WWW.LEGALERAONLINE.COM

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 290 OF 2023

UNION OF INDIA & ORS..... APPELLANT(S)

VERSUS

COSMO FILMS LIMITED ..... RESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 298 OF 2023

CIVIL APPEAL NO(S). 303 OF 2023

CIVIL APPEAL NO(S). 297 OF 2023

CIVIL APPEAL NO(S). 296 OF 2023

CIVIL APPEAL NO(S). 295 OF 2023

CIVIL APPEAL NO(S). 294 OF 2023

CIVIL APPEAL NO(S). 293 OF 2023

CIVIL APPEAL NO(S). 292 OF 2023

TRANSFER PETITION (CIVIL) NO(S). 1526 OF 2020

Signature Not Verified
Digitally signed by
NEETA SAPRA
Date: 2024.04.28
17:08:23 IST
Reason:

WWW.LEGALERAONLINE.COM

J U D G M E N T

S. RAVINDRA BHAT, J.

1. These appeals are directed against a judgment and order of the Gujarat High Court,[1] wherein mandatory fulfilment of a 'pre-import condition'[2] incorporated in the Foreign Trade Policy of 2015-2020 ("FTP") and Handbook of Procedures 2015-2020 ("HBP") by Notification No. 33 / 2015-20 and Notification No. 79 / 2015-Customs, both dated 13.10.2017, was set aside. According to the High Court, such fulfilment in order to claim exemption of Integrated Goods and Services Tax ("IGST")[3] and GST compensation cess[4] on input imported into India for the production of goods to be exported from India, on the strength of an advance authorization[5] ("AA") was arbitrary and unreasonable.

LEGAL MEDIA GROUP
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

I. Background

2. In terms of the Foreign Trade (Development & Regulation) Act, 1992 ("FTDRA") the Central Government ("Union") had been framing, from time to time, Export-Import Policies (or FTPs) for the development, regulation and control of imports and exports in the country. The Union announced duty

---

[1] *M/s Shri Jagdamba Polymers Ltd. & Ors. v Union of India & Ors.*, Special Civil Application No. 19324 of 2018.
[2] Paragraph 4.13 of FTP, read with the HBP.
[3] Leviable under Section 3(7) of The Customs Tariff Act, 1975.
[4] Leviable under Section 3(9) of The Customs Tariff Act, 1975.
[5] Paragraph 4.03 of FTP.

WWW.LEGALERAONLINE.COM

exemption schemes as well. One among these was the AA. To regulate and guide the procedure to be followed for implementing the provisions of the FTP and the rules framed thereunder, the Director General of Foreign Trade ("DGFT") notified the HBP, chapter 4 of which prescribed the procedure for availing duty exemption / remission schemes. By paragraph 4.27, exports in *"anticipation of authorisation"* were permitted, so as not to create hindrances and delays in execution of export orders. At the time, Notification No. 18 / 2015-Customs dated 1.04.2015 exempted payment of basic customs duty ("BCD"), additional duty (countervailing duty ("CVD"), special additional duty ("SAD")), safeguard duty and anti-dumping duty on inputs imported against a valid AA.

3. The GST regime was introduced with effect from 01.07.2017. However, no amendment was made to Notification No. 18 / 2015-Customs with respect to IGST and compensation cess, resulting in the collection of these levies for the inputs imported into India against AAs.

4. On 13.10.2017, six existing notifications were amended. Notification No. 79 / 2017-Customs amended Notification No. 18 / 2015-Customs by granting IGST and compensation cess exemption, subject to the following two conditions:

> *"Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act, has been availed, the export obligation shall be fulfilled by* ***physical exports*** *only*."[6]

[6] Proviso to clause (viii), as contained in Notification No. 79 / 2017.

WWW.LEGALERAONLINE.COM

***

"*That the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act* ***shall be subject to pre-import condition***"[7]

(emphasis supplied)

At the same time, Notification No. 33 / 2015-2020 was issued, amending various provisions of the FTP, whereby this 'pre-import condition' was incorporated in paragraph 4.14 thereof with effect from 13.10.2017. The writ petitioners before the High Court / respondents herein claimed that they were unaware about this condition, and continued exports in anticipation of grant of AA, and consequently expected exemption from all custom duty levies, including IGST and compensation cess.

5. The Directorate of Revenue Intelligence ("DRI") Kolkata noticed the above amendments and thereupon, initiated investigation and issued summons to various manufacturers located across the country importing goods against AAs. The respondents were of the view that the scope of 'pre-import condition' was unclear, whereas the DRI officers conducting the inquiry and investigation, however, were of the view that 'pre-import condition' meant that goods had to be imported *first*, and *then* the final products manufactured with such imported goods were to be exported. When it was established that goods imported against a particular AA were used in relation to manufacture of finished goods exported

[7] Addition of clause (xii), as contained in Notification No. 79 / 2017.

for fulfilment of export obligation of that particular authorisation, the 'pre-import condition' stood satisfied.

6. In view of this development, the exemption granted by Notification No. 18 / 2015-Customs was inadmissible where manufacturer-exporters, who undertook manufacturing and export of goods in a continuous cycle, could not prove the above. Exemption was also not admissible when goods manufactured were exported in *anticipation* of licence / authorisation, since they were exports made first, with duty-free import against the authorisation having been undertaken later. Consequently, the manufacturer-exporters aggrieved by this interpretation approached the High Court.

II. Arguments of the Revenue before the High Court

7. The Revenue contended that exemption from paying duty was not a matter of *right*, and was granted by the State keeping in mind general public interest. The criterion for determination of legality of any notification was always whether the authority acted within its jurisdiction while issuing such notification or not, and not if the Union benefitted from the same. The Revenue contended that exporters were free to export first and import at a later stage in terms of paragraphs 4.27 and 4.28 of the HBP. Those provisions however did not offer absolute freedom to the importers to regulate their imports and exports without complying with other conditions imposed in the policy and the relevant customs notification. The provisions were an exception, to keep the option open for

willing exporters, subject to the condition that it would be availed at their risk. Further, exercising the option was available only when either of the 'pre-import conditions' was not fixed in the SION[8], or exporters were willing to first fulfil their export obligation. As the process of fixing norms was time consuming, the provisions granted an opportunity to importers to export in advance, at the risk of not being considered towards discharge of export obligation.

8. The Revenue submitted that before the introduction of the GST regime, imports allowed under AAs were exempt from payment of many duties.[9] Thereafter, CVD and SAD were subsumed in IGST. Under Section 3 of the Customs Tariff Act, 1975, IGST was made payable at specified rates upon imports. However, a major change that was brought into the policy was to not allow exemption from payment of IGST directly at the time of import under AA. Such exemption was allowed indirectly by allowing *refund* of IGST paid at the time of imports under AA within a specified time. The importers, therefore, started paying IGST on goods imported under AA with effect from 1.7.2017, and were getting outright exemption from BCD, ADD, safeguard duty, etc., and IGST paid was refunded. The legislative intent was clear in imposing IGST on all imports made under AAs, on or after 1.7.2017, without differentiating between the status of such authorisations, whether or not it was issued prior to or after

[8] Standard Input Output Norms, which are standard norms which define the number of input/inputs required to manufacture units of output for export purposes. They are applicable differently for different products.
[9] *Supra*, para 2.

introduction of GST. It was a policy decision, which could have been reversed or altered only by the GST Council. The Revenue also pointed out that due to problems in Goods and Service Tax Network (GSTN)[10], the committed refund of IGST was getting delayed. This resulted in blocking of working capital for many business houses. To obviate this problem, the GST Council allowed exemption from IGST when imported under AAs. The Directorate General of Foreign Trade ("DGFT") accordingly, issued Notification No. 33/2015-20 dated 13.10.2017 which was backed by Customs Notification No. 79/2017 dated 13.10.2017, issued by the Department of Revenue, amending the Notification No. 18 / 2015-Customs, dated 1.4.2015. The Revenue further urged that exemption from the IGST leviable under Section 3 (7) was available and subject to two specific conditions. The conditions were (i) export obligation was to be fulfilled through physical exports only; and (ii) the exemption was subject to 'pre-import condition', which implied that only after the import of the goods commenced, were they required to be used for manufacture of export goods, which were ultimately exported.

9. According to the Revenue, a cut-off date could have been declared, and only AAs issued after 13.10.2017 could have been declared eligible for such benefits, but the same was not done. It was kept open-ended to extend benefit to

[10] Which provides shared IT infrastructure and service to both central and state governments including taxpayers and other stakeholders. The registration front end services, returns, and payments to all taxpayers were provided by GSTN.

the importers, who followed those two conditions, even in respect of the AAs issued to them earlier. A cut-off date would have made exporters ineligible for the benefit. Therefore, policy makers, in their own wisdom, kept the door open for the eligible importers, to enjoy the benefit, irrespective of the date / period of issuance of AA, subject to compliance with the conditions imposed.

10. The Revenue further stated that paragraph 4.13 of the FTP had been in existence under different paragraphs in different policy periods for years. Since 2003, all drug companies had been importing their raw materials sourced from unregistered sources, under the 'pre-import condition'. Silk in any form, raw sugars, natural rubbers, tea, spices and precious metals etc., were allowed to be imported under 'pre-import condition' only. The 'pre-import condition' was in-built within the AA scheme itself under paragraph 4.03 of the policy.

11. Additionally, the AA scheme was not a replenishment scheme. Were it so, the DGFT would not have launched other schemes like 'Duty-Free Incentive Scheme', which allowed exports prior to import, and transferable licences under the FTP. To prevent cash blockage of exporters due to upfront payment of IGST and compensation cess on imports of inputs, the exemption from their payment was granted, subject to 'pre-import condition'. In case of replenishment imports after exports, the issue of cash blockage did not arise. Since exports had already taken place and GST legislation provided for complete zero-rating, extending IGST exemption on replenishment imports would imply double benefit to the

authorisation holder. Therefore, the AA holders were not adversely affected and not prejudiced by the impugned notifications. The IGST paid on replenishment material could be availed as input tax credit for payment of GST.

III. Findings of the High Court

12. The High Court, after considering the notifications and taking into account the exporters' submissions, held that paragraph 4.27 of the FTP envisaged exports in anticipation of authorisation, in terms of the cycle of import-manufacture-export carried out, including delivery time of 3-4 months allowed normally by overseas buyers, within minimum six months' time for completion of the cycle. The court considered this to be an unfeasible condition:

> *"Considering the above interpretation of the condition of physical export and pre-import put forth by the DRI, it is more or less impossible to make any exports under an Advance Authorisation without violating the condition of pre-import. In effect and substance, what is given by one hand is taken away by the other. In other words, in the light of the condition of pre-import, the benefit of exemption from levy of integrated tax and GST compensation cess becomes more or less illusory."*[11]

13. It was noted that while the 'pre-import condition' was levied on duties collected under Sections 3 (7) and (9) of the Customs Tariff Act, 1975, *in respect of the levies under Sections 3 (1), (3) and (5) no 'pre-import condition' was imposed.* The result was that if the importer wanted benefit of exemption from the levy of integrated tax and compensation cess, the fact that other levies were not subject to 'pre-import condition' was immaterial because the same *inputs*

[11] *Supra* note 1, para 27.

WWW.LEGALERAONLINE.COM

were subject to it. This resulted in inputs being subject to 'pre-import condition' *in respect of all the levies*. The High Court then took note of the objects of the FTDRA and the FTP, and the subsequent Notification No. 01/2019-Cus dated 10-01-2019, *whereby condition (xii) was omitted*. The court held that the Union found it to be in public interest not to continue with the 'pre-import condition', for availing exemption from IGST and compensation cess leviable on material imported against an AA. This, according to the impugned judgment, vindicated the exporter/respondents' stand. It was held accordingly that:

> *"The condition of pre-import militates against the Advance Authorisation Scheme and therefore, the impugned condition (xii) in Notification No. 18/2015-Cus dated 1st April, 2015 introduced vide Notification No. 79/2017 : MANU/CUST/0095/2017 dated 13th October, 2017 as well as the amendment in paragraph 4.14 of the Foreign Trade Policy made vide Notification No. 33/2015-2020 dated 13th October, 2017, to the extent the same imposes a "pre-import condition" in case of imports under Advance Authorisation for physical export for exemption from the whole of the integrated tax and GST compensation cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, do not meet with the test of reasonableness and are also not in consonance with the scheme of Advance Authorisation".*[12]

14. The court also concluded that though paragraph 4.27 of HBP clearly permitted exports in anticipation of authorisation by endorsing the file number or authorisation number to establish co-relation of export/supplies with authorisation issued, the Revenue wished to treat such permissible imports made in anticipation of authorisation as replenishment. This was despite the fact that for the purpose of exemption from the other levies imposed under Sections 3(1),

[12] *Supra* note 1.

WWW.LEGALERAONLINE.COM

3(3) and 3(5) of the Customs Tariff Act, 1975 for decades the procedure was permitted, and continued to be permitted, (for the purpose of exemption from levy of IGST and compensation cess), yet, such imports were "*suddenly*" treated as "*replenishment imports*" which was held to be "i*ncomprehensible*".[13] The court held that that the impugned exemption notification and paragraph 4.14 of the FTP, to the extent they were impugned did not meet with the test of reasonableness and were held to be *ultra vires* the scheme of the FTP.

IV. The Union's Contentions before this Court

15. Mr. N. Venkatraman, learned Additional Solicitor General ("ASG") appearing for the Union, urged that the essence of the AA was that the exporters were expected to import duty-free materials first, and use them for the purpose of manufacture of products to be exported out of India or be supplied under deemed export, if allowed by the FTP or the customs notifications. This aspect of physical incorporation of input materials in the export goods was covered under paragraph 4.03 of the FTP, which specifically demanded physical incorporation of imported materials in export goods which was possible only if imports were made prior to export. Therefore, such authorizations principally had an inbuilt 'pre-import condition' which had to be followed. Paragraph 4.27 of the HBP for the relevant period allowed exports / supplies in anticipation of an authorization. This was an exception, to meet requirement in case of exigencies. However, importers and

[13] *Supra* note 1.

exporters were availing the benefit of that provision without exception and the export goods were made out of domestically or otherwise procured materials and duty-free imported goods were used for purposes other than for the manufacture of the export goods. Paragraph 4.27 (d) of the HBP barred benefit of export in anticipation of authorization for the inputs with 'pre-import condition'. The ASG contested the exporters' argument that there was no change in paragraph 4.27 of HBP and that it merely imposed conditions in terms of paragraph 4.14 of the FTP by way of 'pre-import condition'.

16. It was stated that under paragraph 4.27(d), exports / supplies made in anticipation of authorisation were not eligible for inputs with 'pre-import condition'. That meant that the moment input materials were subject to 'pre-import condition', they were ineligible for export in anticipation of authorization, by virtue of paragraph 4.27 (d). Therefore, the respondent pleaded based on wrong notion and understanding and knowledge of the relevant provisions, and the High Court erroneously relied upon such an incorrect submission.

17. It was argued that paragraph 4.27 (a) & (b), i.e., export in anticipation of authorization and the 'pre-import condition' on the input materials were mutually exclusive and could not go hand in hand. The impugned order did not take into consideration this aspect of paragraph 4.27(d). Therefore, holding 'pre-import condition' as unreasonable as the same was in contrast with paragraph 4.27 (a) and also that the Government did not take enough care to eradicate such apparent

WWW.LEGALERAONLINE.COM

paradox, was based on the wrong set of facts, and was contrary to the provisions of the law.

18. It was argued that the High Court erred in setting aside paragraph 4.14 of the FTP and the corresponding provisions of the customs notifications, that imposed 'pre-import' and 'physical export' conditions, and held that the contention of physical incorporation of the duty-free materials under paragraph 4.03 of the FTP was contrary to paragraph 4.27 of the HBP which specifically allowed imports in anticipation of authorization. The observation of the court was without merit. The court erroneously granted primacy to paragraph 4.27 of the HBP over paragraph 4.03 of the FTP, when infact the FTP had pre-eminence over the HBP for laying down the procedures to be followed by an exporter or importer in terms of paragraph 1.03 of the FTP. Therefore, provision of the HBP could not override the FTP in case of a conflict. It was argued that paragraph 4.27(d) limited and confined the scope of paragraph 4.27(a). The moment paragraph 4.27(d) came into picture, paragraph 4.27(a) became inoperative.

19. It was also urged that there was no conflict between paragraph 4.03 of the FTP and that of 4.27(a) of the HBP. The scope and field of operation of individual paragraphs were completely different. Paragraph 4.03(a) of the FTP provided that:

> *"(a) Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is*

> *consumed / utilized in the process of production of export product, may also be allowed."*[14]

20. The object and spirit of the AA scheme to allow duty free import of input, which was to be physically incorporated in export product, was clear. The relevant customs notifications too, referred to paragraph 4.03, which provided that the AA was issued in terms of its provision for extending exemption. The provision of physical incorporation of the inputs in the export goods, was necessary for the purpose of the scheme, for two reasons. One, that input materials actually imported were to be physically incorporated in the export goods and two, that the goods physically incorporated in the export goods only could be imported as input. As far as the first situation was concerned, there was no question of replenishment, because the inputs imported became part of the exports. Such goods were to be imported prior to the commencement of export to enable the importer to manufacture finished goods from them. Therefore, for one had to follow the 'pre-import condition' and at the same time they could not avail the benefit of export in anticipation of authorization. In the second situation however, the importer could use materials procured otherwise, instead of duty-free materials to manufacture export goods, but the nature of materials (so procured) had to be identical in all respects with the input materials to be imported. In other words, materials which were to be used in export goods could only be allowed for import. In this case, there was no need to follow the 'pre-import condition' -

[14] Paragraph 4.03(a) of the FTP.

the importer could avail the benefit of export in anticipation of authorization. The Revenue contended that therefore paragraph 4.03 of FTP was not in conflict with paragraph 4.27 of the HBP. In the absence of 4.27(d), these two provisions were considered as complementary rather than in conflict. By inserting 4.27 (d), the intent was clarified that the importer had to follow the provision of paragraph 4.03 of the FTP.

21. It was urged that the High Court erred in holding that 'pre-import condition' had to be in respect of inputs, mentioned in paragraph 4.13 of the FTP, which was not so in the present case. The court's insistence that pre-import goods were to be specifically mentioned under paragraph 4.13 of the FTP, it was submitted, was misplaced. The Revenue pointed out that paragraph 4.13 (1) itself left the issue of which inputs was to be subjected to 'pre import condition' open to the DGFT to notify:[15]

> *"DGFT may, by Notification, impose pre-import condition for inputs under this Chapter."*

The provision clearly left open, the scope of imposing 'pre-import condition' on any goods which could have been covered by the said Chapter 4 of the Policy. Therefore, imposing, such condition across the board for all goods imported under AA was well within the competence and authority of the policy makers. It was argued that the High Court failed to notice that DGFT was duly empowered to issue Notification No.33/2015-20 dated 13.10.2017. This notification was

[15] Paragraph 4.13(1) of FTP.

general in nature and did not exclude any goods from its purview. The only condition was that wherever the importer wanted to avail the benefit of IGST and compensation cess exemption, the 'pre-import condition' had to be satisfied. In absence of any negative list containing specific mention of a set of goods, which were not to be covered by the said provision, all goods were covered by the said notification and subject to a uniform condition. It was also urged that it was neither practicable nor possible to specify each conceivable item for that purpose. In absence of any negative list in the notification, such 'pre-import condition' was applicable for all goods to be imported.

22. The ASG urged that the High Court erred in construing the purpose of Appendix 4J- issued in tandem with paragraph 4.22 of the FTP during the material period (under paragraph 4.42 of the HBP), which stated the export obligation period with respect to various goods that were allowed to be imported. Paragraph 4.22 was a general provision, specifying 18 months as the export obligation period in general. It also provided that such a period was different for a set of goods mentioned in Appendix-4J. Therefore, Appendix-4J was a part of paragraph 4.22 and not a part of paragraph 4.13. Further, Appendix-4J was a negative list for the purpose of paragraph 4.22, which specified a set of goods for which export obligation period was different from the general provision. In addition, in respect of those items additionally the 'pre-import condition' was applicable. The heading of Appendix-4J ("Export Obligation Period for Specified Inputs") clearly referred to paragraph 4.22 of the FTP and paragraph 4.42 of the

WWW.LEGALERAONLINE.COM

HBP. It was clear that its purpose was to define export obligation period of specified goods. It was submitted that merely because Appendix-4J provided for compliance of 'pre-import condition', that did not mean that it became the list meant for only goods on which the 'pre-import condition' was applicable.

23. It was argued that there was no conflict between paragraph 4.14 of the HBP and paragraph 4.13 of the FTP because paragraph 4.14 imposed 'pre-import condition' even in case of inputs not falling within the ambit of paragraph 4.13. This conclusion was drawn based on an erroneous understanding that only limited items covered under Appendix-4J were covered by paragraph 4.13. All articles intended to be imported under AA, availing exemption from payment of IGST, were covered by the Notification No. 33 / 2015-20 dated 13.10.2017, issued in terms of paragraph 4.13 of the FTP. By virtue of the said notification, the moment any manufacturer decided to import any item under AA availing IGST benefit, the 'pre-import' requirement, as enumerated under paragraph 4.14, was attracted. The notification acted as a bridge between paragraph 4.13 and 4.14 of the FTP. They were in harmony with the spirit of the FTP.

24. The learned ASG urged that the notifications interpreted by the High Court amended the conditions for granting exemption from the levy of certain taxes. The respondent exporters had not challenged the power to impose the levies; their only argument was that the 'pre-import' condition, which was introduced for the first time in the notification, was burdensome. They also contend that these conditions were contradictory and made business cumbersome. The ASG

WWW.LEGALERAONLINE.COM

submitted that once the power to levy was undisputed, the conditions under which such levies were imposed, and the manner in which they were collected, were within the domain of the legislature or Parliament. Unless it was shown that the statute imposed a method of collection that was capricious, or arbitrary, the courts ought not to interfere with the levy. Similarly, a levy could fail if there was no mechanism for assessment and collection. Reliance was placed on the decisions reported as *Khandige Sham Bhat v Agricultural Income Tax Officer*[16]*; Assistant Commissioner of Urban Land Tax v Buckingham & Carnatic Co Ltd.*[17]*; R.K. Garg v Union of India*[18]*; Union of India v VKC Footsteps India (P) Ltd*[19]. It was submitted that the courts ought to be circumspect while interpreting any fiscal legislation, and not hold either the provisions or terms of exemptions, or conditions imposed by the law, or through delegated legislation, as unreasonable, or arbitrary. The learned ASG urged that being a new legislation, the Union had to take into account divergent views and norms, and refashioning of the entire indirect tax spectrum was called for.

25. It was lastly urged that the introduction of Notification No. 01/2019-Cus dated 10-01-2019 by the Union, whereby, condition (xii) requiring the 'pre-import condition', was omitted, could not be a ground to say that for the period such a condition existed, it could be disregarded. It was argued that the said latter

[16] 1963 (3) SCR 809.
[17] 1970 (1) SCR 268.
[18] 1981 (1) SCR 947.
[19] 2022 (2) SCC 603.

notification could not by a process of judicial reasoning, be given retrospective effect to, as even the substantive provisions of FTDRA did not permit subordinate retrospective legislation.

V. Contentions of the Respondent-Exporters

26. Ms. Meenakshi Arora, learned senior counsel, argued that an AA under the FTP could be issued either to a manufacturer-exporter or a merchant exporter tied with a supporting manufacturer with past export performance (in at least the preceding two financial years). The entitlement in terms of CIF value of imports provided was up to 300% of the FOB value of the physical export and / or FOB value of deemed export in preceding financial year or ₹ 1 crore, whichever was higher. On fulfilment of the conditions prescribed under paragraph 4.03 of the FTP, respondents were issued AA licenses.

27. Upon notification of the levy IGST, the benefits of upfront exemption granted to exporters through AA in the erstwhile FTP regime were rescinded through the amendment introduced in the scheme by Notification No. 26 / 2017-Customs dated 29 June 2017 ("Amending GST Notification").

28. It was submitted that the AA scheme was operating without hitch or misuse, from its inception since 1986, without any 'pre-import condition'. It had been successfully operating even from 10.01.2019 onwards when the Central Government deleted the 'pre-import condition' in public interest. Thus, there was no *rationale* or justification in imposing the 'pre-import condition' only for a

limited period from 13.10.2017 to 09.01.2019 to a scheme operating successfully without any such condition.

29. It was urged that the 'pre-import condition' was made applicable for such limited period only for exemption from IGST and compensation cess, whereas other import duties, namely, BCD, ADD, Safeguard Duty etc. were exempt even during this period of about 13 months without the 'pre-import condition'.

30. It was submitted that no reason or justification was provided for subjecting IGST and compensation cess to this 'pre-import condition', and not applying this condition for other types of import duties. If 'pre-import condition' was applicable for AA, then the whole scheme would be nullified because it was impossible for any manufacturer-importer to satisfy the 'pre-import condition' when the export orders were to be executed by supplying the final products within a short period of 4 weeks to 8 weeks after receiving the purchase orders from overseas customers. In a typical case, the manufacturer-exporter could export goods only after more than six months from receiving the purchase orders, if the 'pre-import condition' was to be satisfied. Consequently, the delivery schedule of about 4 to 8 weeks from receiving purchase orders could not have been fulfilled. It was additionally argued that all imports under an authorization were subject to "actual user condition". Therefore, manufacturer exporters were not allowed to sell or dispose of input raw materials imported free of duties against any authorization. Regular exporters conducted their business in

a cycle, i.e., by importing input-raw materials free of duties against several authorizations granted to them, and utilizing such goods for manufacturing final products for export with reference to those several authorizations. Consequently, there could be no 'one to one' correlation between import of a consignment of inputs against one particular authorization and utilization of such inputs for manufacturing final products for export against those particular authorizations only – such a scenario was not possible for regular manufacturer-exporters. On realizing that the 'pre-import condition' did not serve any purpose, the Union deleted the condition on 10.01.2019, which vindicated the exporters' stand that the condition was irrelevant to the scheme, and that condition had no nexus with the objectives of the AA scheme.

31. It was submitted that the 'pre-import condition' violated Article 14, which permitted reasonable classification to achieve specific ends. The respondents relied on *Laxmi Khandsari vs. State of Uttar Pradesh*[20]; *State of Haryana v Jai Singh*[21]; *Welfare Association ARP v Ranjit P. Gohil*[22]; and urged that for classification to be reasonable, it should fulfil the two tests. One, it should not be arbitrary, artificial or evasive, and should be based on intelligible differentia, some real and substantial distinction, which distinguished persons or things grouped together in the class from others left out of it. Two, the differentia

[20] 1981(3) SCR 92.
[21] 2003 (9) SCC 114.
[22] 2003 (9) SCC 358.

adopted as the basis of classification must have a *rationale* or reasonable nexus with the object sought to be achieved by the statute in question.

32. Counsel argued that the High Court concluded, correctly, that the introduction of the 'pre-import condition' was an instance of class legislation. The Union meted out differential treatment to the same class of license holders by enabling only certain class of license holders to avail the IGST benefit. This was because those who fulfilled the export obligation before importing the goods were denied the opportunity to avail the benefit of IGST exemption.

33. The imposition of 'pre-import condition' on AAs issued prior to 13.10.2017 placed the exporter-respondents in the shoes of any importer who did not hold any license. The respondents had imported the goods after fulfilling the corresponding export obligation. It was impossible to fulfil the 'pre-import condition' mandated for old AAs through a retrospective application of an amendment in the impugned notifications, even though the respondents could demonstrate that all imported goods were subsequently used for manufacturing export products.

34. Learned counsel for the respondents highlighted that there was no reason for differential treatment of BCD and IGST under the AA scheme. When the levy of IGST on imported goods was treated like the levy of BCD, there was no reason why the unconditional exemption of BCD granted to license holders under the scheme could not be extended to the IGST exemption available for goods imported under the same scheme. This differential treatment meted out to

the IGST benefit when compared to the BCD exemption under the original Notification No. 18 / 2015-Customs was not justified and failed the test of reasonable classification under Article 14 of the Constitution. There was no intelligible differentia between the two in denying the benefit for IGST while granting exemption for BCD. There was also no *rationale* behind the classification IGST and BCD for exemption, at par with the objectives under the scheme.

35. Learned counsel for the respondents relied on *Union of India (UOI) and Ors. vs. N.S. Rathnam & Sons*[23] which held that grant of different exemption based on unintelligible differentia between two categories of assesses for payment of customs duty was discriminatory and unreasonable. Learned counsel also cited *MRF Ltd., Kottayam v. Asst. Commissioner (Assessment) Sales Tax & Ors.*[24] to submit that imposing the 'pre-import' stipulation in respect of two levies was arbitrary and unreasonable.

36. Reliance was also placed upon the decision of this court in the case of *Vasu Dev Singh v. Union of India*[25], for the proposition that the nature of delegated legislation could be broadly classified as rule- making power and grant of exemption from the operation of a statute. In the latter category, the scope of judicial review would be wider as the statutory authority while exercising its statutory power must show that the same had not only been done within the

[23] 2015 (8) SCR 751.
[24] 2006 Supp (6) SCR417.
[25] 2006 Supp (9) SCR 565.

WWW.LEGALERAONLINE.COM

four corners thereof but otherwise fulfilled the criteria laid down by this court in *P. J. Irani v. State of Madras*[26]. The court held that if by a notification, the Act was effaced, it was liable to be struck down.

37. It was submitted that the entire AA scheme was effaced by virtue of the 'pre-import condition' and therefore, such condition was required to be struck down. Reliance was placed upon *Laxmi Khandsari* (supra), where the court held that in imposing restrictions, the State ought to adopt an objective standard amounting to social control by restricting the rights of the citizens ·where the necessities of the situation demand. When the validity of a law placing restrictions upon the exercise of fundamental rights in Article 19(1)(g) is challenged, the onus of proving to the satisfaction of the court that the restriction is reasonable lies upon the State. It was submitted that this is not a case of first-time exemption. As the Union sought to place restrictions, it had to show that the conditions were remedial and necessary. It was hence contended that as there was no *rationale* behind introducing the 'pre-import condition' (which had no nexus with the object sought to be achieved by the AA scheme), it violated Article 19(1)(g) of the Constitution, and was accordingly set aside.

VI. Analysis and Findings

38. The AA scheme is a duty exemption scheme introduced by the Union, under the FTP. Under the scheme, exemption from the payment of import duties

[26] 1962 (2) SCR 169

WWW.LEGALERAONLINE.COM

is given to raw materials / inputs required for the manufacture of export products i.e., one can import raw materials or inputs at zero customs duty for production of export products. The purpose of this scheme is to ensure competitiveness of India's products in the global market. When duties paid on raw materials are saved, it reduces the cost of the final export product. In terms of the scheme, the exporter can import raw materials duty-free.[27] These inputs either can be in a raw / natural / unrefined / unmanufactured or manufactured state. Advance Licenses are issued to allow duty-free import of inputs, which are then physically incorporated in export goods (after making normal allowance for wastage). In addition to this, fuel, oil, the catalyst which is consumed / utilized in the process of production of export product, may also be allowed. Imports under an AA were exempted from the payment of Basic Customs Duty (BCD), Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty (CVD), Safeguard Duty, and Transition Product Specific Safeguard Duty, wherever applicable.

39. The principal challenge before the High Court, was to the 'pre-import condition' in paragraph 4.14 of FTP inserted by Notification No. 33/2015-2020 dated 13.10.2017 and the 'pre-import condition' introduced by clause (xii) in Notification No. 18/2015-Cus dated 01.04.2015 by Notification 79/2017-Customs dated 13.10.2017.

---

[27] As per Chapter 9 of FTP paragraph 9.44, "Raw material" is input(s) required for manufacturing of goods.

WWW.LEGALERAONLINE.COM

40. Chapter IV of the FTP provides for "Duty Exemption/Remission Schemes". One of the duty exemption schemes is the AA. Paragraph 4.03 of the policy makes provision for AA and reads thus:

> *"4.03 Advance Authorisation*
> *(a) Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed/utilized in the process of production of export product, may also be allowed.*
> *(b) Advance Authorisation is issued for inputs in relation to resultant product, on the following basis:*
> *(i) As per Standard Input Output Norms (SION) notified (available in Hand Book of Procedures);*
> *OR*
> *(ii) On the basis of self declaration as per paragraph 4.07 of Handbook of Procedures."*[28]

41. The other relevant provisions of the FTP for purposes of this case, are paragraphs 4.13, 4.14 and 4.16, which, as they stood at the relevant time when FTP 2015-2020 was introduced, read as follows:

> *"4.13 "pre-import condition" in certain cases*
> *(i) DGFT may, by Notification, impose "pre-import condition" for inputs under this Chapter.*
> *(ii) Import items subject to "pre-import condition" are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).*
> *(iii) Import of drugs from unregistered sources shall have pre-import condition."*
>
> *4.14 Details of Duties exempted*
> *Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any.*
>
> **********

[28] Paragraph 4.03 of the FTP.

4.16 Actual User Condition for Advance Authorisation
(i) Advance Authorisation and/or material imported under Advance Authorisation shall be subject to 'Actual User' condition. The same shall not be transferable even after completion of export obligation. However, Authorisation holder will have option to dispose of product manufactured out of duty free input once export obligation is completed.
(ii) In case where CENVAT/input tax credit facility on input has been availed for the exported goods, even after completion of export obligation, the goods imported against such Advance Authorisation shall be utilized only in the manufacture of dutiable goods whether within the same factory or outside (by a supporting manufacturer). For this, the Authorisation holder shall produce a certificate from either the jurisdictional Customs Authority or Chartered Accountant, at the option of the exporter, at the time of filing application for Export Obligation Discharge Certificate to Regional Authority concerned.
(iii) Waste/Scrap arising out of manufacturing process, as allowed, can be disposed off on payment of applicable duty even before fulfillment of export obligation."

42. Exercising powers conferred under paragraph 1.03 of FTP, the DGFT notified the HBP by a Public Notice dated 01.04.2015. Paragraph 4.27 (a) provides for *"Exports in Anticipation of Authorisation"* which is extracted below:

"4.27 Exports in Anticipation of Authorisation
Exports/supplies made from the date of EDI generated file number for an Advance Authorisation, may be accepted towards discharge of EO. Shipping/Supply document(s) should be endorsed with File Number or Authorisation Number to establish co-relation of exports/supplies with Authorisation issued.
(b) If application is approved, authorisation shall be issued based on input / output norms in force on the date of receipt of application by Regional Authority. If in the intervening period (i.e from date of filing of application and date of issue of authorisation) the norms get changed, the authorization will be issued in proportion to provisional exports / supplies already made till any amendment in norms is notified. For remaining exports, Policy / Procedures in force on date of issue of authorisation shall be applicable.
(c) The export of SCOMET items shall not be permitted against an Authorisation until and unless the requisite SCOMET Authorisation is obtained by the applicant."

WWW.LEGALERAONLINE.COM

43. The provision permitted exports in anticipation of authorisation and permits exports towards discharge of export obligation on the basis of the file number even prior to the grant of AAs. The High Court held that this condition had not been modified and export in anticipation of authorisation was permitted.

44. By the Notification No. 18/2015-Cus dated 01.04.2015, issued in exercise of powers under Section 25 (1) of the Customs Act, 1962, goods imported into India against valid AAs were exempted from the whole of the duty of customs leviable thereon which was specified in the First Schedule to the Customs Tariff Act, 1975 and from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under Sections 3, 8B, 8C and 9A of the Act. The GST regime came into force with effect from 01-07-2017. However, no corresponding amendment was carried out to this notification but Section 3 of the Customs Tariff Act, 1975 was amended by substituting Sections 3 (7) and (9), whereby levy of integrated tax [under Section 5 of the Integrated Goods and Services Tax Act, 2017 and levy of Goods and Service Tax compensation cess leviable under Section 8 of the GST Act (Compensation to States) Cess Act, 2017] was incorporated:

> *"(7) Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding 40% as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8).*
> ********* ***************
> *(9) Any article which is imported into India shall, in addition, be liable to the Goods and Services Tax compensation cess at such rate, as is leviable under section 8 of the Goods and Services Tax (Compensation*

to States) Cess Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (10)."

45. Section 3 of the Customs Tariff Act, 1975 as amended after the coming into force of the GST regime, provided for levy of the following additional duties:

(1) levy of a duty (referred to as additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India [Section 3 (1) CTA];

(2) levy of such additional duty as would counter-balance the excise duty leviable on any raw materials, components, and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article [Section 3 (3) CTA];

(3) levy of additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India [SAD, under Section 3 (5) CTA];

(4) levy of integrated tax as leviable under section 5 of the Integrated Goods and Services Tax Act, 2017; [under Section 3 (7) CTA] and;

(5) levy of GST compensation cess at such rate as is leviable under section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 [SAD, under Section 3 (9) CTA].

46. As there was no corresponding notification exempting the additional duties leviable under Sections 3 (7) and (9) CTA, exporters had to pay IGST and compensation cess and seek input tax credit as applicable under the GST Rules. Import under AA, however, continued to be exempt from payment of basic customs duty and additional customs duty specified in subsections (1), (3) and

(5) of section 3 of the CTA, education cess, anti-dumping duty, safeguard duty and transition product specific safeguard duty, wherever applicable.

47. Since IGST and compensation cess was levied against AAs, they were apparently challenged before the Delhi High Court in several petitions, wherein interim relief was granted. Because of the initial problems relating to GST, the committed refund of IGST got delayed, resulting in blocking of working capital for many businesses. The Union then issued an amending notification dated 13-10-2017 in exercise of powers under Section 25 (1) of the Customs Act, 1962 (Notification 79/2017 - dated 13.10.2017) *inter alia* amending the opening paragraph of Notification 18 / 2015 (dated 1.4.2015) whereby goods imported into India were exempted from the whole of the duty of customs leviable thereon, specified in the First Schedule to the Customs Tariff Act, 1975 and from the whole of the additional duty leviable thereon under sub-sections (1), (3) and (5) of Section 3, IGST leviable thereon under sub-section (7) of section 3 and compensation cess leviable under sub-section (9) of section 3. The amending notification also introduced a proviso in condition (viii), after the proviso which reads thus:

> *"Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act, has been availed, the export obligation shall be fulfilled by physical exports only."*

The said notification also inserted condition (xii) which reads thus:

WWW.LEGALERAONLINE.COM

> *"(xii) that the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act shall be subject to pre-import condition."*

48. Thus, exemption from levy of IGST under Section 3 (7) and compensation cess leviable under Section 3 (9) of Customs Tariff Act, 1975 were subject to the conditions that the export obligation shall be fulfilled by physical exports only and shall also be subject to 'pre-import condition'. Together with the amendment of the exemption notification, by Notification No. 33/2015-2020 (dated 13-10-2017), paragraph 4.14 of the FTP was also amended to read as follows:

> *"4.14: Details of Duties exempted.*
> *Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition."*

49. It is important to notice, at this stage, that exporters were made aware of the changes brought about due to the introduction of GST, through a trade notice, (Trade Notice 11/2017, dated 30-06-2017). To the extent it is relevant to the present case, is extracted below:

> *"Trade Notice 11/2017*
> *Subject: Important FTP provisions in the context of the implementation of the GST regime applicable w.e.f 01.07.2017*

WWW.LEGALERAONLINE.COM

Under the GST regime, no exemption from payment of integrated GST and Compensation Cess would be available for imports under Advance Authorisation.
The chapter wise provisions of the FTP 2015-20:

General Provision:

********** **********

Chapter 4

Under the GST regime, no exemption from payment of integrated GST and Compensation Cess would be available for imports under Advance Authorisation.
Importers would need to pay IGST and take input tax credit as applicable under GST rules.

However, imports under Advance Authorisation would continue to be exempted from payment of Basic Customs Duty, Additional Customs Duty specified under Section 3(l), 3(3) and 3(5) of the Customs Tariff Act, Education Cess, Anti-dumping Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, wherever applicable.

Applicable GST would need to be paid white making local procurement, using an invalidation letter of Advance Authorisation IDFIA. Recipient of goods can take Input Tax Credit CITC) of the GST paid on such local procurement.

This Input Tax Credit can be utilized as per GST rules.

Advance Release Order facility shall not be available for procurement of inputs 11nder Advance Authorization scheme except for inputs listed in Schedule 4 of Central Excise Act, 1944 read with The Taxation Laws (Amendment) Act 2017 No 18 of 2017, with effect from July l, 2017. RAs are directed not to issue ARO except for Schedulc-4 items as stated above.

Imports/exports under the replenishment schemes for the Gems and Jewellery sector covered under chapter 4 of FTP and HBP shall be subject to Customs Notification issued/ to be issued in this regard."

50. The public notice clearly forewarned that AAs and their utilisation would not continue in the same manner as the AA scheme was operating hitherto. This trade notice has escaped the attention of the High Court, since there is no advertence to it in the impugned order, or a discussion about it. Likewise, the HBP was amended, and paragraph 4.27 (d) was inserted, which stated that duty

free authorisation for inputs subject to 'pre-import condition' could not be issued. The said clause is as follows:

> *"(iv) No Duty Free Import Authorisation shall be issued for an input which is subjected to pre-import condition."*

51. By virtue of the trade notice, exporters were made aware of the fact that under the GST regime, *no exemption from payment of IGST and compensation cess would be available for imports under AA.* Importers had to pay IGST and take input tax credit as applicable under GST rules.

52. It is a matter of law that FTPs are statutory and are framed by the Union, exercising its powers under Section 5 of the FTRA [29]. On the other hand, the HBP does not have the status of rules or regulations. It merely contains guidelines. In *Hindustan Granites v Union of India*[30] this court observed that:

> *"Handbook of Procedure merely implements the policy. It does not prevent the Central Government from changing the policy."*

53. The facts in *Hindustan Granites* were that on 01.04.2004, FTP 2004-2009 came into force. The said FTP permitted Domestic Tariff Area ("DTA") sales by units, "*other than gems and jewellery units*", up to 50% of FOB value of exports subject to fulfilment of positive Net Foreign Exchange Earnings ("NFE") on payment of concessional duties. Paragraph 6.8 (h) stated that:

> *"(h) EOU/EHTP/STP/BTP units may sell finished products, which are freely importable under the Policy in the DTA under intimation to the Development Commissioner against payment of full duties provided they have achieved the positive NFE."*

---

[29] *Union of India v. Asian Food Industries*, (2006) Supp (8) SCR 485.
[30] 2007 (4) SCR 743.

54. By a notification paragraph 6.8(*a*) and paragraph 6.8(*h*) of the said FTP were amended, preventing EOUs from making DTA sales of the finished marble made from imported rough marble, with immediate effect. The change was made a few months after renewal of letter of permission to the unit, authorizing it to manufacture and export marble tiles for 5 years, subject to a specified monetary limit. The contention that the FTP could not have been amended, was negatived, by this court.

55. The impugned judgment, in the present case, is premised broadly on the reasoning that the amendment by Notification 79/2017 dated 13.10.2017 to the extent it required payment of duty, and, in the case of advance authorizations, the fulfilment of 'pre-import conditions' was unreasonable and arbitrary. It was concluded that the amendment is contrary to the *objective* of the FTP. Further, it has been held that 'pre-import conditions' are in respect of specific goods and, the notifications impugned, inasmuch as they apply 'pre-import condition' to all goods, is contrary to the provision. Further, the absence of 'pre-import conditions' in respect of basic customs duty, and other levies, where in anticipation of AAs, duty free imports can be made, in contradistinction with the need to follow such 'pre-import conditions' in respect of IGST and compensation cess, rendered the AAs worthless. Lastly, it was held that exporters, who have to import inputs, would face impossibility in fulfilling the 'pre-import condition', because the normal cycle of import of inputs and export of finished products

WWW.LEGALERAONLINE.COM

would be for a period of six months, whereas the period, which the *regime* permits, would work out to three months.

56. It would be necessary to first analyse the introduction of the 'pre-import condition'. The FTP, *inter alia*, facilitated AAs for duty-free import of input, which is physically incorporated in export product, making normal allowance for wastage (paragraph 4.03 of the FTP). No doubt, the *rationale* or object behind this was to smoothen and facilitate export trade, ensuring that finished goods, meant for export, did not suffer a competitive price disadvantage. However, the concept of 'pre-import condition' was not alien – Appendix-4J (mentioned in paragraph 4.13 (ii) of the FTP) listed several articles, such as spices, penicillin and its salts, tea, coconut oil, silk, drugs from unregistered sources, precious metals, etc. as articles for which the 'pre-import condition' was applicable, prior to the GST *regime*. Furthermore, by paragraph 4.13 of the FTP, the DGFT could impose 'pre-import conditions' on articles other than those specified:

> *"(i) DGFT may, by Notification, impose "pre-import condition" for inputs under this Chapter."*

57. The retention of the power to impose 'pre-import conditions' on articles other than those specified in Appendix-4J, meant that the DGFT could exercise it, in relation to any goods. The High Court has not discussed this aspect, and proceeded on the assumption that only specified goods were subject to the 'pre-import condition'. The existence of paragraph 4.13 (i) reserving the power to insist upon the 'pre-import condition', meant that the policy was capable of

WWW.LEGALERAONLINE.COM

change, depending on the exigencies of the time. This omission, together with the High Court's failure to notice paragraph 4.27 (d) of the HBP are serious infirmities in the impugned judgment.

58. Now, coming to the notifications dated 13.10.2017 (No. 79/2017, issued under the Customs Act, 1962) and No. 33 (issued in exercise of Section 5 of the FTDRA read with Para 1.02 of the FTP) the exemption from payment of IGST at the time of import of input materials under AA was granted. The exemption was, however, not absolute. The conditions incorporated in the Notification (No. 79/2017), were one, that the exemption could only be extended so long as exports made under the AAs were physical exports in nature and the other that to avail such benefit, one was to follow the 'pre-import condition'.

59. 'Physical export' is defined in paragraph 4.05(c) and paragraph 9.20 of the FTP read with Section 2(e) of the FTDRA as follows:

> *(e) "import" and 'export" means respectively bringing into, or taking out of, India ang goods by land, sea or air"*

Essentially, therefore, export involves taking goods out of India. AAs can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer (as per paragraph 4.05). However, paragraph 4.05 of the FTP defines categories for which AAs can be issued, somewhat expansively and prescribes that –

> *"(c) Advance Authorization shall be issued for:*
> *(i) Physical export (including export to SEZ);*
> *(ii) Intermediate supply; and/ or*
> *(iii) Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (e), (f) (g) and (h) of this FTP.*

> *(iv) Supply of 'stores' on board of foreign going vessel / aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied."*

The definition extends in specific terms (under Chapter 4 of FTP) - supplies made to SEZ are considered as 'physical exports' despite not being an event in which goods are being taken out of India. The other three categories defined under (c) (ii), (iii) & (iv) are ineligible as 'physical exports'. Supplies of intermediate goods are covered by letter of invalidation, whereas supplies covered under Chapter 7 of the FTP are considered as 'deemed exports'. These supplies are ineligible for being considered 'physical exports'. Therefore, any category of supply, be it under letter of invalidation and/or to EOU and/or under International Competitive Bidding (ICB) and/or to Mega Power Projects, *other than actual exports to other country and supply to SEZ, cannot be considered as 'physical exports'.* One of the objects behind the impugned notifications was to ensure that the entire exports made under AAs towards discharge of export orders were physical exports. In case the entire exports were not physical exports, the AAs were automatically ineligible for exemption.

60. The introduction of the GST *regime* resulted in a substantial and fundamental overhaul of the indirect tax structure, at the State and Central levels. The GST *regime* is based on the idea of removing cascading effect of the taxes. The cascading effect of taxes mean levy of tax on tax. The GST is levied on the *net value added portion* and not on the entire transaction value as the taxpayer would enjoy input tax credit. Barring few indirect taxes, all the major indirect

taxes levied by the Central and State governments are subsumed into the GST. Consequently, taxpayers and suppliers are untroubled about paying multiple indirect taxes under different laws. In the GST framework, simple rules have been prescribed to utilize the cross-sectional credit of input taxes. A trader who could not claim credit of tax paid on services, can seek and get credit on goods as well as services. This framework of seamless credit was introduced to safeguard that taxes on supplies are paid to the extent of value additions and net liability- and to avoid double taxation.

61. The introduction of GST meant considerable legislative exercise in the form of repeal of several enactments (in the wake of the 101st Amendment to the Constitution, introducing Articles 246A, 269A, 279A, amendment to Articles 286 and 366, besides amending List I, II and III of the Seventh Schedule) and enactment of an entirely new set of laws. In this scheme, the new levies were IGST and compensation cess. These were not part of the original Notification No. 18/2015, and necessitated its amendment. Since the entire GST universe, so to say, is dependent on a comprehensive input credit and refund system, the policy makers (which in this case, were tax administrators and the DGFT) were of the opinion that since countervailing duty (CVD) and special additional duty (SAD), which were subsumed under the GST regime and the other levy (compensation cess), the previous regime of permitting AAs to govern import of duty free articles, as inputs, should continue, but that for the new levies, the system of input credit, and refunds should prevail.

WWW.LEGALERAONLINE.COM

62. In this court's opinion, the introduction of the 'pre-import condition' may have resulted in hardship to the exporters, because even whilst they fulfilled the physical export criteria, they could not continue with their former business practices of importing inputs, after applying for AAs, to fulfil their overseas contractual obligations. The new dispensation required them to pay the two duties, and then claim refunds, after satisfying that the inputs had been utilized fully (wastage excluded) for producing the final export goods. The re-shaping of their businesses caused inconvenience to them. Yet, that cannot be a ground to hold that the insertion of the 'pre-import condition', was arbitrary, as the High Court concluded. It was held, in *Rohitash Kumar & Ors. v Om Prakash Sharma & Ors*[31] that inconvenience or hardship is not a ground for the court to interpret the plain language of the statute differently, to give relief.

> *"In Mysore SEB v. Bangalore Woolen Cotton & Silk Mills Ltd. AIR 1963 SC 1128 a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. In Martin Burn Ltd. V. Corpn. Of Calcutta AIR 1966 SC 529, this Court, while dealing with the same issue observed as under: (AIR p. 535, para 14)*
>
> *"14. . A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what is considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not."*
> *26. Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein is unequivocal."*

[31] (2013) 11 SCC 451.

Again, in *State of Madhya Pradesh v Rakesh Kohli*[32] it was observed that the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures and that *"hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law."*

63. The respondents had relied on some decisions, notably *Laxmi Khandsari* (supra) which dealt with the general theory of reasonableness; the court observed that imposition of reasonable restrictions and its extent would depend upon the object which the law or policy seeks to serve. It was held that it was difficult to lay down any hard and fast rule of universal application but in imposing such restrictions the State must adopt an objective standard amounting to a social control. In *Ranjit P. Gohil* (supra) the court in fact held that:

> *"It is difficult to expect the Legislature carving out a classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned, still the court would respect the classification dictated by the wisdom of Legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness on the touchstone of Article 14."*

64. The decision reported in *MRF Ltd., Kottayam* (supra) was relied upon to say that withdrawal of exemptions or tax benefits cannot be resorted to. Facially, this court's observations with respect to withdrawal of tax exemption appear to be favourable to the respondents. Yet, what weighed with this court was that the power of withdrawal of exemption was not retrospective:

> *"Thus while Sub-section (1) authorizes the grant of an exemption or reduction in rate with retrospective effect in respect of any tax payable*

[32] 2012 (6) SCR 661.

> *under the Act, Sub-section (3) does not provide for any cancellation or variation retrospectively."*

In the circumstances, this decision has no application to the facts of this case, because the facility of AA without 'pre import condition' was introduced prospectively.

65. The respondents had alleged discrimination on two counts: one, that for purposes of classification, all exporters who were granted AAs were to be treated alike; and two, that insisting on the 'pre-import condition' in respect to exemption from two levies only, while granting that benefit in respect of other AAs, was discriminatory. As far as the first aspect is concerned, the impugned judgment, in this court's opinion, is on a misreading of the FTP. As noted earlier, paragraph 4.13 (i) itself empowered the DGFT to include articles, which are not specified in Appendix-4J. The existence of this discretion means that there is flexibility in regard to the nature of policies to be adopted, having regard to the state of export trade, and concessions to be extended in the trade and tax regime. Thus, the indication of a few items by virtue of paragraph 4.13 (ii) *per se* never meant that other articles could not be subjected to 'pre import conditions'. Clearly, therefore, all AA holders were never treated alike. On the second aspect, what hurt the respondents was not classification of AAs per se, but their differentiation in the newly introduced tax regimes, *so far as two new levies are concerned.* If one keeps in mind that there cannot be a blanket right to claim exemption, and that such a relief is dependent on the assessment of the State and tax administrators,

as well as the state of the economy and above all, the mechanism for its administration, clearly the argument of discriminatory treatment of the two levies on the one hand, and the other taxes on the other, has to fail. The exemption from the requirement of pre import conditions continues in respect of the old levies, which are, even as on date, not part of the GST regime. That clearly sets them apart from the new levies, the payment of which is insisted (after which refund can be sought) as a part of *a unified system of levy, assessment, collection, payment, and refund.*

66. This court has held, on previous occasions, that when reform by way of new legislation is introduced, the doctrine of classification cannot be applied strictly, and that some allowance for experimentation, to observe the effect of the law, is available to the executive or legislature. This was emphasized in *State of Gujarat v Shri Ambica Mills*[33]

> *"55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.*
>
> *56. The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than*

[33] 1974 (3) SCR 760.

50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate - difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to reshape - and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched.

********** **********

64. Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to criminal procedure, etc. The prominence given to the equal protection Clause in many modern opinions and decisions in America all show that the Court feels less constrained to give judicial deference to legislative judgment in the field of human and civil rights than in that of economic Regulation and that it is making a vigorous use of the equal protection Clause to strike down legislative action in the area of fundamental human rights. [See "Developments Equal Protection", 32 Harv, Law Rev 1065, 1127]

65. The question whether, Under Article 14, a classification is reasonable or unreasonable must, in the ultimate analysis depend upon the judicial approach to the problem. The great divide in this area lies in the difference between emphasising the actualities or the abstractions of legislation. The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities.

66. That the legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry, that exact wisdom and nice adaption of remedies cannot be required, that judgment is largely a prophecy based on meagre and uninterpreted experience, should stand as reminder that in this area the Court does not take the equal protection requirement in a pedagogic manner [See "General theory of law and state"

The same idea was echoed in *Ajoy Kumar Banerjee & Ors. v. Union of India & Ors*[34]

> *"...Article 14 does not prevent legislature from introducing a reform i.e. by applying the legislation to some institutions or objects or areas only according to the exigency of the situation and further classification of selection can be sustained on historical reasons or reasons of administrative exigency or piecemeal method of introducing reforms. The law need not apply to all the persons in the sense of having a universal application to all persons. A law can be sustained if it deals equally with the people of well-defined class-employees of insurance companies as such and such a law is not open to the charge of denial of equal protection on the ground that it had no application to other persons."*

Likewise, *Javed v. State of Haryana*[35] observed that there is no constitutional compulsion that a law or policy should be implemented all at once:

> *"16. A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented at one go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance."*

67. Therefore, there is no constitutional compulsion that whilst framing a new law, or policies under a new legislation – particularly when an entirely different set of fiscal norms are created, overhauling the taxation structure, concessions hitherto granted or given should necessarily be continued in the same fashion as they were in the past. When a new set of laws are enacted, the legislature's effortis to on the one hand, assimilate- as far as practicable, the past *regime*. On the other hand, the object of the new law is creation of new rights and obligations,

[34] 1984 (3) SCR 252.
[35] (2003) 8 SCC 369.

WWW.LEGALERAONLINE.COM

with new attendant conditions. Inevitably, this process is bound to lead to some disruption. In this case, the disruption is in the form of exporters needing to import inputs, pay the two duties, and claim refunds. Yet, this inconvenience is insufficient to trump the legislative choice of creating an altogether new fiscal legislation, and insisting that a section of assessees order their affairs, to be in accord with the new law. Therefore, the exclusion of benefit of imports in anticipation of AAs, and requiring payment of duties, under Sections 3 (7) and (9) of Customs Tariff Act, 1975, with the 'pre-import condition', cannot be characterized as arbitrary or unreasonable.

68. This court had also observed in *State of Madhya Pradesh v Nandlal Jaiswal*[36] that *"in complex economic matters every decision is necessarily empiric, and it is based on experimentation"* and that the court, while considering the validity of executive action *relating to economic matters grant a certain measure of freedom or 'play in the joints' to the executive."* The Court crucially emphasized that:

> *"The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide."*

In *R.K. Garg* (supra) this court similarly spelt out the circumscribed role that the court has, in considering the validity or constitutionality of fiscal laws, or economic measures, stating that *"the court should feel more inclined to give*

[36] 1987 (1) SCR 01.

WWW.LEGALERAONLINE.COM

judicial deference to legislative judgment in the field of economic Regulation than in other areas where fundamental human rights are involved." Likewise, in *Ashirwad Films v. Union of India*[37] this court observed:

> *"The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. Even so, large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill- equipped to investigate…."*

69. The object behind imposing the 'pre-import condition' is discernible from paragraph 4.03 of FTP and Annexure-4J of the HBP; that only few articles were enumerated when the FTP was published, is no ground for the exporters to complain that other articles could not be included for the purpose of 'pre-import condition'; as held earlier, that is the import of paragraph 4.03 (i). The numerous schemes in the FTP are to maintain an equilibrium between exporters' claims, on the one hand and on the other hand, to preserve the Revenue's interests. Here, what is involved is exemption and postponement of exemption of IGST, a new levy altogether, whose mechanism was being worked out and evolved, for the first time. The plea of impossibility to fulfil 'pre-import conditions' under old AAs was made, suggesting that the notifications retrospectively mandated new conditions. The exporter respondents' argument that there is no *rationale* for differential treatment of BCD and IGST under AA scheme is without merit. BCD is a customs levy at the point of import. At that stage, there is no question of

[37] (2007) 6 SCC 624,

WWW.LEGALERAONLINE.COM

credit. On the other hand, IGST is levied at multiple points (including at the stage of import) and input credit gets into the stream, till the point of end user. As a result, there is justification for a separate treatment of the two levies. IGST is levied under the IGST Act, 2017 and is collected, for convenience, at the customs point through the machinery under the Customs Act, 1962. The impugned notifications, therefore, cannot be faulted for arbitrariness or under classification.

70. The High Court was persuaded to hold that the subsequent notification of 10.01.2019 withdrew the 'pre-import condition' meant that the Union itself recognized its unworkable and unfeasible nature, and consequently the condition should not be insisted upon for the period it existed, i.e., after 13.10.2017. This court is of the opinion that the reasoning is faulty. It is now settled that the FTPRA contains no power to frame retrospective regulations. Construing the later notification of 10.01.2019 as being effective from 13.10.2017 would be giving effect to it from a date prior to the date of its existence; in other words the court would impart retrospectivity. In *Director General of Foreign Trade & Ors. v Kanak Exports & Ors*[38] this court held that:

> *"Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this Section confer powers upon the Central Government to 'amend' the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospective."*

[38] 2015 (15) SCR 287.

WWW.LEGALERAONLINE.COM

71. To give retrospective effect, to the notification of 10.01.2019 through interpretation, would be to achieve what is impermissible in law. Therefore, the impugned judgment cannot be sustained on this score as well.

72. This court recollects its recent decision, on the question of entitlement to refund, under the old tax regime, which was subsumed and resulted in some businesses being affected. Negativing the challenge to constitutionality of the provisions of GST, it was held, in *Union of India (UOI) & Ors. v VKC Footsteps India Pvt. Ltd*[39]. that:

> *"A claim to refund is governed by statute. There is no constitutional entitlement to seek a refund. Parliament has in Clause (i) of the first proviso allowed a refund of the unutilized ITC in the case of zero-rated supplies made without payment of tax. Under Clause (ii) of the first proviso, Parliament has envisaged a refund of unutilized ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. When there is neither a constitutional guarantee nor a statutory entitlement to refund, the submission that goods and services must necessarily be treated at par on a matter of a refund of unutilized ITC cannot be accepted. Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax, concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive."*

73. In this court's opinion, what applies to refunds, (the right to which can be curtailed legitimately) applies equally to exemptions. It has been held in *Bannari Amman Sugars Ltd. vs. Commercial Tax Officer & Ors*[40] that if there is any tax concession, it *"can be withdrawn at any time and no time limit should be insisted upon before it was withdrawn".*

---

[39] 2021 (15) SCR 169.
[40] 2004 (6) Suppl. SCR 264.

WWW.LEGALERAONLINE.COM

74. Commentators and economists have spoken about how introduction of GST was one of the most significant tax reforms undertaken by India. It was preceded by a series of meetings and negotiations, whereby concerns of the states, and various other agencies were accommodated. It has ushered a unified market driven by a single tax, converting different markets in states, with different tariffs and governing principles. It has smoothened movement of goods between different states. Before the advent of GST, the Union taxed production of goods and supply of services; and the states taxed sale of goods. With GST, both the Union and the states are entitled to share the taxes of the full value chain of goods and services. Such a transformation cannot be painless; disruptions – especially in the beginning will be felt. Yet, that in the process of unification, if a certain section of the business is inconvenienced, and would have to pay taxes (which exist as levies, newly introduced) and conditions are imposed upon their ability to freely import inputs (for the purpose of export), this alone cannot lead the court to conclude that such a change is unreasonable or arbitrary.

75. For the foregoing reasons, this court holds that the Revenue has to succeed. The impugned judgment and orders of the Gujarat High Court are hereby set aside. However, since the respondents were enjoying interim orders, till the impugned judgments were delivered, the Revenue is directed to permit them to claim refund or input credit (whichever appliable and/or wherever customs duty was paid). For doing so, the respondents shall approach the jurisdictional commissioner, and apply with documentary evidence within six weeks from the

WWW.LEGALERAONLINE.COM

date of this judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard.

76. The Revenue's appeals are allowed, subject to the above terms.

.....J.
[S. RAVINDRA BHAT]

.....J.
[DIPANKAR DATTA]

NEW DELHI;
APRIL 28, 2023.

LEGAL MEDIA GROUP
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE