufacturer/importer. The REP license so issued can be used by the manufacturers or importers to import goods to replenish materials used in production of goods which were exported or for further production of goods which are to be exported, or that such licenses can be freely transferred or disposed of to any person and permission or license of the licensing authority is not required. The conditions subject to which the REP licenses were issued are binding on the purchasers of such licenses from the manufacturers or importers and he will be entitled to import and clearance of the goods covered by such licenses under the policy in question on production by the transferee of only the document of transfer of license concerned in his name. Whenever a REP license is transferred, the transferor is required to give a formal letter to the transferee. The relevant allegations in this regard are as set out in paras 1, 4 and 5 and for purposes of convenience are reproduced hereunder :

"1. The petitioners are dealers registered under the provisions of the Karnataka Sales Tax Act, 1957. The first petitioner is a manufacturer of ready-made textile garments and the

said petitioner exports the ready-made textile garments to various countries. The second petitioner is a manufacturer of ready-made leather garments and the said petitioner exports the ready-made leather garments also to various countries. The petitioners earn substantial foreign exchange to the country and being exporters, the petitioners are entitled to import replenishment licenses under the Import-Export Regulations of the Government of India to facilitate import of goods which are necessary for and to go into the manufacture of items which are exported.

4. REP licenses issued in terms of the scheme envisaged under Chapter XV of the Import-Export Regulations/Policy administered by the Chief Controller of Imports and Exports. The object of the scheme is to provide registered exporters by way of import replenishment, essential inputs required in the manufacture of the products exported and to allow certain flexibility to enable diversification of the export products.

5. Applications for issue of REP licenses are made by manufacturers/ exporters under the scheme as per the procedures laid down thereunder and the REP licenses were issued by the Controller of Imports and Exports based on the export performance of the manufacturer/importer.

The REP licenses so issued can be used by the manufacturers/importers to import goods to replenish materials used in production of goods which were exported or for further production of goods which are to be exported or such licenses can be freely transferred/disposed of to any person, and permission or endorsement of the licensing authority is not required. The licenses issued to the manufacturer/importer are subject to certain terms and conditions, which are also binding on the purchaser of the REP license from the manufacturer/importer and the purchaser of the REP license can import any of the items mentioned in the annexure to the REP license which the manufacturer/importer is entitled to import and clearance of the goods covered by a REP license under this policy will be allowed by the customs authorities on production by the transferee of only the document of transfer of license concerned in his name. Whenever a REP license is transferred, the transferor is required to give a formal letter to the transferee, giving full particulars regarding number, date and value of the license transferred and the name and address of the transferee and complete description of the import items, for which the license is granted."

And they set out the legal position in regard thereto.

3. In respect of such transferred licenses the 1st respondent has issued a circular on January 30, 1990, stating that whenever import license is transferred the same would attract tax under section 5(1) of the Karnataka Sales Tax Act, 1957 (hereinafter referred to as "the Act") as unclassified goods at the rate of 7 per cent and directed the assessing authorities and the revisional authorities to assess tax accordingly. The validity of this circular is challenged in these petitions.

4. The petitioners contend that the REP license issued to the petitioners is based on their export

performance and foreign exchange realization and is an entitlement in the nature of a grant which confers on the petitioners the right to import goods and is therefore an actionable claim failing within the definition under section 3 of the Transfer of Property Act and consequently does not fall within the definition of "goods" defined under the Act. Elaborating further, it is submitted that the REP license being only a claim to a beneficial interest in a movable property, was an actionable claim and that therefore excluded the price realized on sale of the same while computing tax under the Act. It is further contended that the basis upon which the respondents want to treat such import licenses as

goods is the decision of the Supreme Court in *Anraj v. Government of Tamil Nadu*<sup>1</sup> even if the import licenses can be treated as movable property they are not goods in a commercial sense; the accountants have never treated the same as goods; in the case of lottery tickets dealt with by the Supreme Court Anraj's case [1986] 61 STC 165, the same were considered to be goods for the reason that there were two consequences flowing from the purchase of a lottery ticket; firstly, it entitles a person to participate in the draw of a lottery and secondly it provides a chance of getting a price on the draw of the lottery. While the latter part may be considered in the nature of only an actionable claim, the former part was held to be in the nature of a right in goods and transfer of such a right was held to be a sale for the purpose of the Tamil Nadu General Sales Tax Act; but, such a contingency does not arise in the present cases is the point canvassed by the petitioners.

5. Considering the nature of the contentions advanced, it becomes necessary to refer to the definition of the term "goods" under the Act which is as under :

"2(m) 'goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes livestock, all materials, commodities and articles (including those to be used in the fitting out, improvement or repair of movable property), and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale."

So, goods are defined as all kinds of movable property except (1) newspapers, (2) actionable claims and (3) stocks, shares and securities. The petitioners contend that at best the import license could be considered to be only an actionable claim and nothing more. Section 3 of the Transfer of Property Act defines actionable claim to mean any secured debt or beneficial interest in movable property not in possession actual or constructive, whether present or future, conditional or contingent.

6. Let me now proceed to examine the nature of the import license. By virtue of the provisions of the Imports and Exports (Control) Act, 1947, no person except under a permit granted can import goods and that Act bars importation of goods otherwise. The legal incident of such a permit not only enables a dealer to indulge in a business activity of importing goods but also excludes competition confining it to a small number. Viewed thus, a permit authorizing the importation of goods can certainly be treated to be a valuable right in relation to goods and is therefore movable

property. The only question is whether the same amounts to an actionable claim or not. It does not deal with any claim to debts secured either by movable or immovable property and therefore does not fall within the first part of actionable claim. And it is not a claim to beneficial interest of movable property not in possession of the petitioners regarding which courts could give relief. As stated earlier, the import license not merely enables a person the right of indulging in a business of importing goods but it also excludes competition. Therefore, it cannot be said that it is only a beneficial interest in respect of a movable property not in possession of the person but is itself a valuable right which, according to the petitioners themselves, is freely transferable. The import license therefore must be treated as merchandise for the purposes of the Act and clearly falls within the definition of "goods".

7. The argument that the same has not been taken note of as goods by accountants will not  
[1986] 61 STC 165

carry the matter any further. What is stated above is the legal incident of such a right. At any rate, it is clear that the right to import goods granted under the import license is not as ephemeral a right as to participate in a lottery and definitely is of a greater value in the commercial market. Therefore, I have no hesitation in holding that the contentions advanced on behalf of the petitioners have no substance.

8. The question whether it should be subjected to levy of tax at multipoint or single point is a matter of legislative policy and even if it is not classified to be goods failing under any of the Schedules to the Act, section 5(1) of the Act is obviously attracted. In the circumstances, I find the challenge to the circular impugned herein is not well-founded. The petitions shall stand dismissed. Rule discharged. And in respect of those cases where rule has not been issued, the same shall stand rejected.

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