

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

C/40429 & 40430/2018 and C/40519 & 40521/2018

(Arising out of Order-in-Original No. 23/2017 dated 5.12.2017
passed by the Commissioner of Customs, Tuticorin)

M/s. Regin Exports

Shri Regin P. Proprietor of M/s. Regin Agency

M/s. Daniel and Samuel Logistics Pvt. Ltd.

M/s. Zion Logistics : Appellants

Vs.

Commissioner of Customs, Tuticorin : Respondent

Appearance :

Shri D. Arvind, Shri. Adithya Srinivasan & Ms. Meghna Arvind,
Consultants for the Appellants

Shri A. Cletus,

Addl. Commissioner (AR) for the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : 27.08.2018

Date of Pronouncement: 17.09.2018

Final Order Nos. **42432-42435 / 2018**

Per Bench :

The facts of the case are that M/s. Regin Exports (herein
after referred to as RE) were engaged in processing of Raw
Cashew Nuts (herein after referred to as RCN) and export of

cashew kernels. Acting on intelligence, DRI officers conducted investigations into the imports of RCN by RE during 2016 – 17 without payment of customs duty availing concession under Notification No. 18/2015-Cus. on licenses issued by DGFT in terms of Par 4.16 of FTP 2015 – 2020 Pursuant to the investigation, it appeared that RE had :

- (i) Procured seven advance authorizations from DGFT for import of RCN without payment of customs duty under actual user condition with an obligation to export the processed cashew kernels as specified in the said advance authorizations
- (ii) Imported and cleared a quantity of 3073.331 MTs of RCN valued at Rs.31,85,42,558/- without payment of customs duty, under the said seven advance authorizations vide 19 Bills of Entry through Tuticorin Port availing benefit of Notification No.18/2015-Cus. during the period April 2016 to July 2016.
- (iii) Received only 81.05 MTs of the imported RCN at their unit at Ochavilai, Puthukadai, Kunnathur Village, Kanyakumari

District, which is the unit authorized under the seven advance authorizations to process the imported RCN.

- (iv) Used 190.48 MTs of RCN to process 47.62 MTs of cashew kernels for export as per the SION Norms.
- (v) Diverted / sold the remaining 2801.47 MTs of the imported RCN to various unit of another IEC holder viz M/s. Regin Agency (herein after referred to as RA) or to some firms at Kollan / Kanyakumari District, directly from the port of import without following the procedures prescribed under 4.35 of the Handbook of Procedures and in violation of the condition at Sl. No. 14 of the condition sheet annexed to the advance authorizations and condition (x) of Notification No.18/2015-Cus.
- (vi) Neither obtained permission from jurisdictional Central Excise authority for transfer of inputs/RCN.
- (vii) Did not incorporate names of units to whom the RCN was diverted in contravention of provisions of condition contained in 4.10 of the Handbook of Procedures. A quantity of 429.2 MTs of imported RCN lying in stock in 16 premises under RA were seized.

(viii) Did not maintain true and proper account of consumption and utilization of duty-free procured inputs under advance authorization in violation of conditions in S. No.1 of the condition sheet.

2. Based on the investigations, it appeared to DRI that RE had diverted / sold 2801.47 MTs of imported RCN in shell valued at Rs.29,03,94,777/- to the units / commission agents of M/s. RA /other buyers directly from the port of import, involving duty liability of Rs.2,71,69,335/-. Accordingly, a show cause notice dated 30.1.2017 was issued, *inter alia* proposing demand of customs duty foregone of Rs.2,71,69,335/- with interest thereon as also for imposition of penalty under section 112(a) and / or 114A of the Customs Act, 1962 from RE. The show cause notice also proposed confiscation of 2801.47 MTs of imported RCN under provisions of section 111(d) and 111(o) of the Customs Act. Further, the show cause notice also proposed imposition of penalties under Section 112(b) of the Customs Act on the following persons:-

- (a) Shri Regin P., Proprietor of M/s. Regin Agency
- (b) Zion Logistics (CHA)/Customs Broker

(c) Daniel and Samuel Logistics Pvt. Ltd. (CHA)/CB

3. In adjudication, the Commissioner of Customs, Tuticorin vide impugned order dated 5.12.2017 held that as per the condition sheet annexed, the imported cargo should have been delivered only to two units i.e. Pulluvilai and Ochavilai as declared in the Advance licences and processes should have been undertaken only in the said units. However, appellants diverted to other units which have not been authorized for the purpose of processing RCN imported duty-free. As the RCN imported duty-free under advance authorizations had been diverted / sold to unauthorized units, the importer has not satisfied the conditions contemplated in the Notification, for which appropriate action under Customs Act, 1962 is warranted. The adjudicating authority further held that the quantity of 2801.47 MTs out of 3073.331 MTs of RCN imported duty-free under Notification 18/2015-Cus. read with advance authorization has been diverted / sold to unauthorized units, which is totally against policy conditions contemplated under FTP 2015 – 2020 and Handbook of Procedures 2015- 2020 and thereby the benefit of exemption is not available *ipso facto* and duty involved on 2801.47 MTs of RCN is

liable to be paid by the importer with appropriate interest. The adjudicating authority also held that the other noticees are liable for imposition of penalties under section 112(b) of the Act. Based on these and other findings, the adjudicating authority :

- (a) held that in respect of 2801.47 MTs of RCN, conditions prescribed under Notification 18/2015 are not met / fulfilled
- (b) 2732.263 MTs (i.e. total quantity diverted 2801.47 MTs less quantity provisionally released 429.207 MTs) of RCN valued at Rs.25,29,617/- diverted to unauthorized units are liable for confiscation under section 111(d) / 111(o) of the Customs Act.
- (c) confiscated 429.207 MTs of RCN diverted to unauthorized units under section 111(d) and 111(o) of the Act, however ordered release of the same on payment of redemption fine of Rs.10 lakhs under section 125 of the Customs Act.
- (d) confirmed customs duty of Rs.2,71,69,335/- with interest thereon
- (e) imposed equal penalty of Rs.2,71,69,335/- under section 114A of the Act on RE

(f) Imposed penalty of Rs.25 lakhs on Shri P. Regin, Proprietor of RA; Rs.5 lakhs each on Zion Logistics and Daniel and Samuel Logistics Pvt. Ltd. under Section 112(b) of the Customs Act.

Hence the appellants have filed these appeals before this Tribunal.

4. When the matter came up for hearing, Shri D. Arvind, Ld. Consultant, accompanied by Mr. Aditya Srinivasan and Ms. Meghna Arvind, appeared and made a number of submissions on behalf of the appellants, which can be broadly summarized as follows:-

4.1 RA was in the business of cashew processing cum sales business from 2006 and dealt with local sale of cashew kernels which are processed from RCN from 2006 to 2011; RCN procured locally by RA would be sent to various branches / supporting processors / job workers spread across 48 locations in the district of Kanyakumari. The entire process is labour intensive involving rural womenfolk and after processing the same would be sent to RA's office for sale in the domestic market.

4.2 RE was started in 2011 and imported RCN were sent by RE to these very job workers, who were processing the RCN of RA.

However, in order to ensure that the goods of RE are not mixed with RA, different processing units were maintained.

4.3 When the processed cashew kernels were received back by head office from job workers, the receipt was recorded as receipt CO1, CO2 representing RE and RO1 and RO2 representing RA.

4.4 The above process continued without hindrance for five years.

4.5 On 1.3.2016, customs duty was imposed for the first time on import of RCN @ 5% BCD and 4% SAD, totaling to 9.4%.

4.6 Thereafter, RA applied and obtained seven advance licenses for import of 3073.33 MTs of RCN valued at Rs.31,85,42,558/-.

4.7 Based on the quantity of RCN imported, as per the SION norms, 768.48 MTs of cashew kernels had to be exported within the prescribed time.

4.8 As per condition 14 of the license, the goods imported should be processed in the premises mentioned therein. In the advance licenses, the head office located in Puluvilai and one owned processing unit located in Ochavilai are mentioned.

4.9 The practice followed by RE is to import RCN and directly send the containers to various branches / job workers premises, to

get them processed, bring it back to the office mentioned in the licence, sort and grade, pack and store in hygienic conditions and ultimately export.

4.10 The only mistake committed by RE out of ignorance is that they did not mention the branches / job workers' premises at the time of obtaining Advance Authorizations.

4.11 Based on these procedural lapses, department has alleged that RE diverted 2801.47 MTs of RCN. However, this allegation has not been supported by any evidence. When officers searched the Puluvilai office, physical stock of cashew kernels in the finished goods in the godown and the packing was not recorded in the Mahazar.

4.12 The adjudicating authority failed to consider the appellant's request dated 11.7.2017, to consider the stock of 273.77 MTs of cashew kernel which is equivalent to 1095.08 MTs of imported RCN available from the stock register (Sl. No. 4 of Mahazar at Sl. No. 123 in Annexure A to the Show Cause Notice).

4.13 429.267 MTs of RCN seized from 16 numbers of units during July 2016 were provisionally released to RE on 19.1.2017 and the same was processed and exported.

4.14 The adjudicating authority has however erroneously concluded that entire 2801.47 MTs of imported RCN was transferred / sold which includes 429.207 MTs of RCN provisionally released as above.

4.15 DRI officers were well aware of the 37 processing units were engaged by the appellant which was evident in the stock register maintained by them and also in the statement dated 25.7.2016 of Shri Regin P.

4.16 However, the DRI officers restricted themselves to 16 processing units and seized only RCN available in those units. The stock of RCN and cashew kernel available at remaining 21 processing units was not taken into account.

4.17 Department has not brought out any evidence allegedly diverted to RE was transferred or sold. Instead, RCN has been alleged to be sold without considering the receipt of cashew kernels by the appellant from the processing units as shown in the stock register relied as Sl. No. 123 in Annexure to the Show Cause Notice.

4.18 The accounts of both the entities REs and RAs detailed stock / reconciliation, purchase and sales made by both entities in

quantity and value, duly certified by the statutory audits for the year 2016–17, would clearly indicate that only imported RCN have been processed and used to make cashew kernel for export made by RE. Negligible quantity of raw cashew kernel have been procured locally to replace inferior imported RCN received only to match the quality and grade of export products.

4.19 The appellants retained ownership and title of the imported RCN and only sent the goods for processing to their own branches / job workers and received back and carried out the final process in the premises mentioned under the advance authorization. Hence, there is no sale / transfer as contemplated in the FTP and appellant has made the actual user condition in letter and spirit as mentioned in the FTP.

4.20 The Ld. counsel took support from the statements of Shri T. Selvakumar, Managing Director of M/s. Daniel and Samuel Logistics Pvt. Ltd. and Shri V.Leon, operations in-charge of M/s. Daniel and Samuel Logistics Pvt. Ltd. and Shri S. Mariappan, imports in-charge of Zion Logistics referred to in para 6, 7 and 8 of the impugned order to argue that they have correctly explained that the RCN after clearance was dispatched to the processing

units belonging to RE accompanied by Bills of Entry and forms and other transport documents for movement of imported goods for processing.

4.21 The only condition that has been violated, if at all, is the procedure prescribed in para 4.35 of Handbook of Procedures which provides for endorsement of job workers / supporting manufacturers on the authorization.

4.22 The appellant has not imported anything contrary to what has been authorized by the DGFT either in terms of product or quantity or value.

4.23 They have not sold or diverted in the local market after importation and have only send the goods to their processors for processing RCN.

4.24 The appellants have also exported the finished goods within the time limit prescribed in FTP.

4.25 They have also received foreign currency for exports made and have submitted proof of exports and remittance to the DGFT.

4.26 In fact, they have applied for the EODCs for the exports made by them. However, the DGFT have informed them that since DRI are investigating the seven advance authorizations, the

applications cannot be considered at present and that the request for EODC will be processed only after the decision is taken by DRI in the notice issued by them.

4.27 Ld. consultant drew our attention to para 5 of reply dated 16.5.2017 to the show cause notice filed in page 83 onwards of the appeal paper book, where it has been informed that the entire export obligations under the said seven advance licences have been fulfilled well before the stipulated period as per the details given in Annexure I to the reply.

4.28 Ld. Consultant drew our attention to the decision of the Tribunal in the case of *Silverline Plastpack Pvt. Ltd. Vs. Commissioner of Customs, Bhavnagar – 2016 (343) ELT 281 (Tri. Ahmd.)* wherein it has been held *inter alia* that though imported goods had been sent to job work for manufacture of final products, title and ownership of the goods remain with the appellant therein, hence denial of exemption under Notification 32/2005-Cus. under Target Plus Scheme is not justified. Ld. consultant submitted that the ratio of the case was very much applicable to the facts of the present appeal.

4.29 In the case of *Navjyothi International Vs. Commissioner of Customs, Chennai – 2004 (177) ELT 875 (Tri. Chen.)*, the Tribunal held that transfer of the imported raw materials to non-declared job worker whose names were not endorsed on DEEC licenses, but when held by DGFT that appellants have fulfilled their export obligation, the findings of Commissioner is contradictory.

4.30 The Tribunal in the case of *Ashok Enterprises Vs. Commissioner of Customs – 2005 (186) ELT 497 (Tri. Chen.)*, *inter alia* held that very definition of actual user (industrial) in para 3.5 of EXIM Policy, importer is free to manufacture a final product in his own industrial unit or in any other unit including the job worker.

4.31 Moreover, DRI could not gather any evidence of any one in the domestic market having purchased the raw material from the appellant.

5. On the other hand, Ld. AR Shri A. Cletus supports the impugned order and made the following the submissions:-

5.1 The goods have been imported under *Notification 18/2015-Cus. dated 1.4.2015* under advance authorization scheme. As per condition (x) “authorization shall not be transferred and the said

materials shall not be transferred or sold". In the advance authorization only two supporting manufacturers have been authorized to process. As per the conditions of the seven advance authorizations and as per the conditions laid down in the Notification, the imported RCNs should have been only sent to RE or the premises of the supporting manufacturers endorsed in the advance authorization. However, this has not been done and instead the imported the RCN have not been sent to authorized places to other persons.

5.2 Ld. AR took us to para 2 of the impugned order to point out that as on the date of search of the premises of RE on 22.7.2016, there was no stock of imported RCN.

5.3 When goods were not sent in the premises declared in the advance licences, then it is established that they have been diverted. It is not necessary for the department to prove that the goods have been sold other persons. It is enough for the department to prove that the goods have been diverted to premises or persons which are not authorized by the advance authorization licenses. Hence notification condition is violated

and section 111(d) is attracted, the goods become liable for confiscation and penalty.

5.4 Hence it has been proved that 2801.47 MTS of RCN have been diverted. Therefore the conditions of the notification 18/2015-Cus. have been denied and the duty foregone on such quantity diverted is very much demandable.

5.5 RE was fully aware that the processing should be undertaken only in the authorized premises. In spite of this knowledge, they have diverted the subject goods to other unauthorized units. RE have thus misused the authorization scheme for their own benefits and deliberately suppressed the fact of diverting imported RCN with intent to evade appropriate customs duty payable on the 2801.47 MTS of RCN. For these reasons, the Ld. AR drew our attention to paras 74 to 79 of the impugned order to point out that the adjudicating authority has thoroughly analyzed the impossibility of penalties on RE and other co-noticees.

5.6 Hence confiscation of seized cashew kernels is fully justified. For these reasons, the Ld. AR contended that there is no case for interference with the impugned order.

6. Heard both sides.
7. The primary allegation of the Department is that RE have diverted/sold 2801.41 MTs of imported RCN out of a total of 3073.331 MTS imported by them. This conclusion has been arrived at by the following apparent findings :
 - (i) There was no stock of imported RCN during search of premises of RE on 22.07.2016.
 - (ii) RE were directly sending imported RCN either to RE – Ochavilai premises (authorized by DGFT) or to other units of RA.
 - (iii) During search of 16 units of RA, imported RCN totaling 429.20 MTs were found lying and seized.
 - (iv) Shri. Regin P., Proprietor of RA, in his statement dated 18.11.2016 submitted that only unit at Ochavilai belongs to RE and all others are units/commission agents of RA.
 - (v) RCN has been diverted directly from the port of various units under sale invoice and in some cases, payment of applicable sales tax.
 - (vi) As per statement of Shri. S. Mariappan, Imports-in-charge of Zion Logistics, after Customs examinations, RCN

containers are dispatched to various units of RE; that they prepare KK form for transport of imported RCN and hand over goods to truck driver along with copies of Bills of Entry and KK form. The names in such units are sent by e-mail to Zion Logistics by RE.

(vii) Exempt goods imported under Advance Authorizations by RE should have been utilized only in accordance with provisions of paragraph 4.16 of FTP 2015-20 and other provisions of relevant Customs Notification 18/2015 dated 01.04.2015.

(viii) Hence, as per the conditions of Advance Authorizations, RE was required to process imported RCN only at their premises at Ochavilai or Pulluvilai unit and not at any other place. However, only 81.05 MTs of imported RCN was dispatched to the two units of RE which was authorized by DGFT.

(ix) RE had exported 47.62 MTs of processed cashew kernels which works out to RCN quantity of 190.48 MTs.

(x) Thus, it appears that out of 3073.331 MTs of imported RCN, only 81.05 of imported RCN in shell was dispatched to

authorized units, 190.48 MTs was used for export and remaining quantity of 2801.47 MTs was diverted.

(xi) RCN imported under Advance Authorization was subject to “actual user condition”. The same shall not be transferable even after completion of export obligation. Only after export obligation is completed will authorization holder have option to dispose of product manufactured out of duty-free import.

(xii) As per condition (x) of Notification 18/2015, materials imported under Advance Authorization shall not be transferred or sold.

(xiii) Hence, RE have violated conditions prescribed under Notification 18/2015-Cus. in respect of 2801.47 MTs of RCN and hence, duty foregone of Rs. 2,71,69,335/- with interest is required to be recovered from them. Further, penalties under various provisions are also required to be imposed.

8.1 With regard to the allegation that no stock of imported RCN was found during search of premises of RE on 22.07.2016, appellants have contended that no stock taking was done during that search and that only documents were collected. In this

regard, we find that as per the Mahazar dated 22.07.2016 drawn at the premises of RE, which is the relied upon document for the Show Cause Notice, there is no reference to any type of stock taking that has been done. The relevant portions of the Mahazar are reproduced as ready reference :

“Then, the officers and the witnesses entered the office premises of M/s. Regin Exports and started a systematic search of the premises by opening and examining the documents and files present in the cupboards as well as tables. The officers thereafter segregated certain files containing documents relating to their import consignments. As a result of the search, the documents as listed in the annexure to the Mahazar were seized on the reasonable belief that they would be useful for further investigation under the provisions of the Customs Act, 1962.

The officers thereafter took a round of the premises in presence of Shri. C. T. Sureshkumar and the witnesses. It was seen that the packing of processed cashewnuts after segregating them quality wise is carried out there. No other activity relating to processing of cashewnuts was noticed there.”

8.2 It is therefore not known how in para 7.1 of the Show Cause Notice it has been alleged that RE had received only 81.05 MTs of RCN and hence it appears to reason that this conclusion may be a deduction arrived at from the documents seized.

8.3. In the same para 7.1 it is alleged that RE used 190.48 MTs of RCN to process 47.62 MTs of cashew kernels for export. From para 5.4 of the Notice, we find that the quantity of 190.48 MTs of RCN receipts in RE is also a deduction based on quantity of 47.62

MTs of processed cashew kernels exported vide Shipping Bills 8243331/13.06.2016, 8317986/17.06.2016 and 8354161/18.06.2016.

8.4 We further find that these two allegations are at variance and are contradicting one another. On the one hand, it is claimed in the Show Cause Notice that 190.48 MTs of RCN have been received in RE. At the same time, it is also alleged that only 81.05 MTs of imported RCN was dispatched to RE.

8.5 Another allegation in the Notice is that RE were directly sending imported RCN to various units of RA or to other firms at Kollam/KK district directly from the port of import in violation of the procedures prescribed in para 4.35 of HBP and condition (x) of Notification 18/2015-Cus. At the same time, the Show Cause Notice elsewhere alleges that RE had “sold” the imported RCN to commission agents/other buyers. There is also an allegation that in some cases such sales have been effected under sales invoice and even payment of sales tax.

8.6 Notwithstanding such allegations, although as many as 149 documents have been relied upon in the Show Cause Notice, there is not a single sales invoice or challan or document by any other name relied upon as evidence of such alleged sales. Nor

have any of the alleged sales tax documents listed or enclosed. Interestingly, even in the body of the Show Cause Notice there is no reference to any Sl. No. or Invoice No. or sales tax document no. to support an allegation that sales has been caused right at the port of import.

8.6 On the other hand, from the statements of Shri. Regin P., Shri. S. Mariappan, Proprietor of Zion Logistics and of the various other stakeholders and associates of both RE and RA, what actually comes to the fore is that the imported RCN was sent directly from the port of various processing units of RE as well as RA for processing the RCN into cashew kernel.

8.7 In fact, even as per para 7.1 (v) of the Show Cause Notice, it is indicated that a quantity of 429.2 MTs of imported RCN were lying found in stock in 16 premises under RA in the searches carried out by DRI. The appellants have flagged this very fact in support of their contention that the imported RCN was only sent to the said units for processing. Appellants have further pointed out that this stock of 429.2 MTs was ignored by the investigating agency and that further, stock lying in the other 21 such processing units was never considered by DRI.

8.8 The Ld. Counsel for the appellants has drawn our attention to Stock Register seized at Head Office at Puluvilai relied at Sl. No. 123 of the Show Cause Notice. From this relied upon document, it has been pointed out that when the processed kernels were received back in the Head Office from job workers, the receipt was recorded as receipt from CO1, CO2 (for RE processors) and when RA got kernels from their job workers after processing, the initial RO1 and RO2 were mentioned as code. We find that this assertion has not been disputed either in the Notice or even in the impugned Order.

8.9 Ld. Counsel has also demonstrated that the imported RCN were sent to the job workers of both RA and RE. However, in order to ensure that the goods of RE were not mixed with that of RA, as per list in page 139 of the Appeal book, 37 units were asked to do processing only for RE and 11 units listed in page 142 of the Appeal book, were asked to do processing for RA.

9.1 From the facts on record, it also appears to reason that a substantial quantity of RCN alleged to have been diverted from the port itself was found at 16 processing units of RA. Interestingly, even as per the Show Cause Notice in para 7.15, the

allegation is that “a quantity of 429.2 MTs of ‘imported’ RCN, found lying in stock in 16 premises ...” (*emphasis added*). It is therefore evident that even the Show Cause Notice has not disputed that the quantity of RCN found at these 16 processing units was only the part of the RCN “imported” by RE. There is also substance in the appellant’s contention that the DRI located this quantity in their investigations in respect of 16 processing units whereas stock lying at 21 other such units were not taken stock of or investigated by DRI. In any case, there is no dispute that these 37 units were in fact engaged by RE for processing the imported RCN in shell.

9.2 In the impugned Order, there is a finding that RCN processed by processing units were sold in the local market; that RA have sold cashew kernels processed out of imported cashew nuts to different firms, etc. However, as in the other allegations of sale of imported RCN directly from the port, no evidences to corroborate these allegations have been brought forth or adduced.

9.3 *Per contra*, we find that in the statement of Shri. V. Leon, Operations-in-charge of the CHA, it has been clarified that the imported material was sent to the various units under form KK, a

transport document for movement of imported goods. On being asked as to why the Customs Authorities were not informed about the dispatch of RCN by RE to various units which were not authorized in their licences, Mr. Leon has replied that the destination of the imported goods was only RE with various addresses and that it was known that the processed goods would eventually be returned to the premises of RE mentioned in the Advance Licence. Hence, they did not feel anything strange warranting informing the Customs Authorities. "Strangely" enough, this assertion of the Customs House Agent (CHA) has not been contradicted or not been countered or demolished by the Department.

9.4 No proof or evidence has also been adduced by the Revenue to dispute the assertion of the appellants that they retained ownership and title of the imported RCN; that they only sent the imported RCN to 37 units for processing and that they received back the processed cashew kernel.

9.5 However, the Department has alleged that even such transfer even if not involving sale, since not being to units

authorized by DGFT, falls foul of the condition (x) in Notification 18/2015-Cus. which reads as under :

*“(x) that the said authorization shall not be transferred and the said materials shall not be transferred or sold :
 Provided that the said materials may be transferred to a job worker for processing subject to complying with the conditions specified in the relevant Central Excise Notifications permitting transfer of materials for job work:
 ”*

As per para 6 of the Show Cause Notice, the actual user condition for Advance Authorizations (para 4.16) of the FTP and the para 4.35 (facility of supporting manufacturer/job worker/co-licensee) have also been allegedly followed in the breach. True, these conditions do mandate *inter alia* that the materials imported under the said Advance Authorization shall not be transferred or sold. At the same time, there is a provision that the materials may be “transferred” to a job worker for processing, subject to complying with certain conditions.

9.6 Section 4 of the Sales of Goods Act, 1930 defines a sale of goods as a “contract of sale whereby the seller transfers or agrees to transfer the property in the goods to the buyer for price”. One important ingredient is that there should be transfer of ownership of goods. The transfer of mere possession or limited interest is not enough.

Obviously, then without any evidence of sale – documents, invoices, payments effected and transfer of ownership, the allegation that the imported RCN has been sold can at the best be called an assumption.

9.7 We, however, find that even in the para 4.35 of the HBP, it is provided that “if applicant desires to have name of any manufacturer or job worker added to authorization, he may apply”. Evidently, both the Customs Notification 18/2015-Cus. as well as para 4.35 of the HBP do provide for addition of supporting manufacturers/processors. Discernibly, the appellants have added the names of only two such processing units. However, they continued to send the imported RCN to all the 37 processing units, as they used to prior to 01.03.2016, when Customs Duty was imposed for the first time on the import of RCN. There is however no allegation that there has been any misuse or diversion of imported RCN on earlier occasions.

9.8 There is then no evidence that the imported RCN has been “sold”. The only allegation that survives is that the imported RCN has been sent to processing units of RA/RE which have not been

authorized as supporting manufacturer in the licences, but without transfer of ownership.

9.9 Credence is also found in the appellants' submission that they regularly export pre-dominantly to the USA and the cashew kernels which are exported to that country have to meet the stringent USA Regulatory Approvals, apart from high quality specifications required by the customers. For this reason only the appellants are importing RCN in shell from abroad because the export orders require a better quality of cashew kernel which is not available in India. If this be the case, we wonder what the appellants would achieve by selling the imported RCN, since the cashew kernel of Indian origin would not be accepted by the buyers abroad. In any case, there is no allegation that any of the export consignments effected by the appellant have been rejected or sent back. On the other hand, appellants have adduced proof of export as well as receipt of foreign exchange proceeds in USD in all the consignments exported by them.

9.10 Appellants have submitted the details of export of 769.759 MTs cashew kernel out of 3073.921 MTs imported RCN, between

June, 2016 to March, 2017 as required under SION norms, as under :

Sl. No.	Advance Authorization	Qty. of RCN Imported (in MT)	Qty. of Cashew Kernel Exported (in MT)	Period of Export
1.	3510044901/23.3.16	296.305	74.070	6/16 to 8/16
2.	3510044902/23.3.16	197.850	49.462	8/16
3.	3510044903/23.3.16	74.000	19.352	8/16 to 9/16
4.	3510044913/13.4.16	357.899	89.475	9/16
5.	3510044914/13.4.16	219.338	54.835	10/16
6.	3510044936/13.5.16	883.890	221.405	10/16 to 12/16
7.	3510044942/27.5.16	1044.639	261.160	12/16 to 3/17
TOTAL		3073.921 (MT)	769.759 (MT)	

9.11 Viewed in this light, the non-inclusion of all the supporting manufacturers in the Advance Authorizations are then only a procedural aberration that can surely be condoned. The type of diversion that is sought to be disallowed by Notification 18/2015-Cus. and also by the relevant para 4.35 of the FTP is transfer by way of sale or transfer of ownership, once and for all. The facts on record do not bear out any such transaction. The above facts have been informed by the appellants in their reply to the Show Cause Notice dated 16.05.2017. At the same time, there is no allegation or evidence that, in actuality, cashew kernel was not exported or, for that matter, that the exported cashew kernel were not processed out of the imported 3073.921 MTs of RCN in shell. From all accounts, therefore, the *raison d'être* for allowing duty-

free import of RCN in shell by issue of Advance Authorizations has been fulfilled since the mandated quantity of cashew kernel has been exported as above.

9.12 Appellants have also submitted statements of bank realization in foreign exchange in USD for all these exports. There is no allegation made that RE have not exported 769.759 MTs as claimed by them or that the foreign exchange proceeds have not been realized . In fact, it is seen that they have sought for the EODC from DGFT, who, while acknowledging the receipt of the said applications, have informed the appellants that the request of EODC has been held up as per a DRI letter on alleged misuse of Advance Authorization.

9.13 It has to be kept in mind that this type of value addition exports in the area of food processing are highly labour intensive. As brought out by the appellant, the process of de-shelling imported RCN and its conversion to cashew kernel is done by hand, pre-dominantly by rural womenfolk who do the peeling of the skin of the kernel, grading and primary packing by hand. Surely, this is not a process involving highly mechanized or

organized sector. In such spread out job working, therefore, there may be a few aberrations or procedural infractions along the way.

9.14 What is to be seen is whether these aberrations are substantive, causing grave economic loss to the country or whether they are condonable and curable defects. As per the discussions hereinabove, we hold that they are only of the latter variety. It is also an undeniable fact that appellants have produced proof of export of the quantity that they were required to export as per the SION norms and they have also shown proof of the valuable inward foreign exchange payments received.

9.15 In arriving at this decision we also draw sustenance from the Tribunal decision in *Navjyothi International Vs. Commissioner of Customs - 2004 (177) E.L.T. 875 (Tri. – Chennai)*.

The relevant portion of the Order is reproduced below :

“6. We have carefully considered the submissions. The short question arising in this case is whether the appellants committed any breach of conditions of Notification Nos. 30/97-Cus. and 51/2000-Cus., disentitling themselves to the benefit of exemption from payment of duty on the subject imports and rendering themselves liable for penalty under Section 112 of the Customs Act along with rendering any goods liable for confiscation under Section 111 of the Act. It appears, the impugned order has found, against the appellants, violation or non-fulfilment of two conditions of Customs Notification. The following were the relevant conditions of Notification 30/97 :-

“(vii) exempt materials shall not be disposed of or utilised in any manner except for utilisation in discharge of export obligation or for replenishment of

such materials and the materials so replenished shall not be sold or transferred to any other person;

(viii) that in relation to an Advance Licence issued to a Merchant- Exporter
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(a) the name and address of the supporting manufacturer is specified in the said licence and the said certificate and the bond required to be executed by the importer in terms of condition (ii) shall be executed jointly by the Merchant-Exporter and the supporting "manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification; and

(b) exempt materials are utilised in the factory of such supporting manufacturer in terms of condition (vii)".

With reference to condition (vii), it has been held that the appellants violated this condition by transferring 68.972 MTs of imported raw material to non-declared job workers i.e., jobbers whose names were not endorsed (as supporting manufacturers) on the licences. We find that this finding of the Commissioner is not sustainable inasmuch as the JDGFT has found (vide his order dated 4-2-2004) as follows :-

"(a) A merchant-exporter can get a licence with AU condition and that the goods imported under the licence can be manufactured through a supporting manufacturer or through a jobber.

(b) The merchant-exporter has got the option to get the name of the supporting manufacturer endorsed on their licence.

(c) Such endorsement is only optional and not mandatory.

(d) Prior endorsement and the approval of the Licensing Authority for the manufacture of the resultant product in the supporting manufacturer premises is required only for those item which contained prior import condition and not otherwise."

As it was not mandatory to get supporting manufacturers' (jobbers') names endorsed on the advance licences, it was permissible for the appellants to get the imported raw material processed through jobbers other than M/s. Heena International. Hence, in respect of 68.972 MTs of raw-material processed into SS utensils through non-declared jobbers, there was no breach of condition (vii).

The finding recorded by the Commissioner with reference to condition (viii) is not cogent. After reading this condition followed by condition (vii), he holds thus :

“.....it is quite clear that 53.060 MTs of S.S. utensils got manufactured by job workers not mentioned in the licences and exporter are not eligible for export benefits as claimed. This is against the obligations enforced by the DEEC licence quoted therein.”

In any case, this finding is contradictory to the JDGFT's findings. According to the latter, the appellants could validly get the imported raw material processed into finished goods through non-declared jobbers. This is precisely what the appellants did for export of 53.060 MTs of SS utensils manufactured (through jobbers) out of 68.972 MTs of imported raw material.”

9.16 In the light of the findings, discussions and conclusions *supra*, we find that the allegations raised in these proceedings and consequential demand and penalties confirmed by the impugned Order against RE cannot be sustained and will have to be set aside, which we hereby do. So ordered. The ratio in *Silverline Plastpack Pvt. Ltd. (supra)*, relied upon by the Ld. Counsel, will also apply on all fours to the appeal on hand. In the said decision, the Tribunal held that though the imported goods had been sent to job work for the manufacture of final products, the title and ownership of the goods remained with the importer all throughout. Hence, denial of exemption Notification under Target Plus Scheme is not justified.

10. As the main appeal C/40429/2018 succeeds on merits, the penalties imposed on other appellants in Appeal Nos. C/40519 &

40521/2018 will also require to be set aside, which we hereby do.

So ordered.

11. Accordingly, all the appeals are allowed with consequential reliefs, if any, as per law.

(Pronounced in open court on 17.09.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Rex/Sdd