IMPORT TRADE CONTROL IN INDIA

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Introduction

The import and export control in India was introduced for the first time during the Second World War. The marshalling of limited resources for war and civil purposes necessitated the imposition of controls on the free economy of the country. The statutory basis for these controls was provided by the Defence of India Act, 1939 and the rules made thereunder. The power to control the import and exports was exercised by the Government under *rule* 84 of the Defence of India Rules. Several notifications were issued under this rule imposing restrictions on the import and export of goods.

With the end of war and lapse of the Defence of India Rules in September, 1946, the control over imports and exports was continued by the Emergency Provisions (Continuance) Ordinance. The ordinance was to cease to be operative in March 1947. The question of continuance of import and export controls was again considered by the Government of India and it was thought that

> "though the actual administration of these measures call for gradual simplification as conditions permit, the measures themselves should be retained for some time longer in order to avoid any disturbance to the economy of the country during the transition from war to peace time conditions".[1]

The Imports and Exports (Control) Act was accordingly enacted on 24th March, 1947. The Act initially was to be in force for a limited period of three years. Its life has been extended from time to time. For the present it remains in force till 31st March 1971. With the launching of various *five year plans* and vast programme for economic development of the country, conditions regarding foreign exchange are far from normal, and it is unlikely that the Act would be allowed to lapse in 1971.

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1. Statement of objects and reasons, Imports and Exports Control Bill, *Gazette of India*, 1947, Part V, p. 86.

Besides, the Imports and Exports (Control) Act, 1947, there are few other enactments, which control the import and export of certain commodities. Thus, the Foreign Exchange Regulation Act, 1947, control the import and export of gold, silver, coin, currency notes and bank notes. Under *Section* 11 of the Customs Act 1962, the Central government has power to prohibit the import and export of goods for purposes mentioned in the section. The export of coffee is regulated by the *Coffee Board* under Coffee Act, 1942, of tea by the *Tea Board* under the Tea Act, 1953. and of coir and coir products by the *Coir Board* under the Coir Industry Act, 1953. The special enactments are not the subject matter of this paper.

The Import and Export (Control) Act is a short enactment of eight sections. *Section* 3 is the key section which confers a blanket power on the Central government to make provisions by order published in the official *Gazette* "for prohibiting, restricting or otherwise controlling the import into, and export of goods out of, India". The power given to the government under the section is very wide. Any conceivable commodity can be controlled under the section.[2] The power of controlling extends not only on the point of importation and exportation, but also to the internal trade in, and use of, the imported commodity.[3] Under *Section* 3, the Central government has promulgated the Import (Control) Order 1955, and the Exports (Control) Order 1962. The import order introduces a scheme of import licensing. The goods specified in the order cannot be imported without a licence being granted by an appropriate licensing authority unless the government has granted an exemption to any commodity from licensing. The list mentioned in the order requiring the licence import of commodities is so long that hardly anything can be said to be left out.

The order prescribes very broad factors for issuing the licence by the lecensing authority.[4] The broad discretion conferred by the order, however, is attempted to be restricted through the announcements contained in the import trade control policy book, commonly known as the *Red Book*. Further as the supplement to the *Red Book* the government issues from time to time *Hand Book of Rules and Procedures* containing procedural and other matters relating to licensing.

It is well-settled that the control of the import and export trade through licensing does not violate Article 19 (*i*) (*g*) of the Constitution which guarantees to every citizen the right to carry on any occupation, trade of business, but permits the state to impose reasonable restrictions. *In*

2. *Bhatnagars & Co.* v. *Union of India*, A.I.R. 1957 S.C. 478.
3. *Abdul Aziz* v. *State of Maharashtra*, A.I.R. 1963 S.C 1470.
4. One of the factors for refusal to issue a licence is the "non-availability of foreign exchange" and "in the interests of the state".

Glass Chatons Importers and Association v. *The Union of India*,[5] import of glass chatons was banned by the government, though licences were issued to the *State Trading Corporation*, under *rule* 6 of the import order authorizing the Government to cannalize import through special or specialized agencies. It was held that rule 6 did not violate Article 19 (*i*) (*g*) of the Constitution.

The Licensing Policy

The *Hand Book* along with the *Red Book* prescribes the following three broad categories of importers for the purpose of issue of licences :

(*a*) Established Importers ;

(*b*) Actual users ; and

(*c*) Registered Exporters.

These categories have varied from time to time depending on economic needs of the country at a particular moment of time and the foreign exchange position, *etc.* and the experience gained by the department in the matter of licensing. For instance, to begin with, the major category that existed was only that of an established importer and the category of registered exporter was not there. Now the categories of actual users and the registered exporters have gained ascendency over the established importers.

In this paper it is not possible to give in detail the principles for issuing the licences. Suffice to mention that the basis for issue of licence to established importers is expressed in terms of fixed standards, fixed percentages of the past imports. So also in case of registered exporters, generally speaking, the policy is expressed in fixed percentages. The exporter registered with one of the various registering authorities is entitled for an import licence for a specified commodity, to be used in the licensee's factory for manufacture of the exportable commodity. However, the licensing authorities may consider requests for permitting import of items not specified in the policy.

However, in case of actual users authorities enjoy a wide discretion to grant licences. The actual users are divided into three broad sub-categories for purposes of licensing—(*i*) small-scale industries ; (*ii*) scheduled industries registered with the Directorate General of Technical Development (D.G.T.D.) ; and (*iii*) scheduled industries like textiles and jute not registered with the D.G.T.D. and also non-scheduled industries other than small

5. A.I.R. 1961 S C. 1514. Also *Daya* v. *Joint Chief Controller Importer*, A.I.R. 1962 S.C. 1796 ; *Ramchand Jagdishchand* v. *Union of India*, A.I.R. 1963 S.C. 563.

scale, *e.g.*, coffee and coir. Depending on the particular sub-category, the D.G.T.D., Textile Commissioner, *etc.* are involved in licensing in that it is necessary to have their recommendations before the licensing authority issues the licence.

The lincence to be issued to a manufacturer depends on the following various factors : availability of foreign exchange ; essentiality of the article for the manufacturing unit ; availability of the commodity asked for or substitute from indigenous sources ; and priority of the industry tn the context of the needs of the economy.

All these factors, and particularly the first one, are vague and difficult of objective determination. In practice, as the Study Team of the *Administrative Reforms Commission* (A R C.) on Economic Administration, points out that "the prime consideration is to relate the current allocation to that made in the past years[6]." It is, however, not a rational way of doing things as this does not take into account (except in a general way) the anticipated changes in production, estimated capacity, indigenous contents, stock position with the manufacturer, and the resulting benefit in the context of the overall economy[7] *etc.* According to the Study Team, the criteria for decision making are neither clearly defined nor uniformly applied. Here the recommendations made by the Study Team may be reiterated that this uncertainity should be removed and more definite criteria be evolved. All this of course requires knowledge of complete data regarding the installed capacity and its utilization of the different industries, inventory position, indigenous contents, availability of substitutes within the country *etc.*

Licensing Procedure

Under *Section* 3 of the Act power if conferred on the Central government to regulate the import and export of commodities. However, the Central government has conferred the power to issue licences on the *Chief Controller of Imports* and various other licencing authorities through the import order. The statute, it may be noted, does not expressly permit sub-delegation of powers of the government. As a general principle of law, a discretionary power cannot be further sub-delegated unless the statute permits this either expressly or through implication.[8] The sub-delegation involved in import licensing was questioned in *C.T.A. Pillai* v. *Lohia.*[9] Upholding the order, the Calcutta High Court stated that "the Central

6. *Report at 67 (1967).*

7. The Study Team points out that the department has no way of "deciding if any given change in the output of one sector is preferable to a different change in the output of the different sector." *Report at 67 (1967).*

8. *Barium Chemicals Ltd.* v. *Company Law Board*, A.I.R. 1967 S.C. 295.

9. A.I.R. 1957 Cal. 83.

government as such does not issue a licence ; but power of issuing a licence is always conferred on a prescribed officer under a statutory provision and therefore having the force of law."[10] The court, however, missed the very issue whether the statutory provision authorizing the government to issue the order empowered it to sub-delegate its functions. Of course, there did not seem to be any difficulty in impliedly reading the power of sub-delegation in the statutory provision, since the provision is in general terms and power of regulation could be taken to include the creation of administrative machinery also to control the import and export of commodities.

Rule 3 read with schedule IV of the Import Trade Control Order 1955 specifies various licensing authorities. However, the *Hand Book* mentions the heads of the regional offices as the licensing authority.[11] As the *Hand Book* is issued by the *Chief Controller*, it in substance means that it is the *Chief Controller of Imports* who specifies these heads as the licensing authorities. It is not clear under what provision it is done. It looks odd that after specifying officials of different ranks as licensing authorities in the order which expressly is stated to be issued under the statute, the *Chief Controller* should exclude them through the *Hand Book* the status of which remains doubtful. The only provision relevant in this respect can be *clause* 4 of the order which is entitled as "Fees on Application for Licence." Sub-clause (*i*) of the *clause* reads "that every application for a licence shall be made to the appropriate licensing authority." This cannot be taken, except perhaps through a remote implication, to empower the *Chief Controller* to prescribe appropriate licensing authorities with reference to different applicants, or to exclude officials mentioned in the order from the category of licensing authorities. In this respect *clause IV* of the Export Trade Order 1962 is better worded. It states that "an application for licence shall be made to the *Chief Controller of Imports and Exports* or any officer authorised by him in this behalf".

Rule 6 also provides some ambiguity in this regard and appears to be defectively worded. It says that the Central government or the *Chief Controller of Imports* may refuse to grant a licence or direct any other licensing authority not to grant a licence on the grounds mentioned therein. Literally read, this *clause* governs the power of the *Chief Controller*, as the statutory provision stands now, the licensing authorities seems to enjoy absolute power to refuse a licence.

10. *Ibid* at 86.

11. Apart from the *Chief Controller of Imports and Exports*, New Delhi, who is at the apex of the import trade control organization, there are several regional offices situated at various places in the country.

Directions

Apart from the *Red Book* and the *Hand Book*, it is usual for the *Chief Controller of Imports* to issue directions on various matters pertaining to import licensing to the regional licensing authorities to control their discretion so that a uniform licensing policy is followed throughout the country. These instructions either clarify the import policy or lay down the basis of the issue of instructions by the *Chief Controller of Imports* remains doubtful. Prior to 1967 it can be said without difficulty that there was no provision in the import order conferring power on the *Chief Controller* to issue directions. In 1967 *clause* 6 of the order was amended which now provides that "the Central government or the Chief Controller of Imports and Exports mentioned therein." The wordings of the clause are not happy. If literally read, it means that the *Chief Controller* can direct the licensing authorities only in specific cases, but cannot fetter their discretion followed by them in granting licences. Assuming that the *clause* 6 speaks of a direction for refusing to issue a licence and not directions laying down conditions for its issue. However, since a more drastic power would ordinarily include a less drastic one, it seems that the present wordings of the clause should not create any legal difficulty on that score in issuing a direction containing general principles for issuing licences by the licensing authorities.

Assistance of other Agencies

As has been observed by the Study Team of the A.R.C. on Economic Administration, the office of the *Chief Controller of Imports* is recommendation-oriented. In granting import licences particularly to actual users, the licensing authorities take the help of other governmental or semi-governmental agencies in that the applicants are required to route their applications through the various sponsoring authorities. The amount of licence to be issued to an applicant very much depends on the recommendations of these authorities. In fact in case of scheduled industries registered with the *D.G.T.D.*, the licensing authorities follow more or less the recommendations of the sponsoring authority. There is no provision for such assistance in the import order. Only the *Hand Book* and the *Red Book* contain the necessary provisions in this regard. In the absence of express provision for sub-delegation in the statute or the import order, the legality of such a procedure depends on whether it amounts to sub-delegation or merely taking of assistance. It is trite law that assistance can be taken, but sub-delegation may not be permitted unless there is statutory authority for such a course. It the licensing authorities follow mechanically the recommendations of these authorities then in law may amount to sub delegation; but if they keep

their mind open to hear objections against these recommendations then it may be a case of assistance. It seems that though the licensing authorities act by and large on the recommendations of the sponsoring authorities, they may take a different view in suitable cases. The procedure, therefore, appears to be valid.

The rules of procedure to be followed in the *Chief Controller's* office are generally published in the *Hand Book* and are thus known to the applicants. But not much is known of the procedure of the sponsoring authorities. Procedural safeguards available to an applicant in the office of the *Chief Controller* consists in an opportunity of interviewing the dealing officer and in the remedy of two administrative appeals—one to the head of the office where the application was dealt with and another to the *Chief Controller*. However, the safeguards of administrative appeal do not seem to be available to an applicant in the office of the sponsoring authority, though as far as procedural aspect of hearing is concerned the applicant may have an opportunity of interview with the relevant officials. Since in practice very much depends upon the recommendations of the sponsoring authority to depart from the recommendation of the former, fairness requires that applicants should have a reasonable opportunity of being heard at the initial stage, and in addition an opportunity of appeal to a higher authority against the initial decision within the office of the sponsoring authority.

Administrative Appeals

The *Hand Book* makes provision for two administrative appeals. In the regional office, it may be noted, it is usual for import applications to be considered not by the head of the office but by some subordinate officials. An appeal in the first instance lies with the head of the office in which application was dealt with. The second appeal lies with the *Chief Controller of Imports* from the decision of the appellate authority. In either appeal the appellant is heard in person if he so requests.

The *Hand Book* also provides for a review of the decision of the *Chief Controller* in appeal by the *Chief Controller* himself. The purpose of this review is not clear when the appeal and the review applications are to be considered by the same authority. Though the *Hand Book* is silent, there is also a *Grievances Committee* at governmental level with Special Secretary, Ministry of Commerce, as Chairman and two joint secretaries and the *Chief Controller* as members to hear applications for review of the decisions of the *Chief Controller*.[12]

13. *A R.C. Report on Economic Administration*, 44.

Chief Controller is an integral part in the processing of licensing. It is he who lays down the Import trade control policy, specifies the officials for grant of licences, issues directions and co-ordinates and supervises the work within his department. It is not expected of him to possess that objective impartiality which may be essential in hearing the case of an applicant, with an open mind. To infuse objectivity in the decisions at the appellate stage, it is essential that a body other than the *Chief Controller of Imports* may be constituted to hear appeals against the order of the *Chief Controller*. This matter was examined by the *Administrative Reforms Commission*. It was against the institution of an independent tribunal, and rightly so. An independent tribunal is appropriate in situations where the decision has to be taken on an objective reading of the statutory provisions and not where too much discretion has been conferred on the department and the departmental policies are an inseparable part of the decision-making process. The issue of import licence depends on many vague and fluid factors such as the foreign exchange situation, priorities, economic policies at a particular moment of time and so on. A tribunal is hardly expected to possess necessary expertise to decide these factors. The need of justice in a particular case may be out of tune with the departmental policies and the requirements of the economy at a particular moment of time.

The *A.R.C.* was of the opinion that instead of a tribunal there should be constituted a *Board of Referees* to advise the government in respect of review applications received by the government against the orders of the *Chief Controller*. About the constitution of the *Board*, the *A.R.C.* was of the opinion that the membership of the board should include some representatives of recognized bodies in the field of industry and commerce like the *F.I.C.C.I.* and *Associated Chambers of Commerce*[13] so as to inspire public confidence. The role of this *Board* is to be merely advisory. The actual review of the decision of the *Chief Controller of Imports* will have to be considered by the *Grievances Committees* mentioned above which will take into account the advice of the *Board of Referees* in deciding review applications. About the *Grievances Committee* it may be mentioned that membership of the *Chief Controller* does not seem to be desirable due to natural reluctance on his part to change his own decision.

Legal Statuts of the Hand Book and the Red Book

The *Hand Book* and the *Red Book* restrict administrative discretion by laying down principles to be followed by the licensing authorities in issuing import licences. It is not yet a settled question whether these

14. *Supra note* 13 at 44.

books have statutory force. If they do not have statutory force, they can generally be disregarded by the licensing authorities if they so wish. Till recently it was believed that in no case administrative instructions would be enforced at the instance of the individual. But the landmark decision of the Supreme Court in *Union of India* v. *Indo-Afghan Agencies Ltd.*[14] indicates that in exceptional situations the judiciary may enforce the provisions of these books even if they are not regarded as having statutory force, though the nature of such exceptional situations is not easy to articulate. In this case the court directed the licensing authority to grant an import licence to the applicant under the export promotion scheme on grounds of equity. The principle of equity could be invoked by the court because the applicant under the representation of the department had exported certain goods in the hope of getting an licence for certain other goods.

The Supreme Court has not directly decided whether these books have statutory force. There is conflict of judicial opinion amongst the High Courts on this point. The Punjab High Court and the Calcutta High Court have held that these books do not have statutory force. On the other hand the Madras High Court has consistently proceeded on the basis that the policy statements contained in these books have statutory force.[15]

In the opinion of the author these books have statutory force. As a practical matter, the need for formulating merely departmental instructions instead of rules arises because many policy variables may not be easily crystallized into statement of fixed principles or that the administration may lack sufficient expertise to formulate rule governing specific situations. Further, departmental instructions may be based on expediency rather than principles and subject to rapid changes. However, it is anamolous to issue departmental instructions and not rules or regulations having statutory force when the above mentioned factors are absent. The *Hand Book* contains matters which be justified on principle and which are not subject to rapid or frequent change. Therefore, on this basis the *Hand Book* ought to be regarded as having statutory force.

It is true that changes in the *Red Book* have to be made more frequently than in the *Hand Book*, but still normally the *Red Book* is operative for a period of one year. Even if exceptional situations necessitate some changes during this period, these should not create any difficulty of accomplishment. As far as the actual users are concerned, the policy itself confers a wide discretion on the licensing authority; therefore the issue

15. A.I.R. 1968 S.C. 718.
16. See S.N. Jain, *Administrative Discretion in the issue of Import Licences*, 10 *J.I.L.I.* 120 (1968).

of licences can be adjusted to meet the new situation even without a formal change in the policy. However, in case of established importers because the policy is expressed in definite terms, it would be necessary to make formal changes in the *Red Book*. Since these changes will have to be made with reference to importers, a formal change in the policy should not be a difficult matter. This conclusion is substantiated by the past experience. Whenever changes had become necessary during the operation of a particular policy period they were made through public notices published in the *Gazette* of India and newspapers.

Certain legal consequences against the department are likely to arise if they are not regarded as having statutory judicial decisions is that absolute discretion cannot be conferred by a statutory provision on the administrative authorities without violating article 19(*i*)(*g*) of the Constitution.[16] Such a provision may be saved from unconstitutionality if it contains procedural safeguards in the form of administrative appeals against the exercise of discretion. The Import Trade Control Order gives almost unguided power to the licensing authorities to grant licences. The order as such does not contain provisions for administrative appeal against refusal of licences. Only the *Hand Book* provides for administrative appeals. In considering the constitutionality of the Import Trade Control Order, *Hand Book* is to be disregarded if it is held not to have statutory force. And without reading the provisions of the *Hand Book* relating to the administrative appeals, there is no scope in concluding that import order is unconstitutional because of its conferring an unguided power to grant licences on the *Chief Controller*.

Further, it is settled principle of law that if discretion is conferred by law on an authority, it is expected to exercise it from case to case. It cannot fetter the exercise of discretion by self-created rules of policy or laying down inflexible principles to be followed by it. If these books are regarded as not having statutory force then the administrative action based on them may have to be regarded *ultra-vires*. With regard to established importers, for example, both the books lack flexibility of approach and lay down rigid rules. Thus the *Hand Book* defines an established importer, and the *Red Book* lays down the policy for the issue of licences in terms of inflexible percentages, *e.g.*, ten per cent of the past imports and so on. Nowhere it is stated that the principles contained therein may not be followed in exceptional situations. When a particular principle can be stated in definite and invariable terms, it seems unjustified to regard it as a non-statutory rule.

17. *Dwarka Prasad* v. *State of U.P.*, A.I.R. 1954 S.C. 224; *Chandrakant* v. *Jasjit Singh*, A.I.R. 1962 S.C. 204; *Hari Chand Sarda* v. *Mizo District Council*, A.I.R. 1967 S.C. 928.