

**AUTHORITY FOR ADVANCE RULINGS
(CENTRAL EXCISE, CUSTOMS & SERVICE TAX)
NEW DELHI**

PRESENT

Mr. Justice P. V. Reddi (Chairman)
Mr.A.Sinha Mrs. Chitra Saha
Member Member

The 14th day of October 2008

Order No.AAR/08/Cus/2008
in
Application No.AAR/14(Cus)/2007

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| Applicant | M/s Paradise International Room No.22, 2 nd Floor, Gopal Market, Bhagirath Palace Delhi – 110 006. |
| Commissioners concerned | 1. Commissioner of Customs (ICD) New Delhi 2. Commissioner of Customs (Imports), Mumbai 3. Commissioner of Customs & Central Excise, Meerut-II |
| Present for the Applicant | Mr.Piyush Kumar, Advocate Mr.Abhinav Jain, Advocate |
| Present for the Commissioner concerned | Ms.A.P.Tiwari, Jt.CDR Mr.Sumit Kumar, SDR |

ORDER
(By P.V.Reddi)

1. In this application under section 28-H of the Customs Act, 1962, the applicant seeks advance ruling on the following question :

“Whether the components namely Outer Shell (comprising 4 sub-parts) proposed to be imported for manufacture of Torch Light would attract Anti-Dumping Duty under Notification No.125/2003-Cus. dated 13.08.2003, wherein Anti Dumping Duty has been imposed on the Non Brass Metal Flash Light (in compact and SKD condition)?

Contd....2/-

2. In view of the objections raised regarding the maintainability of this application, both sides were heard before taking up the case on merits.

3. The applicant is a proprietary concern of Shri Ram Niwas Aggarwal who has filed this application as Proprietor. The applicant states that it entered into a Memorandum of Understanding (hereinafter referred to as MOU) on 24/9/2007 with an overseas company by name Dynamic Exports (P) Ltd. incorporated under the laws of HongKong and having its registered office in HongKong. The purpose of MOU is stated to be to collaborate together for manufacturing and marketing of Metal Torches / Flash Lights in India. Dynamic Exports (P) Ltd., is a company formed by the applicant's brother Shri Aggarwal Rajesh Kumar on 14.8.2007, who at the time of application held all the shares of the company and was the sole Director. Subsequent to the filing of the application, the applicant brought to the notice of this Authority that 100 shares each were transferred to two Chinese residents after receiving consideration equivalent to original share value. The share capital of the company is 10,000 HK\$ divided into 10,000 shares of one dollar each. Though the residential address of Shri Aggarwal Rajesh Kumar is shown as Phase-I, Ashok Vihar, Delhi -52, it is the case of the applicant that Shri Rajesh Kumar is not a resident of India as he has been residing mostly in HongKong for business purpose. Xerox copies of Passport entries (which are not very clear) are relied on for this purpose.

4. In the application, it is stated that the proposed undertaking will be located in the industrial area of Uttarakhand. The applicant subsequently stated that it has since taken an industrial premises on lease in Haridwar industrial estate for

establishing the unit. A copy of the rent deed dated 12th May, 2008 has been filed in support of this averment.

5. Coming to the nature of activities proposed to be undertaken by the alleged joint venture consisting of the applicant and Dynamic Exports (P) Ltd., HongKong, the applicant states that the Unit proposes to import nickel-plated metal parts (4 out of 26) from China, as detailed in a diagram and the other parts needed for the manufacture of Flash Lights will be procured partly from the domestic market and partly manufactured in-house. The applicant has also stated in the application that “Pressed Metal parts, Spring Metal Wire parts and Plastic Insulating components are proposed to be manufactured in the factory with the indigenous machinery”. In the concluding para of Annexure-II, the applicant states that “the components/parts so procured, imported and manufactured will be subjected to vigorous testing and then assembled into the final product on the main assembly line” and the finished product will be sold in the Indian market.

6. The applicant, in light of the above facts, submits that Notification No.125/2003-Cus. dt.13-08-2003 which imposes anti-dumping Duty on non-brass metal flash lights in compact or SKD* condition imported from China has no application to the proposed imports by Joint venture.

7. The Department contends that the application cannot be entertained for more than one reason. Firstly, it is pointed out that the bar under the proviso to Section 28(I)(2) applies in as much as the issue relating to the exigibility of anti-

* Semi-knocked down

dumping Duty on the Flash Light parts imported in the past by the applicant and his associates is pending adjudication. The Directorate of Revenue Intelligence has issued show cause notices in this behalf to the applicant and others. The allied submission is that the applicant has an ongoing activity of assembling torch lights and imports were made in the past for this purpose. Hence, it is no longer a proposed activity which is a pre-requisite for making an application for advance ruling. It is then contended by the Departmental representative that the present application does not conform to the definition of 'applicant' in clause (c) of section 28-E of the Customs Act. It is the contention of the Department that the ingredients of joint venture as defined in the Explanation to section 28-E (c) are not satisfied for two reasons : (i) the MOU in the instant case cannot be construed as a contractual arrangement and (ii) the control and substantial interest of Dynamic exports (P) Ltd. Is not established. Further, it is submitted that the non-resident status of Dynamic Exports (P) Ltd. has not been satisfactorily established and therefore the requirement of sub-clause (b) of clause (c) of section 28 E is not satisfied for that reason also.

8. The relevant provisions of the Customs Act are extracted below :

- 28 E. (a) "activity" means import or export;
- (b) "advance ruling" means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity which is proposed to be undertaken, by the applicant;
- (c) "applicant" means –
- (i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or
 - (b) a resident setting up a joint venture in India in collaboration with a non-resident; or
 - (c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

who or which, as the case may be, proposes to undertake any business activity in India:

- (ii) a joint venture in India; or
- (iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf, and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 28H;

Explanation:- For the purposes of this clause, “joint venture in India” means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement;

28-I. (2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application:

Provided that the Authority shall not allow the application where the question raised in the application is,-

- (a) already pending in the applicant’s case before any officer of customs, the Appellate Tribunal or any Court;
- (b) the same as in a matter already decided by the Appellate Tribunal or any Court::

Provided further

9. We do not find any merit in the first contention advanced on behalf of the Department that the bar under proviso to section 28(I)(2) is attracted. In our view, the adjudication proceeding does not come in the way of entertaining this application for the reason that the question raised in the application is not the same as the one that is pending adjudication. In the show cause notice, it is alleged that the applicant and others imported the torch light in ‘semi/completely knocked-down condition’ by mis-declaring that only some components were

being imported and thereby evaded the anti-dumping Duty. What calls for determination in this application is a legal question and no controversy on a factual issue is involved. The gravamen of the charge against the importers including the applicant is the mis-declaration of goods imported in order to get out of the clutches of the notification No.125/2003 for the purpose of evading the duty. That question has a different dimension and it has little bearing on the question formulated in the application. The question raised in the application is a straightforward question i.e., whether anti-dumping Duty will be attracted or not in terms of the notification no.125/2003-Cus., if 4 specified parts of the flash light are imported and the finished product is manufactured in the proposed unit with the aid of the parts imported, the parts purchased from the domestic market and the parts manufactured within the proposed manufacturing unit.

10. The second contention of Revenue is that the activity of import by the applicant has already started and therefore it is no longer a 'proposed activity' within the meaning of clause (b) of section 28-E. It is the contention of the applicant that the activity of import so far made by the applicant cannot be mixed up with the import of few parts to be made in the future by the Joint Venture enterprise for manufacturing the finished product in its proposed unit in Uttarakhand. We need not express any view on this point in view of our conclusion that the plea of 'joint venture' has not been substantiated. The disputed question of fact turning on the nature and description of goods imported in the past need not be gone into.

11. That takes us to the most debated question about the locus standi of the applicant to file this application claiming to be “a resident setting up a joint venture in India in collaboration with a non-resident”. Assuming that Dynamic Exports (P) Ltd. is a non-resident, the point which needs to be focused is whether on the facts stated by the applicant, a joint venture in India springs into existence by virtue of the MOU entered into. That depends on the question whether the proposed venture with Dynamic Exports (P) Ltd. would fall within the four corners of the Explanation to clause (c) of section 28-E which defines joint venture. The Explanation reads thus :-

“Explanation.- *For the purposes of this clause, “joint venture in India” means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement;*

12. A ‘contractual arrangement’ under which two or more persons undertake a business activity is the first requisite ingrained in the definition. The next requirement is that the activity to be undertaken shall be subject to joint control of the participants in the joint venture. The last ingredient is that one or more of the participants or partners or equity holders shall be non-residents and such participants/partners or equity holders shall have substantial interest in the arrangement.

13. The expression ‘contractual arrangement’ needs to be explored to understand the true scope and import of the Explanation. At the outset, it must be noted that the legislature guardedly used the expression ‘contractual arrangement’ instead of ‘contract’. ‘Contractual arrangement’ is definitely wider

in scope than the expression 'contract' which obviously means an agreement enforceable by law. Section 10 of the Indian Contract Act declares that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void". If the agreement is not enforceable by law, it is said to be void. It is trite that mutual promises gives rise to an agreement. A promise or a set of promises resulting in an agreement and an agreement culminating into a contract enforceable by law – these are the facets integral to the concept of contract. Then, what does 'contractual arrangement' mean? Certainly, it is not the same thing as contract. It can fall short of a contract. It may be a step in aid to a contract. It may be a broad framework within which a contract will be concluded. Though not enforceable in law, a contractual arrangement should clearly reflect the understanding of the parties on the material terms that form the basis of a formal agreement to be entered into later.

14. The adjective 'contractual' means "pertaining to or of the nature of contract" (see The New Shorter Oxford Dictionary). The expression 'arrangement' which is preceded by the adjective 'contractual' should thus be understood as an arrangement relatable to a contract already concluded or to be concluded. It need not necessarily be a fall out of the concluded contract. In other words, an arrangement giving rise to a contract and a precursor to a contract can be legitimately regarded as 'contractual arrangement' within the meaning of the Explanation.

15. Now, we shall advert to the meaning of the term 'arrangement' which is not a term of art and which has no precise meaning either in legal or in ordinary sense. The ordinary dictionary meaning of the word 'arrange' is to plan or settle beforehand the details (of something to be done); come to an agreement or understanding (with a person, about something); settle or determine matters, take steps, make plans (about, for, to do) (vide The New Shorter Oxford Dictionary). In *Newton vs. Commissioner of Tax*^{*}, Lord Denning observed that the "the word 'arrangement' is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons – a plan arranged between them which may not be enforceable by law". These words succinctly spell out the width and amplitude of the term 'arrangement'.

16. In light of the above discussion, any informal document like a Memorandum of Understanding can properly be considered as a 'contractual arrangement' within the meaning of the Explanation, provided it spells out the basic terms of understanding or agreement in definite terms. It is well known that MOU is a prelude to a contract and serves as an "outline of some intended instrument". It may or may not be enforceable by law as a contract. But, it can very well answer the description of 'contractual arrangement'.

17. That the expression 'contractual arrangement' occurring in the Explanation to Section 2(C) is not synonymous with 'contract' is reinforced by the fact that the advance ruling can only be obtained at the stage of proposed activity. At this

^{*} 1958(2) All ER 759 at 763

stage, very often, there will be no concluded contract in the sense in which it is understood under the Indian Contract Act. This is an additional reason to conclude that the phrase 'contractual arrangement' is intended to carry a wider meaning than the expression 'contract'. We cannot therefore accept the Revenue's extreme contention that the existence of a contract as per the strict requirements of Indian Contract Act is a *sine qua non* for invoking the jurisdiction of this Authority. Such construction also goes against the settled principle of interpretation that a remedial provision should be liberally construed in favour of the subject.

18. Next, we turn our attention to the crucial point, i.e., whether on a reasonable construction, the MOU spells out a "joint venture in India" within the meaning of the Explanation to Section 28-E(c) of the Act. Of course, we approach this question keeping in view the wider meaning attributable to the phrase 'contractual arrangement' as discussed supra.

19. On a close perusal of the MOU, we are inclined to reject the contention of the applicant's counsel that the MOU brings into existence a joint venture as defined in the Explanation. The MOU has ostensibly been entered into to set up a manufacturing facility for Metal Torches / Flash Lights. Clauses (2) and (3) purport to set out the terms of investment. The two clauses are so vague and ambiguous that it is difficult to infer therefrom a contractual arrangement. Whereas clause (2) says that Paradise International will invest to the extent of 50% in the form of "arranging land, building, indigenous machinery, working capital and indigenous capital", clause (3) states that Dynamic Exports (P) Ltd.

will arrange 50% of the investment in the form of technical know-how, supply of plant and machinery to be procured from overseas and furnishing counter-guarantee to the suppliers of raw material abroad. Pausing here for a moment, as per the averments in the application, the production unit will have indigenous machinery only (vide Annexure-II, page 9), whereas cl.(3) speaks of import of machinery. Such type of vague and loosely worded stipulations can hardly form the basis of a contract to be eventually entered into. The MOU does not make any secret of the fact that the parties have yet to come to a definite understanding as regards the two crucial aspects of Joint Venture because it is specifically stated in clauses (5) & (7) that after negotiations, "a separate agreement for induction of capital and sharing of profit" will be arrived at. From the Memorandum, it is not possible to infer an element of 'joint control' and the non resident participant or partner having substantial interest in the undertaking. On the other hand, clauses (5) & (7) make it clear that there will be further negotiations and an agreement will be reached regarding induction of capital and sharing of profit. None of the clauses in the MOU throw light on the twin aspects of joint control and substantial interest. Further, a vague stipulation that 50% of investment will be made by Dynamic Exports (P) Ltd. in the form of technical know-how and expertise and furnishing counter guarantee to the raw material suppliers abroad (leaving aside imported machinery referred to earlier), does not inspire confidence that the MOU is a bona fide contractual arrangement. It has not disclosed the non-resident company's substantial interest and the element of control in the venture. On the other hand, clause (4) gives an indication that it is

Paradise International which will be in charge of the manufacturing and marketing operations whereas Dynamic Exports will only provide technical support and assistance. None of the clauses viz. (2), (3) and (4) would give any definite idea as regards the two crucial ingredients of joint control and substantial interest. The fact that clause (5) expressly states that a separate agreement for induction of capital and sharing of profits would be negotiated for and concluded separately is a clear pointer that by entering into MOU, the parties have not made a serious effort to spell out the terms of Joint Venture with reasonable certainty.

20. When it was pointed out to the applicant in the course of hearing that the terms of MOU are too vague and nebulous to give rise to a contractual arrangement containing material terms, the counsel for the applicant pointed out at the next date of hearing that the terms of MOU have since been translated into action by forming a new company by name Tulsi Electronics (P) Ltd with both entities having equal stake therein and therefore the relevance of MOU has paled into insignificance. In the affidavit signed on 24th June, 2008 it is stated by Ram Niwas Aggarwal (applicant) that Tulsi Electronics (P) Ltd. has been duly incorporated on 11/6/2008. A true copy of Company's details downloaded from the official website of Registrar of Companies, Delhi was annexed to the affidavit. It is interesting to note that as per the Memorandum of Association of Tulsi Electronics (P) Ltd., the authorised share capital of the company is a measly amount of Rs.1 lakh divided into 10,000 equity shares of Rs.10 each out of which 5,000 shares were subscribed by the applicant and Dynamic Exports (P) Ltd.

Be that as it may, if a new joint venture company has been formed for the purpose of manufacturing the Flash Lights and the imports are to be made in connection therewith, the newly formed entity can only file the application seeking advance ruling. It is no longer open to the applicant to maintain this application.

21. Though an argument has been raised by the Revenue that the control and management of Dynamic Exports (P) Ltd. is directed by Rajesh Kumar Aggarwal from India, during the relevant year, we refrain from going into that aspect especially because the material on record does not enable us to give a definite finding.

22. For the reasons stated above, we uphold the objection of the Revenue, though for somewhat different reasons, that the applicant by entering into MOU with Dynamic Exports (P) Ltd. HongKong cannot be said to have set up a "joint venture in India" in collaboration with a non-resident as per the requirements of sub clause (b) of clause (c) of Section (2) read with the Explanation thereto. Accordingly, the application is rejected under section 28 I (2) of the Customs Act, 1962.

Sd/-
(P.V.Reddi)
Chairman

Per A.Sinha (Member) :

I am in agreement with the Hon'ble Chairman's views.

Sd/-
(A.Sinha)
Member

Per Chitra Saha (Member) :

While broadly agreeing with the ground for rejection of the application given above, I have the following observations to make about the non-resident status claimed by the applicant in respect of Dynamic Exports (P) Ltd. :-

It follows from a combined reading of Section 28 E (h) of the Customs Act, 1962 and Sections 2(30), 2(31) and 6(3) of the Income Tax Act, 1961, that a company registered outside India would be considered to be a resident of India, if during the previous year, control and management of its affair is situated wholly in India. In case of Dynamic Exports (P) Ltd., Shri Rajesh Aggarwal, its sole Director, held 100% of the equity of the company during the relevant year and thus controlled and managed the affairs of the company. To determine whether Shri Rajesh Aggarwal was a resident or a non-resident as per Section 6 of the Income Tax Act, this Authority vide its Order dated 26.06.2008 directed that the passport of Shri Rajesh Aggarwal be produced for examination. Despite the above direction, the applicant failed to produce complete details of Shri Aggarwal's passport. The onus of proving the non-resident status of his joint venture partner rests with the resident – applicant. Hence, it is for the applicant to establish that Shri Rajesh Aggarwal is a non-resident. Since complete details of passport to determine residency status of Shri Rajesh Aggarwal has not been produced, it may be concluded that Shri Aggarwal is a resident and not a non-resident as claimed and that the company Dynamic Exports (P) Ltd. cannot be considered to be a non-resident as its affairs were controlled and managed by a resident Indian. This constitutes another ground in addition to the one mentioned

in paras 19 and 20 above for concluding that the proposed joint venture is not an eligible applicant within the meaning of Section 28 E(c)(i)(b) of the Customs Act, 1962.

Sd/-
(Chitra Saha)
Member

Registered /A D

F. No. AAR/14(Cus)/2007

Dated 15th October, 2008

This copy is certified to be a true copy of the Order and is sent to :-

1. M/s Paradise International, Room No. 22, 2nd Floor, Gopal Market, Bhagirath Palace, Delhi-110006
2. Commissioner of Customs (ICDs), ICD Tughlakabad, New Delhi-110020.
3. Commissioner of Customs (Import), New Custom House, Ballard Estate, Mumbai-400001.
4. Commissioner of Customs & Central Excise (Meerut-II), Opposite Shaheed Park (Near Ashok Ki Lat), Delhi Road, Meerut (U.P.)
5. Member (Customs), Central Board of Excise & Customs, North Block, New Delhi.
6. Ms. A.P.Tiwari, Jt.CDR, Customs, Excise & Service Tax Appellate Tribunal, West Block-2, R.K.Puram, New Delhi-66.
7. Individual Folders of Chairman/Member
8. Guard File

(Krishna A.Mishra)
Additional Commissioner