

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 16TH DAY OF FEBRUARY 2023

BEFORE

THE HON'BLE MR.JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION No.14963 OF 2022 (T- CUS)

BETWEEN:

M/S PATANJALI FOODS LIMITED
A PUBLIC LIMITED COMPANY IN CORPORATED UNDER THE
INDIAN COMPANY ACT,
(FORMERLY KNOWN AS M/S RUCHI SOYA INDUSTRIES LTD)
HAVING ITS REGISTERED OFFICE AT
RUCHI HOUSE, SURVEY NO. 169
ROYAL PALMS , AAREY COLONY
GOREGAON (EAST), MUMBAI 400 065.

REPRESENTED BY ITS AUTHORISED SIGNATORY
DEPUTY MANAGER LEGAL
SHRI. T. GAJENDRA

...PETITIONER

(BY SRI. RAJESH RAWAL, ADV. ALONG WITH SRI.T.GAJENDRA &
SRI. K.P.CHANDRASHEKAR REDDY, ADV.)

AND:

- 1 . UNION OF INDIA
THROUGH THE SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
NORTH BLOCK, NEW DELHI 110 001.
- 2 . DIRECTOR GENERAL OF FOREIGN TRADE
UDYOG BHAWAN H-WING
MAULANA AZAD ROAD,
NEW DELHI 110011.
- 3 . COMMISSIONER OF CUSTOMS
OFFICE OF COMMISSIONER OF CUSTOMS

NEW CUSTOM HOUSE, PANAMBUR
MANGALORE 575 010.

...RESPONDENTS

(BY SRI. V.C.JAGANNATHAN, ADV. FOR R1 & R2
SRI.AKASH B. SHETTY, ADV. FOR R3)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DIRECT WHILE CALLING FOR RECORDS PERTAINING TO THE PUBLIC NOTICE NO.15/2015-20 DTD: 14.6.2022 AND QUASH/SET ASIDE CONDITION X MENTIONED IN PARA 2 OF THE SAID PUBLIC NOTICE NO.15/2015-2020 DTD.14.6.2022 VIDE ANNEXURE-J BY R2 AND ETC.

THIS W.P. IS BEING HEARD AND RESERVED ON 18.11.2022 COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

In this petition, petitioner has sought for the following reliefs:-

“(a) Issue writ of Certiorari or any other appropriate writ, order of direction while calling for records pertaining to the public Notice No. 15/2015-20 dated:14.06.2022 and quash / set aside ‘ condition x’ mentioned in pare 2 of the said Public Notice No. 15/2015-20 dated: 14.06.2022 vide Annexure-J.

*(b) Issue a Writ of Mandamus or any other appropriate writ, order or direction while directing Respondent No.2 to delete Condition No. 3 in the condition sheet of the Tariff Rate Quota dated 05.07.2022 vide **Annexure – M** issued / allotted to the Petitioner.*

(c) Issue a Writ of Mandamus or any other appropriate writ, order or direction while directing the Respondents to permit clearance of balance quantity of the subject goods i.e., 1973.04 MTs. after clearance from the customs bonded warehouse in terms of Section 68 of the Customs Act, 1962 on production of Tariff Rate Quota dated: 05.07.2022 vide Annexure-M by the petitioner and also extended the benefit of Notification No. 30/2022-Cus dated: 24.05.2022 on such clearance.

(d) Issue a writ of Mandamus or any other appropriate writ, order or direction while directing the Respondents to account for the clearance of 4000 MT's of of the subject goods, as stated above, against the Tariff Rate Quota dated: 05.07.2022 vide Annexure-M issued to the petitioner while also extending the benefit of Notification No. 30/2022- Cus dated: 24.05.2022 vide Annexure-F on such clearance and refund excess duty of Rs.3,79,33,896/- paid on clearance of the said 400 MTs of the subject goods with interest @ 12 % p.a.

(e) Pass any other appropriate Order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the instant case and in the interest of justice.

2. The brief facts giving rise to the present petition as contended by the petitioner in its amended petition are as follows:-

Petitioner Company is engaged in the business of solvent extraction, refining of oils, manufacture of soya food products, import, export and trading of agricultural commodities. Petitioner Company was earlier known as M/s. Ruchi Soya Industries Ltd. and the name of the Petitioner Company has changed from M/s. Ruchi Soya Industries Ltd. to M/s. Patanjali Foods Limited w.e.f. 24.06.2022. Petitioner had entered into a contract with its foreign supplier viz. Aston Agro Industrial SA, Switzerland for import of the subject goods, Crude Sunflower Seed Oil of Edible Grade in Bulk. The said foreign supplier had supplied 6000 MTs of the subject goods vide its Invoice dated 10.06.2022. The subject goods were shipped vide vessel 'MT Loyal' with port of discharge being Mangalore Port, India. The subject goods were dispatched against Eight Bills of Lading dated 04.06.2022 and four Bills of Lading dated 07.06.2022. The aforesaid vessel carrying the subject goods arrived at Mangalore port and was granted Entry Inward on 30.06.2022. Petitioner had filed Warehouse Bill of Entry No. 9296578 dated 27.06.2022

under Section 46 of the Customs Act, 1962 and the subject goods were warehoused accordingly.

2.1 The Respondent No.2 is the Director General of Foreign Trade (DGFT). In exercise of his powers under paragraphs 1.03 and 2.04 of the Foreign Trade Policy (FTP), the DGFT issued a Public Notice bearing No.10/2015-20 dated 24.05.2022, whereby Tariff Rate Quota (TRQ) was allocated for the financial years 2022-23 and 2023-24 by amending paragraphs 2.60 and 2.61 of the Handbook of Procedures, thereby laying down procedural conditions for Crude Soya-bean oil, whether or not degummed and Crude Sunflower seed oil. The Duty structure in regard to the aforesaid goods is Basic Customs Duty @ 0% plus Agriculture Infrastructure and Development Cess (AIDC) @ 5% plus Social Welfare Surcharge (SWS) @10% plus IGST @ 5%. It is stated that import of the above mentioned goods is exempted from levy of whole of Basic Customs Duty and from whole of Agriculture Infrastructure and Development Cess as per Notification No. 30/2022-Cus dated 24.05.2022. It is also contended that the aforesaid goods are freely importable as

per the ITC (HS) Schedule 1 - Import Policy, 2022. Further in regard to the aforesaid goods, there is no restriction for trading thereof by State Trading Corporations.

2.2 Petitioner contends that as per the aforesaid Public Notice No. 10/2015-20 dated 24.05.2022, fresh applications for allocation of TRQ Authorisation/License were called for by the respondents. Petitioner was eligible for all the conditions mentioned therein and the Petitioner accordingly applied online to the office of Respondent No.2 for allocation of TRQ Authorisation/ License for import of Crude Soya-bean oil and Crude Sunflower seed oil by means of Application dated 17.06.2022 and the said application was duly acknowledged by the office of Respondent No.2 vide its email dated 17.06.2022.

2.3 Petitioner submits that subsequently, Respondent No.2-DGFT, in exercise of his powers under Para1.03 and 2.04 of FTP, issued another Public Notice No.15/2015-20 dated 14.06.2022 amending para-2 of the aforesaid Public Notice No.10/2015-20 dated 24.05.2022 in addition to imposing/inserting certain further conditions. Amongst others, an additional condition was imposed as

per 'condition x' whereby import consignments landing at Indian Ports after the date of issuance of TRQ license shall only be considered for clearance under TRQ. The said 'condition x' also stipulates that any quantities lying at the Indian ports (under warehousing etc) before the date of issuance of the TRQ license shall not be considered for import clearance under TRQ.

2.4 It is contended that after the aforesaid vessel carrying the subject goods secured berth, discharge of the subject goods in the custom bonded tanks commenced and the cargo stood discharged on 02.07.2022. On discharge of the subject goods in the bonded tanks, there was short quantity receipt of 26.96 MTs and the total quantity of the subject goods that was discharged in the bonded tanks was 5973.04 MTs. Petitioner needed the subject goods urgently to keep its manufacturing unit functioning and to avoid losses, so awaiting issuance of TRQ license, Petitioner had filed Ex-bond Bill of Entry No.9407307 dated 04.07.2022 under Section 68 of the Customs Act, 1962 seeking clearance of 500 MTs of the subject goods for home consumption. The said Bill of Entry was processed by the

revenue and on payment of applicable duty out of charge was given on 05.07.2022.

2.5 Petitioner had applied to the office of Respondent No.2 for allocation of TRQ licenses for import of Crude Soya-bean oil and Crude Sunflower seed oil. The said application of the Petitioner was duly scrutinized by the Office of Respondent No.2 and Petitioner was given TRQ dated 05.07.2022, being the Authorisation/License/Scrip, for import of Crude Soya-bean oil and Crude Sunflower seed oil, as so stated therein. It is contended that the aforesaid 'condition x' is forming part of the Condition Sheet of the aforesaid TRQ license dated 05.07.2022 as Condition No. 3. Petitioner wanted to clear the subject goods against the aforesaid TRQ authorization/license and had approached the Department accordingly, who, however it was pointed out that the said request cannot be entertained since the goods stood warehoused before issuance of TRQ license. Though the petitioner objected, it was told that the same was a legal issue and till the same was resolved, goods will not clear against the aforesaid TRQ license. Since the goods were urgently needed,

Petitioner had no option but to clear the goods without tendering TRQ license for such clearance. Petitioner had accordingly filed Ex-Bond Bills of Entry dated 07.07.2022 and 12.07.2022 seeking clearance of 500 MTs and 1000 MTs respectively of the subject goods for home consumption. The said Bills of Entry were processed by the revenue and on payment of applicable duty out of charge were given.

2.6 Petitioner had written letters dated 11.07.2022 and 13.07.2022 to the office of Respondent No.3 while stating therein, amongst others, that the Petitioner had cleared the aforesaid subject goods (2000 MTs) on account of compelling circumstances and without prejudice to Petitioner's rights and contentions in law to challenge 'condition x' imposed by Public Notice No. 15/2015-20 dated 14.06.2022. Petitioner had taken clearance of 2000 MTs of the subject goods on payment of applicable duty and on such clearance, Petitioner had paid excess duty amount of Rs.1,89,66,948/-, without prejudice its rights and contentions in law.

2.7 It is contended that subsequent to filing of the present petition on 20.07.2022, petitioner urgently needed the subject goods to keep its manufacturing unit functioning and to avoid losses. Petitioner wanted to clear the goods against the aforesaid TRQ license and had approached the Department accordingly, who pointed out that the said request cannot be entertained since the goods stood warehoused before issuance of TRQ license. Since the goods were urgently needed, Petitioner had no option but to clear 2000 MTs out of the balance quantity of 3973.04 MTs of the subject goods without tendering TRQ license for such clearance. Petitioner had accordingly filed Ex-Bond Bills of Entry dated 22.07.2022 and 28.07.2022 seeking clearance of 2000 MTs for home consumption. The said Bills of Entry were processed by the revenue and on payment of applicable duty.

2.8 Petitioner had written letters dated 25.07.2022 and 29.07.2022 to the office of Respondent No.3 while stating therein, amongst others, that the Petitioner had cleared the aforesaid subject goods (2000 MTs) on account of aforesaid compelling circumstances and without

prejudice to Petitioner's rights and contentions in law to challenge "condition x" imposed by Public Notice No. 15/2015-20 dated 14.06.2022. Petitioner had taken clearance of aforesaid 2000 MTs of the subject goods on payment of applicable duty and on such clearance, Petitioner had paid excess duty amount of Rs.1,89,66,948/- without prejudice to its rights and contentions in law. In total, Petitioner has made excess payment of Rs.3,79,33,896/- for clearance of 4000 MTs of the subject goods, without prejudice to its rights and contentions in law.

2.9 It is contended that the instant writ petition was listed before this Court on 01.08.2022 and after hearing both sides, this Court had permitted clearance of the balance quantity of the subject goods viz. 1973.04 MTs on furnishing of Bank Guarantee by the Petitioner to the tune of Rs.1,89,66,948/-. The said interim order was passed without prejudice to the rights and contentions of the parties and subject to the final outcome of the writ petition. In pursuance to the aforesaid order, Petitioner had furnished Bank Guarantee No. 0963222BG0000172 dated 05.08.2022 of State Bank of India, Indore for

Rs.1,89,66,948/- and the aforesaid quantity of 1973.04 MTs was cleared accordingly. Under these circumstances, petitioner is before this Court by way of the present petition seeking the aforesaid reliefs.

3. The respondents have filed their statement of objections opposing the petition and have sought for its dismissal. While admitting the facts leading to the present petition, respondents deny the various contentions of the petitioner as regards the legality and validity of the impugned notifications and contend that there is no merit in the petition and the same is liable to be dismissed.

4. Heard learned counsel for the petitioner and learned counsel for the respondents-revenue and perused the material on record.

5. In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned counsel for the petitioner submitted that the impugned 'condition x' in the Public notice dated 14.06.2022 issued by the DGFT is illegal, arbitrary and without jurisdiction or authority of law, inasmuch as the

same is contrary to Clause 2.13 of the FTP and has the effect of altering and amending the FTP which is impermissible in law, since the same lies within the exclusive domain of the Central Government and not the DGFT. The FTP is framed by the Central Government under the Foreign Trade(Regulation and Development Act), 1992 (for short, 'the FTDR Act') and the same provides for the DGFT to issue a Handbook of Procedure by way of a Public Notice and also amend/vary/alter the Handbook of Procedure by way of a Public Notice. The DGFT is empowered or authorized only to issue a public notice as aforesaid to regulate the procedure and not change/alter/modify the FTP which can be done only by the Central Government. In the instant case, the impugned 'condition x' in the Public Notice is issued by the DGFT and not by the Central Government and the same being contrary to the FTP and having the effect of altering and modifying clause No.2.13 of the FTP is clearly illegal and without jurisdiction. It is therefore contended that the impugned 'condition x' in the Public Notice dated 14.06.2022 and the consequential condition No.3 in the

Condition sheet of the TRQ dated 05.07.2022 issued / allotted to the petitioner are illegal and arbitrary and deserve to be quashed and consequential directions have to be issued to the respondents.

In support of his contentions, learned counsel for the petitioner has placed reliance upon the following judgments:-

- (i) Director General of Foreign Trade vs. Kanak Exports – 2015 (326) E.L.T.26 (S.C.);***
- (ii) M.D.Overseas Ltd., vs. Union of India – 2020 (373) ELT 151 (Delhi).***

6. Per contra, learned counsel for the respondents – revenue submits that the DGFT functions not only as the Director General of Foreign Trade but he is also the Ex-Officio Additional Secretary to the Government of India and consequently, both the Public Notice dated 24.05.2022 and the impugned Public Notice dated 14.06.2022 having been issued after due approval from the Ministry of Commerce and Industry are deemed to have been issued by the Central Government only. It is submitted that the DGFT is an authority constituted under the FTDR Act and entitled to

issue the public notices prescribing the procedure including the impugned 'condition x' in the Public Notice dated 14.06.2022.

6.1 It is also submitted that as per Authentication (Orders and Other Instruments) Rules, 2002, the DGFT is the Authenticating Officer, who is entitled to sign the Notification on behalf of the Central Government. It is therefore submitted that the DGFT was perfectly justified in inserting the impugned conditions in the Public Notice dated 14.06.2022 and the TRQ dated 05.07.2022 issued in favour of the petitioner, which do not warrant interference by this Court in the present petition.

In support of his contentions, learned counsel for the respondents has placed reliance upon the following judgments:-

(i) Union of India & others vs. AGRICAS LLP & others – 2020 SCC Online SC 675.

(ii) Chowgule & Company Limited vs. Assistant Director General of Foreign Trade & Others - 2022 Live Law (SC) 919;

(iii) SCA No.14959/2019 by the Gujarath High Court;

(iv) W.P.No.15921 to 15924/2018 etc., by the High Court of Madras;

(v) W.P.No.552 & connected cases/2019 by the High Court of Andhra Pradesh;

(vi) DGFT & Anr. Vs. Mustafa Traders & Anr.- W.A.No.480/2011 dated 02.11.2020 – High Court of Kerala at Ernakulam.

7. The only question that arises for consideration in the present petition is with regard to the legality and validity of 'condition x' mentioned in para-2 of the Public Notice at Annexure-J dated 14.06.2022 and consequential condition No.3 in the Condition sheet of the TRQ dated 05.07.2022 (Annexure-M) issued / allotted to the petitioner, whereby the subject goods of the petitioner lying at Indian Ports (under warehousing etc.,) before the date of issuance of TRQ licence are directed by the respondents not to be considered for import clearance under TRQ.

8. Before advertng to the rival contentions, it is necessary to refer to certain provisions of the Foreign Trade (Development and Regulation) Act, 1992 (for short 'the FTDR Act) and the Foreign Trade Policy 2015-2020 (FTP);

FTDR Act:

- *As per Section 5 of the FTDR Act, the Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy.*
- *As per Section 6(3) of FTDR Act, the Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under Section 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the DGFT or such other officer subordinate to the DGFT, as may be specified in the Order.*
- *As per Section 3(2) of FTDR Act, the Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology.*

8.1 A conjoint and cumulative reading of the aforesaid provisions of FTDR Act makes is clear that only the Central Government can formulate and announce the Foreign Trade Policy by 'Notification' in the Official Gazette and may also, in like manner, amend that policy; further the power of the Central Government to formulate and amend

the Foreign Trade Policy cannot be exercised by DGFT; so also, as per Section 3(2) of FTDR Act, only the Central Government can by Order published in the Official Gazette make provision for prohibiting, restricting or otherwise regulating import or export of goods or services or technology and this power of the Central Government cannot be exercised by the DGFT.

FTP

- *As per **Para1.00 of the FTP**, the Central Government notifies the FTP in exercise of powers conferred under Section 5 of FTDR Act.*
- *As per **Para1.02 of the FTP**, the Central Government can amend the FTP by means of 'Notification', in public interest.*

***Para1.02 of the FTP** is reproduced below for ready reference:*

***1.02 Amendment to FTP -- Central Government,** in exercise of power conferred by Section 5 of FT (D&R) Act, 1992, as amended from time to time, reserves the right to make any amendment to the FTP, by means of notification, in public interest.*

- *As per **Para1.03 of FTP**, DGFT by means of 'Public Notice' notifies Hand Book of Procedure (HBP), amongst others, for laying down the procedure to be followed by an*

exporter or importer for the purpose of implementation of the FTP.

- **Para1.03 of FTP** is reproduced below for ready reference:

1.03 Hand Book of Procedure (HBP) and Appendices & AayatNiryat Forms (AANF) - Director General of Foreign Trade (DGFT) may, by means of Public Notice, notify Hand Book of Procedure, including Appendices and Aayat/Niryat Forms or amendment thereto, if any, laying down the procedure to be followed by an exporter or importer or by any Licensing/Regional Authority or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and provisions of FTP.

As per **Para2.04 of FTP**, DGFT may by means of 'Public Notice' specify procedures, amongst others, to be followed by an exporter or importer or by any Licensing / Regional Authority or by any other authority for purpose of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and provisions of FTP.

Para2.04 of FTP is reproduced below for ready reference:

Para2.04 Authority to specify Procedure - DGFT may, specify Procedures to be followed by an exporter or importer or by any Licensing/Regional Authority (RA) or by any other authority for purpose of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and provisions of FTP. Such procedures, or amendments if any, shall be published by means of a Public Notice.

8.2 A perusal of the aforesaid provisions of FTP, it is apparent that DGFT by means of 'Public Notice' may notify Hand Book of Procedure or amendment thereto, if any, laying down the procedure to be followed by an exporter or importer or by any Licensing/Regional Authority or by any other authority for purposes of implementing provisions of FTDR Act, the Rules and the Orders made there under and provisions of FTP.

Para2.13 of FTP permits clearance of warehoused imported goods for home consumption against Authorisation issued subsequently.

Para2.13 of FTP is reproduced below for ready reference:

2.13 Clearance of Goods from Customs against Authorisation - *Goods already imported / shipped / arrived, in advance, but not cleared from Customs may also be cleared against an Authorisation issued subsequently. However, such goods already imported/shipped/arrived, in advance are first warehoused against Bill of Entry for Warehousing and then cleared for home consumption against an Authorisation issued subsequently. This facility will however be not available to "restricted" items or items traded through STEs.*

*As per **Para9.07 of FTP** "Authorisation" means permission as included in Section 2(g) of the Act to import or export as per provisions of FTP*

*As per **Section 2(g) of FTDR Act**, "licence" means a licence to import or export and includes a customs clearance permit and any other permission issued or granted under this Act.*

8.3 A perusal of the aforesaid provisions of the FTP will clearly indicate that the impugned condition i.e. 'condition x' is clearly diametrically opposite, violative and contrary to the provisions of Para2.13 of the Foreign Trade Policy, inasmuch as, while Para2.13 of the FTP permits clearance of goods shipped/imported prior to issuance of TRQ licence, the impugned 'condition x' in the Public Notice dated 14.06.2022 stipulates that only import consignments landing at Indian Ports after the date of issuance of TRQ license shall only be considered for clearance under TRQ and any quantities lying at the Indian ports (under warehousing etc) before the date of issuance of the TRQ license shall not be considered for import clearance under TRQ and consequently, the subject 'condition x' is contrary to Para2.13 of FTP and the same cannot be sustained in law, particularly when the Hand

Book of Procedure is meant to lay down the procedure for implementation of the FTP and the same cannot override the provisions of the FTP which is formulated and framed by the Central Government and not by the DGFT.

9. It is significant to note that as per Para 1.02 of the FTP, only the Central Government can amend the FTP by means of Notification, in public interest; further, as per Para1.03 and Para2.04 of the FTP, the DGFT by means of Public Notice can notify and amend only the Hand Book of Procedure, amongst others, for laying down the procedure to be followed by an exporter or importer for the purpose of implementation of the FTP. In other words, while the power to amend the FTP vests solely and exclusively with the Central Government, the DGFT has the power to issue a Public Notice prescribing and amending only the procedure; in this context, a perusal of the Public Notice dated 24.05.2022 issued by the DGFT will clearly indicate that he traces his power to Para1.03 and Para 2.04 of the FTP for the purpose of issuing the Public notice; similarly, even in the Public Notice dated 14.06.22 containing the

impugned 'condition x', the DGFT traces his power only to Para 1.03 and Para 2.04 of FTP and in both the aforesaid Public notices, he does trace his power to the FTDR Act.

10. It follows there from that the power and jurisdiction to issue Public Notice stipulating the procedure and amending the same by the DGFT is circumscribed and traceable only to the FTP and consequently, the DGFT does not have jurisdiction or authority of law to stipulate any condition contrary to the FTP and which has the effect of amending, modifying or altering the FTP, thereby establishing that 'condition x' in the Public Notice dated 14.06.22 being contrary to Para 2.13 of FTP, the same clearly tantamounts to amending the provisions of the FTP, which power cannot be exercised by the DGFT, especially when the power to amend the FTP is within the sole domain of the Central Government and not by the DGFT and on this ground also, the impugned 'condition x' and consequential condition in the TRQ issued in favour of the petitioner deserve to be quashed.

11. The contention of the Respondents that DGFT / Respondent No.2 had issued Public Notice No.15/2015-20 dated 14.06.2022 in his capacity as Ex-officio Additional Secretary to the Government of India and had authenticated the same cannot be accepted; in the instant case, the DGFT has issued aforesaid Public Notice dated 14.06.2022 which makes it evident that the decision was taken by DGFT while amending Para 2 of Public Notice dated 24.05.2022 while incorporating amongst others 'condition x' therein, in terms of Para1.03 and 2.04 of FTP, whereby DGFT can only amend the Handbook of Procedure. However while doing so, the DGFT has purported to amend the provisions of FTP, which power is not in the domain of DGFT and hence, the impugned 'condition x' cannot be sustained in law.

12. As per Section 3(2) of FTDR Act, only the Central Government can make provision for prohibiting, restricting or otherwise regulating the import or export of goods or services or technology. The contention of the Respondents that in terms of Section 9 of the FTDR Act,

the DGFT can impose conditions and restrictions in license cannot be accepted, as only the Central Government can make provision for prohibiting, restricting or otherwise regulating import or export of goods. Issuance of license is only procedural aspect and in any case, the DGFT cannot impose conditions and restrictions in license which are contrary to FTP and FTDR Act and any such condition cannot be sustained in law. On this score also, the impugned 'condition x' is not sustainable in law.

13. Under similar circumstances in ***Kanak Export's*** case *supra*, the Apex Court held as under:

2. Vide Notification No. 28 dated 28-1-2004, the Central Government sought to amend certain provisions of the EXIM Policy by inserting Notes 1 to 5, which was unpalatable to the exporters of the goods mentioned therein as, according to them, under the guise of the said Notes, some benefits which had already accrued to these exporters under the EXIM Policy were taken away. Vide Public Notice dated 28-1-2004, the Government announced exclusion of export performance in relation to four classes of goods mentioned in Para 2 thereof from computation of the entitlement under the Scheme and, at the same time, sought to disallow the import of agricultural products falling

under Chapters I to XXIV of ITC (HS) under the said Scheme. Thereafter, Notification No. 38 dated 21-4-2004 was published under Section 5 of the Act on the same lines on which Public Notice dated 28-1-2004 was issued. The exporters of these goods, naturally, felt aggrieved thereby. There was an innocuous amendment to Notification No. 38 dated 21-4-2004 wherein in addition to the Director General of Foreign Trade (for short "DGFT") as an officer to enforce these notifications, ex officio Additional Secretary to the Government of India was also added. All such exporters who were affected thereby filed writ petitions in various High Courts, particulars whereof shall be taken note of hereinafter at the appropriate stage.

6. In order to achieve the aforesaid objectives, power is given to the Central Government under Section 3 of the Act to make provisions relating to imports and exports with primary focus on the development and regulation of foreign trade. Further, Section 5 specifically empowers the Central Government to formulate and announce the EXIM Policy. It reads as under:

"5. Export and import policy.—The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy."

7. In order to carry out the purposes of this Act, DGFT is to be appointed by the Central

Government as per the provisions of Section 6 of the Act. In addition to carrying out the purposes of this Act, DGFT is also supposed to advise the Central Government in formulation of the EXIM Policy. He is also made responsible for carrying out that Policy. However, sub-section (3) of Section 6 empowers the Central Government to give the aforesaid functions of DGFT even to other officers subordinate to DGFT, except for powers conferred under Sections 3, 5, 15, 16 and 19 of the Act.

8. As already noted above, Sections 3 and 5 give certain powers to the Central Government and, therefore, these powers have to be exercised by the Central Government only and cannot be delegated to DGFT or an officer subordinate to him. Sections 15 and 16 relate to appeal and revision which can be filed against the orders passed by the adjudicating authority against any person committing contravention of the provisions of the Act, the Rules, the Orders and the EXIM Policy. The appeal lies to DGFT if the adjudicating authority, who passes the order, is an officer subordinate to DGFT. In those cases, where the adjudicating officer is DGFT himself, appeal lies to the Central Government. Under Section 16, revisionary powers are conferred upon the Central Government. These powers of appeal and revision also cannot be delegated by virtue of Section 6(3) of the Act. Section 19 again confers power upon the Central

Government to make rules for carrying out the provisions of the Act generally and in respect of various matters specifically enumerated in sub-section (2) of Section 19. This power of the Central Government also cannot be delegated.

9. It may be noted that under Section 5 of the Act, the Central Government has been formulating EXIM policies from time to time. The Policy with which we are concerned is the EXIM Policy for the period 2002-2007, which was substituted by EXIM Policy 2004-2009.

*10. The EXIM Policy of 2002-2007 was announced and came into force from 1-4-2002. Amendment to this Policy was notified on 31-3-2003 and the revised edition of the Policy was to come into force from 1-4-2003. Even though the Central Government is generally entitled and empowered to carry out amendments in this Policy from time to time, in the EXIM Policy 2002-2007, such a right was specifically reserved stating that “however, the Central Government reserves the right in **public interest** to make any amendments to this Policy in exercise of powers conferred by Section 5 of the Act”. It was also mentioned that such amendments would be made by means of a notification published in the Gazette of India.*

11. Chapter I of the Policy, which gives “Introduction”, had made transitional arrangements

vide Para 1.2 thereof clarifying that any notifications made or public notices issued or anything done under the provisions of the EXIM Policy and in force immediately before the commencement of the said Policy shall continue to be in force, insofar as those notifications, etc. are not inconsistent with the provisions of the instant Policy. It was also clarified that licences/certificates/permissions issued under the earlier Policy would continue to be followed for the purpose for which such licences/certificates/permissions were issued, unless otherwise stipulated. Para 1.4 enshrines the objectives which led to formulation of such a policy and reads as under:

“1.4. The principal objectives of this Policy are:

(i) To facilitate sustained growth in exports to attain a share of at least 1% of global merchandise trade.

(ii) To stimulate sustained economic growth by providing access to essential raw materials, intermediates, components, consumables and capital goods required for augmenting production and providing services.

(iii) To enhance the technological strength and efficiency of Indian agriculture, industry and services, thereby improving their competitive strength while generating new employment opportunities, and to encourage the attainment of internationally accepted standards of quality.

(iv) To provide consumers with good quality goods and services at internationally competitive prices while at the same time creating a level playing field for the domestic producers.”

12. *Keeping in mind the aforesaid principal objectives, Para 2.1 made it clear that exports and imports shall be free, except in cases where they are regulated by the provisions of the said Policy or any other law for the time being in force. As per Para 2.4, DGFT was authorised to specify the procedure which needs to be followed by an exporter or importer or by any licensee or other competent authority for the purposes of implementing the provisions of the Act, the Rules and the Orders made therein and this Policy. Such a procedure was to be stipulated and included in the Handbook (Vols. I & II), Schedule of DEPB and in ITC (HS) and published by means of a public notice. It was permissible to amend this procedure from time to time.*

86. *The next issue relates to the validity of the Public Notice dated 28-1-2004. The question that is posed for determination on this issue is as to:*

III. Whether Public Notice dated 28-1-2004, issued by DGFT, which sought to exclude the export performance related to class of goods, is without jurisdiction?

87. *The main submission of the petitioners, which was before the High Courts as well and reiterated before us, was that the Public Notice dated 28-1-2004 seeks to amend the EXIM Policy and DGFT does not have any such power inasmuch as this EXIM Policy is statutory which is issued*

under Section 5 of the Act by the Central Government and, therefore, it is only the Central Government which has the power to make amendments to the EXIM Policy. Therefore, the Public Notice issued by DGFT dated 28-1-2004 was without jurisdiction. An additional ground of retrospectivity was also taken to challenge the public notice. It was also argued that DGFT by the said public notice was seeking to impose additional conditions, not forming part of the original policy which was again impermissible.

88. *Mr Adhyaru, learned Senior Counsel appearing for the Union of India, on the other hand, submitted that the paramount consideration in issuing the public notice was to check unscrupulous exporters including the writ petitioners from inflating their export turnover by adopting dubious methods. He emphasised the rationale for inclusion of four items by this public notice which has already been taken note of. His endeavour was to demonstrate that issuance of the public notice in question became paramount to check unscrupulous methodology adopted by certain exporters with the objective to wrongfully acquire the benefits of the Schemes that could not be countenanced and had to be checked. We are not delving with those alleged malpractices and hold back the same at this juncture. They will be spelled out while discussing the validity of the Notification dated 21-4-2004 as*

the subject-matter thereof is same. Here, we are concerned with the powers of DGFT to issue such a public notice.

89. In order to answer this question, we have to first determine as to whether this Public Notice dated 28-1-2004 is only an amendment to Handbook of Procedures or it tinkers with the EXIM Policy. To answer this question, we may first go into the scheme of the Act. For this purpose, Section 5 as well as Section 6 of the Act are to be taken note of in the first instance and read as under:

“5. Foreign Trade Policy.—The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the Foreign Trade Policy and may also, in like manner, amend that Policy:

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the Foreign Trade Policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.

6. Appointment of Director General and his functions.—(1) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act.

(2) The Director General shall advise the Central Government in the formulation of the Foreign Trade Policy and shall be responsible for carrying out that Policy.

(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than

the powers under Sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.”

90. *From the aforesaid, it is clear that Section 5 provides that the Central Government may, from time to time, formulate and announce, the EXIM Policy. This has to be done by issuing/announcing this Policy by way of notification in the Official Gazette. The Central Government also has the power to amend the Policy so announced by adopting the same procedure i.e. by issuing notification in the Official Gazette. It is not in dispute that the EXIM Policy in question was issued by notification in exercise of powers conferred under Section 5 of the Act. This Policy, thus, is infested with statutory flavour.*

91. *For the purpose of carrying out the objectives of the Act which includes implementation of the Policy, the Central Government is authorised to appoint DGFT as per Section 6 of the Act. The main functions of DGFT are advising the Central Government in formulation of the Policy and he is also responsible for carrying out the said Policy. Sub-section (3) of Section 6 provides that the Central Government may delegate its power exercisable under the Act. However, powers under Sections 3, 5, 15, 16 and 19 are specifically excluded which means these powers cannot be*

delegated. Thus, power to announce the Policy and to amend the same remains with the Central Government. Likewise, power to make rules under Section 19 which vests with the Central Government, cannot be delegated.

92. *Keeping in mind the aforesaid legal position, we reproduce certain portion of the EXIM Policy announced vide Notification No. 1 dated 31-3-2003 which have bearing on the issue at hand. These are:*

Para 1.1 of the Export and Import Policy provided that:

In exercise of the powers conferred under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), the Central Government hereby notifies the Export and Import Policy for the period 2002-2007. This Policy shall come into force with effect from 1-4-2002 and shall remain in force up to 31-3-2007 and will be co-terminus with the Tenth Five Year Plan (2002-2007).

However, the Central Government reserves the right in public interest to make any amendments to this Policy in exercise of the powers conferred by Section 5 of the Act. Such amendment shall be made by means of a Notification published in the Gazette of India.”

Para 1.2 of the said Policy provides that:

Any Notifications made or Public Notices issued or anything done under the previous Export/Import Policies, and in force immediately before the commencement of this Policy shall, insofar as they are not inconsistent with the provisions of this Policy, continue to be in force and shall be deemed to have been made, issued or done under this

Policy. Licence/certificate/permissions issued before the commencement of this Policy shall continue to be valid for the purpose for which such licence/certificate/permission was issued unless otherwise stipulated.”

Para 2.4 of the Import and Export Policy dealing with the procedure provides that:

“The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing or any other competent authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and this Policy. Such procedures shall be included in the Handbook (Vol. 1), Handbook (Vol. 2), Schedule of DEPB Rate and in ITC (HS) and published by means of a public notice. Such procedures may, in like manner, be amended from time to time.

The Handbook (Vol. 1) is a supplement to the EXIM Policy and contains relevant procedures and other details. The procedure of availing benefits under various schemes of the Policy are given in the Handbook (Vol. 1).”

93. *It is explained by the learned counsel for the Union of India that a notification issued under Section 5 of the Act or any change brought about by DGFT in exercise of the powers under Para 2.4 of the Import and Export Policy in the Handbook Procedure, by way of a public notice the same are gazetted and notified in the Gazette of India. It is also pointed out that the notification/public notices issued relating to non-statutory rules, regulations, order and resolutions issued by the Ministries of Government of India (other than the Defence*

Ministry), and by the Supreme Court of India are published under Part 1 Section 1 of the Gazette of India. On the other hand, notifications issued by the Ministries of Government of India (other than the Defence Ministry) are published under Part II Section 3(ii) of the Gazette of India. On that basis, justification is sought to be given that Notification No. 28/(RE-2003)/2002-2007 dated 28-1-2004, Notification No. 38/(RE-2003)/2002-2007 dated 21-4-2004 were published in the Gazette of India under Part II, Section 3 sub-section (ii), while Public Notice No. 40 dated 28-1-2004 was published in the Gazette of India under Part I Section 1 of the Gazette of India and as such, as both the notifications as well as the public notices are officially gazetted in the Gazette of India. Thus, there is no distinction between the two as the same carry the same impact and effect.

94. *From the aforesaid explanation, we take it that the Public Notice dated 28-1-2004 was published in the Gazette of India in accordance with the requirement of law. The question, however, is as to whether by this public notice, DGFT was only carrying out the EXIM Policy or this public notice amounted to change in the said EXIM Policy. It is crystal clear that the public notice alters the provisions of the EXIM Policy. It would, therefore, amount to amending the EXIM Policy, whether clarificatory or otherwise. There may be a valid*

justification and rational for exclusion of four items contained therein, as pleaded by the Union. However, it had to be done in accordance with law. When DGFT had no power in this behalf, he could not have excluded such items from the purview of the EXIM Policy by means of public notice. The power of DGFT is only to be exercised for procedural purposes and both the High Courts have rightly remarked that Para 3.2.6 inserted by the public notice goes beyond the procedural conditions.

95. *In fact, the Government itself realized the same, namely, the DGFT had no such power, it is for this reason that what was sought to be achieved by the said Public Notice, was formalized by the Central Government by issuing Notifications dated April 21 and 23, 2004 in exercise of powers conferred on the Central Government by Section 5 of the Act and the same four items were excluded.*

96. *Therefore, we hold that public notice dated January 28, 2004 issued by DGFT, so far it excludes the aforesaid four items, is ultra vires.*

14. The aforesaid judgment of the Apex Court has been followed by the Delhi High Court in ***M.D.Overseas's*** case *supra*.

15. Insofar as the judgment of the Apex Court in **AGRICAS LLP's** case *supra* relied upon by the respondents is concerned, a perusal of para-15 of the said judgment will indicate that the same were issued by the Central Government and that the DGFT had performed only the ministerial act of publication and that the decision to amend and issue the Notification was that of the Central Government. The said judgment is inapplicable to the facts of the instant case, since, as stated *supra*, the power to amend the FTP is vested solely and exclusively with the Central Government in terms of Para 1.02 of the FTP. In this context, as is clear from the Public Notice dated 14.06.2022 containing the impugned 'condition x', the said Public Notice is traceable to Para 1.03 and Para 2.04 of the FTP and not to Para 1.02 of the FTP. To put it differently, amendment to the FTP can be done only by the Central Government under Para 1.02 of the FTP, whereas amendment to the procedure can be done by the DGFT under Para 1.03 and Para 2.04 of the FTP.

16. Under these circumstances, in the light of the undisputed fact that the Public Notice dated 14.06.2022 containing the impugned 'condition x' has been issued by the DGFT by tracing his powers to Para 1.03 and Para 2.04 and not to Para 1.02, it is clear that the said Public Notice has been issued only by the DGFT alone and not by the Central Government and consequently, in the facts of the present case, the said judgment has no application and cannot be relied upon by the respondents.

17. Insofar as the judgment of the Kerala High Court in ***Mustafa Traders*** case (*supra*) is concerned, apart from the fact that the facts obtaining in the said case were entirely different; no ratio has been laid down by the Division Bench and the matter has been remitted back to the learned Single Judge and as such, the said judgment is not applicable to the facts of the instant case.

18. Insofar as the judgment of the Apex Court in ***Chowgule & Company's*** case (*supra*) is concerned, no ratio, much less any finding with regard to the power of the DGFT to amend the FTP or the issue in relation to Para

1.02, 1.03 and 2.04 of the FTP was returned or laid down by the Apex Court and consequently, mere reference to the DGFT in the said judgment cannot be made the basis to come to the conclusion that the DGFT has power and jurisdiction to amend the FTP as contended by the respondents.

19. Insofar as the other judgments of the High Courts of Gujarath, Madras and Andhra Pradesh relied upon by the respondents are concerned, apart from the fact that the facts obtaining in the said cases were different; Notifications were issued by the Central Government and not by the DGFT as is evident in the instant case and consequently, even these judgments are inapplicable to the case on hand.

20. In view of the aforesaid facts and circumstances, I am of the considered opinion that the impugned 'condition x' mentioned in Para 2 of the Public Notice at Annexure-J dated 14.06.2022 and the consequential Condition No.3 in the Condition sheet of the TRQ dated 05.07.2022 vide Annexure-M issued / allotted to the petitioner deserve to

be quashed and necessary directions are to be issued to the respondents to refund the excess duty paid by the petitioner back to him, in addition to returning the Bank Guarantee dated 05.08.2022 furnished by the petitioner pursuant to the orders of this Court.

21. In the result, I pass the following:-

ORDER

(i) Petition is hereby allowed.

(ii) The impugned 'condition x' mentioned in Para 2 of the Public Notice No.15/2015-20 dated 14.06.2022 issued by the 2nd respondent is hereby quashed insofar as the petitioner is concerned.

(iii) The impugned condition No.3 in the Condition sheet of the Tariff Rate Quota vide Annexure-M dated 05.07.2022 issued / allotted to the petitioner is also hereby quashed;

(iv) Respondents are hereby directed to refund the entire excess duty paid by the petitioner as expeditiously as possible back to the petitioner and at any rate, within a period of one month from the date of receipt of a copy of this order.

(v) Respondents are also directed to return the Bank Guarantee dated 05.08.2022 furnished by the petitioner pursuant to the interim order dated 01.08.2022 passed by this Court in the present petition.

**Sd/-
JUDGE**

Srl.