IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.11.2024

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.No.16528 of 2024
and
W.M.P.Nos.18125, 18127, 18129 & 18130 of 2024

Nike India Private Limited
Ground & 1st Floor, Olympia Building, No.66/1,
Bagmane Tech Park, CV Raman Nagar,
Bangalore - 560 093, India.
represented by its Authorized Signatory,
Mrs.Suchitra Bhat ...Petitioner

Vs.

1.The Deputy Commissioner of Customs,
Acting as FAG Officer,
Group III, NS-III,
Jawaharlal Nehru, Customs House,
Nhava Sheva, Tal-Uran, District-Raigad,
Maharashtra - 400 707.

2.Chief Commissioner of Customs,
Chennai Sea,
No.60, Rajaji Salai, Chennai.
Tamil Nadu - 600 001.

3.Commissioner of Customs (Import Commissionerate),
Chennai Sea,
No.60, Rajaji Salai, Chennai.
Tamil Nadu - 600 001. ... Respondents

Prayer: This Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records relating to the impugned order No.187(L)/2024-25/DC/GR.III/NS-III/CAC/JNCH dated 14.05.2024 passed by the first respondent and quash the same and to direct the first respondent to re-assess the subject Bill of Entry at preferential rate of duty against the Notification No.46/2011-Cus dated 01.06.2011.

For Petitioner	:	Mr.Raghavan Ramabadran for M/s.Lakshmi Kumaran and Sridharan Attorneys
For Respondents	:	Mr.K.Mohanamurali Senior Panel Counsel

ORDER

The present Writ Petition is filed challenging the impugned order dated 14.05.2024, whereby the first respondent rejected the claim of preferential rate of duty claimed by the petitioner and directed the Bill of Entry be assessed without extending the benefit of Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of Southeast Asian Nations (Asean) and the Republic of India) Rules, 2009 and the consequential Notification No.46/2011, SI.No.908(I) dated 01.06.2011.

2. It may be relevant to set out the facts:

The petitioner/Nike India Private Limited placed an order on Fortune

Planet Industrial Ltd., Taiwan (Fortune Planet) for supply of shoes. Fortune Planet in turn placed a purchase order on Ching Luh Shoes Co., Ltd. Vietnam (Vietnam Manufacturer), who manufactured the shoes and directly shipped to the petitioner along with the Certificate of Origin (COO). The petitioner also has an arrangement/contract with Sojitz Corporation USA (Sojitz) to act as a payment facilitator.

3. The above facts are not in dispute and the same have also been extracted in the impugned order.

3.1 Under the present contract, it is the case of the petitioner that the role of Sojitz is confined to make payment to the Fortune Planet on behalf of Nike India Private Limited in terms of the purchase order/contract placed by Nike India Private Limited for supply of shoes on Fortune Planet.

3.2 The impugned order proceeds to reject the benefit of Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of Southeast Asian Nations (Asean) and the Republic of India) Rules, 2009 and the consequential Notification No.46/2011, SI.No.908(I) dated 01.06.2011, on the basis that the COO, which is issued by the Ching Luh Shoes Co., Ltd, does not bear reference to Sojitz Corporation USA, as a third country invoicing.

Findings in the impugned order:

3.3. Before proceeding further, it may be relevant to take a look at the relevant finding in the impugned order:

> *"On scrutiny of the Bills of Entry (BEs) it was observed that in respect of the invoice with regard to the BEs is filed was issued by Sojitz Corporation of USA. Further, in the Certificate of Origin (COO), "third country invoicing" Box 13 was ticked. However, the name and country of the company issuing the invoice (Sojitz Corporation of USA, in the present case) has not been indicated in Box 7, as required in Note 9 of Overleaf Notes of attachment to the Operational Certificate Procedure (OCP).*
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> *Accordingly, queries were raised to the importer. In reply, the importer submitted that "Sojitz is not treated as third country invoice and not captured in ASEAN- India Free Trade Agreement (AIFTA) COO as a third country invoicing entity as per Para 22 of the OCP in the AIFTA Origin of Goods Rules.*
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> *Further, the importer requested for personal hearing in the matter, and the same was granted. The personal hearing was held on 26.04.2024, wherein the importer reiterated their submission made in query reply and further submitted that:*
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> > *"Nike India Pvt Ltd., imports goods from various vendor factories located in Free Trade Agreement (FTA) and non-FTA member*

nations for distribution in India. They imported goods from Vietnam and Indonesia through third-country invoicing and claimed benefits under the AIFTA. The transaction involves multiple entities, including Sojitz Corporation Inc., and Chang Shin Vietnam Co. Ltd. They have an agreement with Sojitz to act as its agent for facilitating import payments. There is a query about leaving column 4 (Transacting Parties) blank in the bill of entry. Nike suggests a revised structure to capture all transacting parties details, including Sojitz as the Supplier, Chang Shin Vietnam Co Ltd., as the FTA Manufacturer, and Chang Shin Inc., as the Seller. They emphasize the urgency of clearing consignments and commit to follow the revised structure for future transactions."

4. It is submitted by the learned counsel for the petitioner that if one keeps in mind the above factual scenario, the impugned order, insofar as it looks to reference of Sojitz Corporation USA, as a third party invoicing, is wholly mis-directed, inasmuch as the role of Sojitz Corporation USA, is limited to payment facilitation. In this regard, reliance was placed on the agreement on the Buying Agency and Logistics Services Agreement entered into between Nike India Private Limited (Nike) and Sojitz Corporation of America (Sojitz) and particularly reliance was placed on Clause 3, which reads as follows:

"**Engagement to provide services**: Nike hereby engages Sojitz to provide the following services to NIKE pursuant to the terms and conditions of this Agreement.

3.1 Buying Agency Services, including the purchase of Goods from suppliers on behalf of NIKE on a disclosed principal basis:

3.2. Trade Financing, including the payment of funds on behalf of NIKE (which are treated as reimbursable Costs hereunder) to L/C issuers, suppliers, transportation companies, third party logistics providers, insurers, customs brokers, and governmental authorities (e.g., customs authorities) as directed by NIKE;

3.3. L/C and payment Process Management, including the application for, amendment of, payment under, and tracking of L/C's or open account purchases on behalf of NIKE on a disclosed principles basis in accordance with NIKE's instructions; and"

5. It was also brought to the notice of this Court that the purchase order was in fact placed only on Fortune Planet by the petitioner and the sample was also furnished which described that the buyer is Nike India Private Limited, the seller is Fortune Planet and the shipment will be directly made to Nike India Private Limited. The invoices raised by Fortune Planet would also clearly indicate that the buyer is Sojitz Corporation of America (Sojitz) for the account of Nike India Private Limited. It was explained that reference to Sojitz, is in view of the fact that, Sojitz Corporation of America (Sojitz) is making payment, on behalf of Nike India Private Limited, pursuant to the contract entered into between Nike India Private Limited and Fortune Planet. Reliance was also placed on Rule 3 of Annexure 29 to the effect, that what is relevant for the importer to claim the benefit under the said rule, is to show that the material imported has its origin from the country covered under the said rules and must be consigned directly to India. Rule 3 reads as follows:

"**Rule 3. Origin criteria**:- The products imported by a party which are consigned directly under rule 8, shall be deemed to be originating and eligible for preferential tariff treatment if they conform to the origin requirements under any one of the following:

(a) products which are wholly obtained or produced in the exporting party as specified in rule 4; or,

(b) products not wholly produced or obtained in the exporting party provided that the said products are eligible under rule 5 or 6."

6. It is submitted that there was no dispute that Ching Luh Shoes Co.Ltd., pursuant to the order being placed on Fortune Planet, had shipped the shoes directly to the petitioner along with the COO. The certificate of origin also bears reference to Fortune Planet. It is submitted that even if the petitioner intended to add the name of Sojitz Corporation of America, they may not be enable to do the same and, in any view, if one bears in mind the role of Sojitz Corporation of America in the scheme of transaction, it would be evident and clear that the role is confined to facilitation of payment and has nothing to do with either manufacturing, supply, transportation or shipment of the goods. It is also not in dispute that if the goods has its origin in Vietnam which is admitted, the petitioner would be entitled to the benefit of Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of Southeast Asian Nations (Asean) and the Republic of India) Rules, 2009 and the consequential Notification No.46/2011, SI.No.908(I) dated 01.06.2011, subject

to complying with the condition in the notification.

7. It is submitted by the learned counsel for the petitioner that except for the fact that the name of Sojitz Corporation of America is not reflected as a third party, the petitioner has complied with every other requirements in terms of Rules and Notification No.46 of 2011. It is also submitted that the Standing Order has been issued by the Chennai Commissioner of Customs, wherein they have dealt with payment service facilitator and issuance of COO, wherein the payment service facilitators are also involved.

8. It is further submitted that the Standing Order No.14/2021 has been issued by the Chennai Commissioner of Customs on 10.08.2021, which deals with the payment facilitator and how the claim of benefit under ASEAN-India Free Trade Agreement (in short, AIFTA) ought to be examined wherever payment facilitators are involved. It is submitted that though the above Standing Order was brought to the notice, the same was not considered.

9. It is submitted by Mr.K.Mohanamurali, learned Senior Panel Counsel

for the respondents that the impugned order does not warrant interference inasmuch as the column "Certificate of Origin" is incomplete. Further, the column relating to third party invoicing does not reflect the name of Sojitz Corporation of America as per Clause 13.

10. Having considered the submission of both sides, this Court is of the view that the impugned order is liable to be set-aside inasmuch as the impugned order has been passed without taking into account the relevant factors inter alia the fact that the petitioner had entered into a contract with Fortune Planet, Taiwan, who in turn had placed an order on Ching Luh Shoes, Vietnam and the goods have been directly consigned to the petitioner in India. That being admitted viz., that the goods has its origin in Vietnam, the denial of the benefit of Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of Southeast Asian Nations (Asean) and the Republic of India) Rules, 2009 and the consequential Notification No.46/2011, SI.No.908(I) dated 01.06.2011, on the premise that name and country of the company issuing the invoice (Sojitz Corporation of USA) has not been indicated in Box 7, as required in Note 9 of Overleaf Notes of attachment to the Operational

Certificate Procedure (OCP) is contrary to the Standing Order No.14/2021. The relevant portion of which is extracted hereunder:

"F.No.Misc.02/2018-19-AM-CH-II Dated : 10.08.2021

STANDING ORDER NO.14/2021

.....

In some instances, the importers avail the services of payment facilitators who provide services such as opening of letters of credit, making payment to the foreign suppliers and related services. These activities are undertaken on behalf of the importers. The foreign suppliers raise invoice on these payment facilitators under "Bill To / Ship To Model showing the name of the Importer as the person to whom the goods are shipped. In turn, the payment facilitator raises an invoice for collection on the importer wherein in addition to the amount indicated in the foreign seller's invoice, his charges towards commission, bank charges, interest etc. are added. The importers present these invoices with the Bills of Entry and discharge duty on the basis of the final amount indicated in the invoice raised by the payment service facilitator. The invoices of the payment facilitator also bear reference to the foreign seller's invoice. The bill of entry filed by such importers indicate these facilitators as supplier, in addition to mentioning the name of seller in abroad. In this arrangement, the fact remains that the payment facilitator never gets the right or title or lien over the goods and is not the seller of goods.

2. In the context of availment of exemptions under Foreign Trade Agreements, the relevant Certificates of Origin do not mention the name of these payment facilitators as they are not the seller of goods.

3. It is advised that in such cases of imports, the FTA exemption is available, if otherwise meets the other conditions for extending such FTA exemption. The benefit of the FTA should not be denied on the ground that the name of the payment facilitator is indicated in the Certificates of Origin either as a third country supplier or otherwise. As the payment facilitator is not the seller of goods and there is no statutory requirement to indicate his name in the Certificate of Origin. However, it has to be ensured that

a) The goods are directly shipped from the originating country and a through Bill of Lading has been issued from the country of origin to the country of importer;

b) Sufficient co-relation exists from the import documents to establish that the goods though invoiced by the payment facilitator are the same as the ones originally invoiced by the originating manufacturer,

c) The names of the foreign seller/manufacturer are also indicated in the Bill of Entry and the supporting invoices of the foreign seller/manufacturer are also uploaded in the EDI system by the Importer."

11. There is gross non-application of mind to the material on record inasmuch as neither the relevant Rules, Standing Order nor the orders placed by the petitioner with Fortune Planet have been taken into account which is relevant and has a material bearing on the petitioner's claim of the benefit of Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of

Southeast Asian Nations (Asean) and the Republic of India) Rules, 2009 and the consequential Notification No.46/2011, SI.No.908(I) dated 01.06.2011.

12. In view thereof, the impugned order is set-aside and the matter is remitted back to the first respondent for fresh consideration. It is open to the petitioner to place on record all material evidence, including Standing Order No.14/2021 within a period of 4 weeks from the date of receipt of a copy of this order. The respondent shall pass orders taking into account the materials that may be placed by the petitioner, after affording the petitioner a reasonable opportunity of hearing within a period of 4 weeks from the date of submission of the material by the petitioner.

13. With the above directions, this Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petitions are closed.

13.11.2024

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
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To:

1.The Deputy Commissioner of Customs,
Acting as FAG Officer,
Group III, NS-III,
Jawaharlal Nehru, Customs House,
Nhava Sheva, Tal-Uran, District-Raigad,
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No.60, Rajaji Salai, Chennai, Tamil Nadu - 600 001.

MOHAMMED SHAFFIQ, J.
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