REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 554 OF 2006

DIRECTOR GENERAL OF FOREIGN TRADE AND ANOTHER .....APPELLANT(S)

VERSUS

M/S. KANAK EXPORTS AND ANOTHER .....RESPONDENT(S)

WITH

CIVIL APPEAL NO. 658 OF 2006

CIVIL APPEAL NO. 1587 of 2006

CIVIL APPEAL NO. 1589 OF 2006

TRANSFER CASE (CIVIL) NO. 32 OF 2007

TRANSFER CASE (CIVIL) NO. 33 OF 2007

TRANSFER CASE (CIVIL) NO. 36 OF 2007

TRANSFER CASE (CIVIL) NO. 1 OF 2008

TRANSFER CASE (CIVIL) NO. 3 OF 2008

WRIT PETITION (CIVIL) NO. 27 OF 2008

TRANSFER CASE (CIVIL) NO. 49 OF 2009

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ASHWANI KUMAR
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WRIT PETITION (CIVIL) NO. 343 OF 2009

WRIT PETITION (CIVIL) NO. 246 OF 2010

AND

TRANSFER CASE (CIVIL) NO. OF 2015
(ARISING OUT OF TRANSFER PETITION (CIVIL) NO. 568 OF 2014)

JUDGMENT

A.K. SIKRI, J.

Civil Appeal No. 554 of 2006
Civil Appeal No. 658 of 2006
Civil Appeal No. 1587 of 2006

Export Import (EXIM) Policy 2002-2007 was framed by the Central Government under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the 'Act'), which came into force with effect from April 01, 2003. The main purpose and objective of this Policy was to boost the exports. In furtherance of the same, a Special Scheme containing the provisions thereof was incorporated therein which gave certain kind of incentives to the exporters of some specified items. However, some amendments were made thereto vide Notification No. 28 dated January 28, 2004. On the same day, Public Notice No. 40(RE-2003)/2002-2007 was also issued in exercise of powers conferred under the provisions of Para 2.4 of the said

Policy, which was followed by Notification No. 38 dated April 21, 2004 and Notification No. 40 dated April 23, 2004.

2) Vide Notification No. 28 dated January 28, 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 January 28, 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 April 21, 2004 was published under Section 5 of the Act on the same lines on which Public Notice dated January 28, 2004 was issued. The exporters of these goods, naturally, felt aggrieved thereby. There was an innocuous amendment to Notification No. 38 dated April 21, 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.

3) The Bombay High Court in Writ Petition No. 2397 of 2004, decided on July 04, 2005, has given partial relief to the exporters/ writ petitioners. The Gujarat High Court has substantially affirmed the validity of these Notifications while giving relief on one particular aspect. Insofar as judgments of Bombay High Court and Gujarat High Court are concerned, both the Union of India as well as the writ petitioners preferred Special Leave Petitions, in which leave was granted, and these are now converted as Civil Appeal No. 658 of 2006 and Civil Appeal 554 of 2006 respectively. That apart, the Single Judge of the Gujarat High Court in one of the cases dismissed the writ petition and the LPA was filed by the said petitioner before the Division Bench of the High Court. Since the issue involved in these appeals is the same, which is raised in the LPA in the Gujarat High Court and still pending in the writ petitions filed in various High Courts, transfer petitions were filed by the Union of India seeking transfer of all those cases and to be heard along with these two appeals. Those transfer petitions were allowed. This is how all these cases are bunched together and heard simultaneously as the issue is substantially the same in all these matters.

4) With this background reflecting the nature of these cases, we now proceed to discuss the main provision of the EXIM Policy and how the

aforesaid Notifications have amended the provisions of that Policy. That would give an indication as to what kind of grievance is raised by these exporters in challenging the validity of these Notifications.

5) The Act was passed to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for matters connected therewith or incidental thereto. The Statement of Objects and Reasons of this Act stipulates that foreign trade is the driving force of economic activity. Technology, investment

and production are becoming increasingly interdependent upon each other and foreign trade brings these elements together and spurs economic growth. The Imports and Exports (Control) Act, 1947 was made in different circumstances. Although it has been amended from time to time, the Act does not provide an adequate legal framework for the development and promotion of India's foreign trade. Besides, in July, 1991 and August, 1991, major changes in trade policy were made by the Government of India. The goals of the new trade policy are to increase productivity and competitiveness and to achieve a strong export performance. The Exports and Import Policy is a vital part of trade policy. The basic law governing foreign trade must serve as an instrument to create an environment that will provide a strong impetus to exports, facilitate imports and render export activity more profitable. It has, therefore, been considered necessary to enact a new law repealing

the existing law. The Act intends to achieve these objectives.

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 the DGFT even to other Officer 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 provisions of the Act, Rules, Orders and EXIM Policy. 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 Sections 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) EXIM Policy of 2002-2007 was announced and came into force from April 01, 2002. Amendment to this Policy was notified on March 31,

2003 and the revised edition of the Policy was to come into force from April 01, 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 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 in consistent 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:
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> (i) To facilitate sustained growth in exports to attain a share of at least 1% of global merchandise trade.
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> (ii) To stimulate sustained economic growth by providing access to essential raw materials, intermediates, components, consumables and
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> capital goods required for augmenting production and providing services.
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> (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.
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> (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 licencee 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 (Volume-I), Handbook (Volume-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.

13) Another provision of this Policy which needs to be noticed is para 2.34 that pertains to ’third party exports’ and reads as under:

> "2.34 Third party exports, as defined in paragraph 9.55 shall be allowed under the Policy."

14) Since the third party exports are to be allowed, as defined in para 9.55, we reproduce herein the said para as well:

> ""Third-party exports" means exports made by an exporter or manufacturer on behalf of another exporter(s). In such cases, shipping bills shall indicate the name of both the exporter/ manufacturer and exporter(s)."

15) Registration by importer or exporter is needed to avail the benefits of this Policy and provision in this respect is contained in para 2.44 mentioning about the Registration-cum-Membership Certificate, which reads as under:

> "2.44 Any person, applying for (i) a licence/ certificate/permission to import/export, [except items listed as restricted items in ITC (HS)] or (ii) any other benefit or concession under this policy shall be required to furnish Registration-cum- Membership Certificate (RCMC) granted by the competent authority in accordance with the procedure specified in the Handbook (Vol.I) unless specifically exempted under the Policy."

16) Chapter III of the EXIM Policy deals with ’Promotional Measures’ which are to be undertaken to achieve the objective of the Policy. Apart from various other measures stipulated therein, with which we are not concerned, this Chapter also deals with grant of ’Status Certificate’ which is to be given to various kinds of exporters etc. who are eligible for such recognition. Categories of the exporters are mentioned therein depending upon the export performance level achieved by such export

houses. Such status holders are eligible for certain special facilities which could be availed during the validity period of the Policy, i.e. April 01, 2002 to March 31, 2007, unless otherwise specified. Since all the petitioners who filed the writ petitions have this Status Certificate, on the strength of which they are claiming the special facilities, and in their perspective the impugned notifications adversely affect the availment of these facilities, we reproduce verbatim concerned paras of the Policy

touching upon this aspect:

Status Certificate	3.7.1	Merchant As Well as Manufacturer Exporters, Service Providers, Export Oriented Units (EOU's) / Units Located in Special Economic Zones (SEZ's) / Agri Export Zone (AEZ's) / Electronic Hardware Technology Parks (EHTPs) / Software Technology Parks (STPs) shall be eligible for such recognition.
Export Performance Level	3.7.2	The applicant is required to achieve the prescribed average export performance level:

Category	Total FOB/FOR during the current licencing year or during the preceding 1/2/3 licensing years (in Rupees)
Export House	45 crores
Trading House	300 crores
Star Trading House	1500 crores
Super Star Trading House	6000 crores

Note: 1. Units in Small Scale Industry/Tiny Sector/ Cottage Sector/Units registered with KVICs or KVIBs/Units located in North Eastern States,

Sikkim and J&K/Units exporting handloom, handicrafts, hand knotted carpets, silk carpets/ exporters holding golden status/exporters exporting to countries in Latin America and CIS/ sub Saharan Africa as listed in Appendix-17C, units having ISO 9000 (series)/ WHOGMP/ HACCP/SEI CMM level-II and above status granted by agencies listed in Appendix-28A, shall be entitled for export house status on achieving Rs.15 crore FOB/FOR during the current licencing year or during the preceding 1/2/3 licensing years. The same threshold limit shall be applicable to the service exporters and agri exporters (other than grains) for obtaining Export house status.

2. Export made on re-export basis shall not be counted for the purpose of recognition.

3. The exports made by a subsidiary of a limited company shall be counted towards export performance of the limited company for the purpose of recognition. For this purpose, the company shall have the majority share holding in the subsidiary company.

We now advert to the most crucial provision which entitles these Status Holders to the following benefits:

Special	3.7.2.1	The status holders shall be eligible for

Strategic Package for Status Holders

the following new/special facilities:

(i) Licence/certificate/permissions and Customs clearances for both imports and exports on self-declaration basis;

(ii) Fixation of Input-Output norms on priority within 60 days;

(iii) Exemption from compulsory negotiation of documents through banks.

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The remittance, however, would continue to be received through banking channels;

(iv) 100% retention of foreign exchange in EEFC account;

(v) Enhancement in normal repatriation period from 180 days to 360 days;

(vi) Duty free import entitlement for status holders having incremental growth of more than 25% in FOB value of exports (in free foreign exchange) subject to a minimum export turnover of Rs. 25 crore (in free foreign exchange). The duty free entitlement shall be 10% of the incremental growth in exports. Such entitlement can be used for import of capital goods, office equipment and inputs for their own factory or the factory of the associate/supporting manufacturer /job worker. The entitlement/goods shall not be transferable.

The exporters who gets the Status Certificate are known as 'Status Holders'. The term 'Status Holder' is defined in para 9.53 and reads as under:

> ""Status Holder" means an exporter recognised as "Export House/Trading House by DGFT/ Development Commissioner or Star Trading House/Super Star Trading House" by the Director General of Foreign Trade."

17) As noted above, the main objective of this EXIM Policy was to achieve the share of 1% of global trade and accelerated growth in exports. For this purpose, certain sectors, where such exports were to be given the necessary boost, were mentioned in para 3.10 describing them as

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'Thrust Sector'. These are as under:

3.10 With a view to achieve the share of 1% of global trade and accelerated growth in exports, the

following shall be the thrust sectors:

a) Electronic hardware
b) Textile including garments
c) Auto components/ancillary
d) Gem & Jewellery
e) Agriculture
f) Service sector

Department of Commerce shall take concerted efforts to promote exports of these sectors by specific sectoral strategy.

18) It is already noted above in para 3.7.1 that various kinds of categories are eligible for recognition as status holders. These include Export Oriented Units (EOUs), Electronic Hardware Technology Parks (EHTPs) and Software Technology Parks (STPs). A separate Chapter, i.e. Chapter VI, is carved out to deal with the aforesaid categories. Eligibility thereof is stipulated in para 6.1, which is to the following effect:

Eligibility	6.1	Units undertaking to export their entire production of goods and services, except permissible sales in the DTA, as per the Policy, may be set up under the Export Oriented Unit (EOU) Scheme, Electronic Hardware Technology Park (EHTP) Scheme or Software Technology Park (STP) Scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering, and rendering of services. No trading units shall, however, be permitted.

19) Such EOUs/EHTPs/STPs are permitted to export goods through status

holder, as specifically provided in para 6.10 and we reproduce hereunder:

Export through Status Holder	6.10	An EOU/EHTP/STP unit may export goods manufactured/software developed by it through a merchant exporter/status holder recognized under this Policy or any other EOU/EHTP/STP/SEZ unit.

20) Special Economic Zones (SEZs) are also entitled for Status Certificate. The provisions concerning these SEZs are contained in Chapter VII of the EXIM Policy. Their eligibility is defined in para 7.1 in the following words:

Eligibility	7.1	(a) Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs.

(b) Goods and services going into the SEZ area from DTA shall be treated as exports and goods coming from the SEZ area into DTA shall be treated as if these are being imported.

(c) SEZ units may be set up for manufacture of goods and rendering of services.

21) Para 7.8 deals with DTA Sales and Supplies which these SEZ Units ma undertake. These SEZ Units are also entitled to export through status holder in terms of para 7.10, as under:

Export through Status Holder	7.10	SEZ unit may also export goods manufactured/software developed by it through a merchant exporter/status holder recognized under this Policy or any other EOU/SEZ/EHTP/STP unit.

22) Chapter IX contains definition of various terms which are used in the EXIM Policy. We have already noted the definition of 'Status Holder' as well as 'Third Party Exports'. Some other definitions which require a mention are as under:

9.5 "Actual User (Industrial)" means a person who utilises the imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit.

9.6 "Actual User (Non-Industrial)" means a person who utilises the imported goods for his own use in:

(i) any commercial establishment carrying on any business, trade or profession; or

(ii) any laboratory, Scientific or Research and Development (R&D) institution, university or other educational institution or hospital; or

(iii) any service industry.

9.10 "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. Capital goods also include packaging machinery and equipment, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in

the services sector.

9.31 "Manufacturer Exporter" means a person who export goods manufactured by him or intends to export such goods.

9.33 "Merchant Exporter" means a person engaged in trading activity and exporting or intending to export goods.

23) To put it in nutshell, EXIM Policy 2002-2007 was promulgated with the principal objective, inter alia, to facilitate sustained growth in exports to achieve a share of 1% of global merchandise trade. Therefore, the thrust of this Policy was to ensure and facilitate growth in exports. Because of this reason, exports and imports were made free, except in relation to cases where they were specifically regulated by the provisions of this Policy or under any law. In order to facilitate the growth of these exports, following measures were specifically provided in the EXIM Policy:

(a) third party exports;

(b) stipulating thrust sector, viz. mentioning those products which were having potential in achieving the target of 1% of global trade and accelerated growth in exports. It was, therefore, perceived that in these sectors there is an ample scope for boosting the exports. Six such sectors mentioned in para 3.10 include Gem and Jewellery Sector as well;

(c) it was held that growth in exports can be accelerated through small scale industry sector/mid level export houses. For this purpose, depending

upon the level of export by the exporters, categories of the exporters were carved out, namely, Export Houses, Trading Houses, Star Trading Houses and Super Star Trading Houses. In order to encourage these export categories, depending upon their category, the export incentives were provided for them;

(d) in the same direction, certain categories were chosen for giving recognition as status holders, who could get such Status Certificate if they come within the purview of the definition of ’Status Holder’ contained in para 9.55.

24) The importance that was given to these status holders was highlighted by the then Commerce Minister while announcing special strategic

package for status holders. Relevant extract of the said speech contained in para 19 thereof is noted as under:

> "19. The status holders have been a pillar of strength in increasing exports. There is a feeling among them that under the Exim Policy, substantive benefits are no longer available to them since the earlier benefits such as fast track clearance and relaxation from certain procedures, are now universally applicable in the liberalized environment. We recognize that the status holders will continue to play a significant and increasing role in boosting exports, particularly from the small scale sector, as most of the small scale units will not be in a position to directly access the international markets. Moreover, it will be our endeavor to facilitate India emerging as a major base for outsourcing products and services for the rest of the world. They are also critical to our strategy for accelerating the rate of incremental growth of exports. Therefore, we intend to give a premium to the status holders who achieve high growth rate in their exports. It is proposed to give a duty free entitlement to them for import of capital goods, spares, office equipments and

> consumables. This will be available to status holders who achieve a growth rate of 25% or more in the current year with a minimum export performance of Rs.25 crore. They would be entitled to a duty free entitlement of 10% of the incremental growth in exports during the current financial year. This entitlement would be subject to actual user condition which can be passed on to associate manufacturers."

25) In fact, as a part of the EXIM Policy, with amendment coming into effect from April 01, 2003, certain incentives known as 'Special Strategic Package' for status holders was incorporated in para 3.7.2.1. We are concerned with sub-para (vi) thereof, which granted duty free entitlement of 10% of the incremental growth in exports. This para is reproduced above. A reading of the said para would demonstrate that in order to have the aforesaid entitlement, following conditions were to be satisfied:

(a) the exporter had to be 'Status Holder';

(b) achieving incremental growth of more than 25% in FOB value of exports in free foreign exchange ;

(c) minimum export turnover of 25 crores in free foreign exchange;

(d) entitlement could be used for import of capital goods, office equipment and inputs for their own factory or the factory of the associate/supporting manufacturer/job worker;

(e) such entitlement/goods was non-transferable; and

(f) since the Scheme was intended to be a specific incentive for fast growing status holders, the benefits were to be available only after April 01, 204

on the basis of the export performance during the period April 01, 2003

to March 31, 2004.

26) On the very same day, i.e. on March 31, 2003, in exercise of the powers conferred by Section 5 of the Act, read with para 1.1 of the EXIM Policy 2002-2007, the Central Government amended and notified the EXIM Policy 2002-2007 (revised edition: March 2003). The revised edition came into force with effect from April 01, 2003. The relevant provisions of the EXIM Policy, as amended upto March 31, 2003, and relevant for the purpose of the present case, are paras 1.1, 1.2, 1.3, 2.2, 2.3, 2.4, 2.6, 2.8, 2.9 and 2.10 and the same are reproduced below:

> "1.1 In exercise of the powers conferred under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 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 1st April 2002 and shall remain in force upto 31 st March 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.
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> 1.2 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.
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> 1.3 In case an export or import that is permitted freely under this policy is subsequently subjected to any

restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that the shipment of the export of import is made within the original validity of the irrevocable letter of credit established before the date of imposition of such restriction.

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2.2 Every exporter or importer shall comply with the provisions of Foreign Trade (Development & Regulation) Act 1992, the Rules and Orders made thereunder, the provisions of this Policy and the terms and conditions of any licence/certificate/ permission granted to him, as well as provisions of any other law for the time being in force. All imported goods shall also be subject to domestic laws, rules, orders, regulations, technical specifications,

environmental and safety norms as applicable to domestically produced goods. No import or export of rough diamonds shall be permitted unless the shipment parcel is accompanied by Kiberley Process (KP) Certificate required under the procedure specified by the Gem & Jewellery Export Promotion Council (GJEPC).

2.3 If any question or doubt arises in respect of the interpretation of any provision contained in this Policy, or regarding the classification of any item in the ITC (HS) or Handbook (Vol.I) or Handbook (Vol.2), or Schedule of DEPB Rate the said question of doubt shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

If any question or doubt arises whether a licence/certificate/permission has been issued in accordance with this Policy or if any question or doubt arises touching upon the scope and content of such documents, the same shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

2.4 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).

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2.6 DGFT may, through a notification, adopt and enforce any measure necessary for:

(i) Protection of public morals.

(ii) Protection of human, animal or plant life or health.

(iii) Protection of patents, trademarks and copyrights and the prevention of deceptive practices.

(iv) Prevention of prison labour.

(v) Prevention of national treasures of artistic, historic or archaeological value.

(vi) Conservation of exhaustible natural resources.

(vii) Protection of trade of fissionable material or material from which they are derived; and

(viii) Prevention of traffic in arms, ammunition and implements of war.

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2.8 Every licence/certificate/permission shall be valid for

the period of validity specified in the licence/certificate/permission and shall contain such terms and conditions as may be specified by the licensing authority which may include:

(a) the quantity, description and value of the goods;

(b) Actual User condition;

(c) export obligation;

(d) the value addition to be achieved; and

(e) the minimum export price.

2.9 No person may claim a licence/certificate/ permission as a right and the Director General of Foreign Trade or the licensing authority shall have the power to refuse to grant or renew a licence/ certificate/permission in accordance with the provisions of the Act and the Rules made thereunder.

2.10 If a licence/certificate/permission holder violates any condition of the licence/certificate/ permission or fails to fulfill the export obligation, he shall be liable for action in accordance with the Act, the Rules and Orders made thereunder, the Policy and any other law for the time being in force.

27) On March 31, 2003, in exercise of the powers conferred under paragraph 2.4 of the EXIM Policy, 2002-207, the DGFT notified the Handbook of Procedures (Volume-I) (Revised Edition - March 2003) which was to come into effect with effect from April 01, 2003. Para 3.2.5 of the same provided that:

"The status holders having an annual incremental growth of more than 25% in the FOB value of exports (in free foreign exchange) shall be entitled to the facility of duty free credit entitlement subject to achieving a minimum annual export turnover of Rs.25 crore (in free foreign exchange). Such status holders shall be entitled to duty free credit entitlement certificate to the extent of 10% of the incremental growth in exports.

Accordingly, status holders who will achieve more than 25% growth in exports in the year 2003-04 (in free foreign exchange) as compared to the exports made in 2002-03 (in free foreign exchange) subject to a minimum export of Rs.25 crore (in free foreign exchange) shall be entitled for duty free credit entitlement certificate @ 10% of the incremental growth in exports.

The duty free credit entitlement can be used for import of capital goods, office equipments and inputs provided the same is freely importable under ITC (HS). Such goods shall be non-transferable. Goods imported against such entitlement certificate shall be used by status holders or his supporting manufacturer/job worker provided the name and address of the supporting manufacturer/job worker is endorsed on the certificate issued by RLA.

Application shall be filed with the jurisdictional regional licensing authority as per the address given in status certificate. The application for the duty free credit entitlement certificate would be made in Appendix 17D.

The duty free entitlement certificate shall be valid for a period of 12 months. The status holder shall within one month of the expiry of the validity of the duty free entitlement certificate, submit a statement of imports made under the certificate as per Appendix 17E to the jurisdictional Regional Licensing Authority."

28) After taking stock of the main provisions of the EXIM Policy which concern us in these proceedings, we now advert to the nature of amendments made by Notification dated January 28, 2004 as well as Public Notice of even date, followed by Notification No. 38 dated April 21, 2004.

29) Vide Notification No. 28 dated January 28, 2004, which was issued in exercise of powers contained in Section 5 of the Act read with para 1.1 of the EXIM Policy, certain amendments were made in the EXIM Policy. However, we are concerned here with amendment in para 3.7.2.1 in Chapter III. As noted above, this para provides certain incentives and contains seven sub-paragraphs. After sub-paragraph (vii), five notes were inserted by way of amendment. Though some provisions of Note I

are the bone of contention, we reproduce here all these Notes for better understanding:

"Note 1 - For the purpose of calculating the value of exports, the following exports shall not be taken into account, namely:

(i) re-export of imported goods or exports made through transshipment;

(ii) export turnover of units operating under SEZ/ EOU/EHTP/STP Schemes or products manufactured by them and exported through DTA units;

(iii) deemed exports (even when payments are received in free foreign exchange) and payment from EEFC account;

(iv) service exports;

(v) supplies made by one status holder to another status holder;

(vi) export performance made by one status holder on behalf of other status holder will not be eligible for entitlement under the scheme;

(vii) supplies made or export performance effected by a non-status holder (Merchant exporter/ Manufacturer

with any export performance in 2003-04) to a status holder if the applicant as well as the non status holder have less than 25 per cent incremental growth over their respective previous years direct export turnover; and

(viii) the exports made by an applicant within a group and the group to which it belongs has individually less than 25 per cent incremental growth of export.

Note 2 - The incremental growth of exports by an exporter shall not, directly or indirectly, be transferred to any other exporters.

Note 3 - Government reserved the right in public interest, to specify the export products, which shall not be eligible for calculation of incremental growth/ entitlement. Similarly, the government may also notify the list of goods,

which shall not be allowed for imports under the scheme.

Note 4 - These guidelines will be applicable to the exports made on or after 1.04.2003.

Note 5 - The entitlement will be in terms of duty credit."

To point out here itself, challenge was laid to sub-note (ii), (v), (vi) and (vii) of Note 1.

30) Sub-paragraph (3) of the para 3.8 pertaining to the "duty free credit entitlement for service providers" was amended to read as under:

"Service provider (other than hotels) shall be entitled to duty free import equivalent to 10% of the average foreign exchange earned by them in preceding three licensing years. However, hotels (one star and above), heritage hotels, stand-alone restaurants approved by Department of Tourism, Govt. of India and other service providers in tourism sector registered with Department of Tourism, Govt. of India, and shall be entitled for duty free imports equivalent to 5% of the average foreign exchange earned by them in free imports equivalent to 5% of the average foreign exchange earned by them in preceding three licensing years. For one & two star hotels and stand-alone restaurants, the foreign exchange earned through international credit cards only shall be taken into account for the entitlement under the scheme. The duty free entitlement shall be used for import of any capital good including spares, office equipment(s) & professional equipment(s), office furniture(s) & consumables. However, agriculture, diary products motor cars sports utility vehicles and all purpose vehicles would not be allowed to be imported against this entitlement."

31) Vide Public Notice bearing No. 40 dated January 28, 2004, which was issued along with the aforesaid Notification No.28 on the same date, certain amendments were made in the Handbook of Procedures

(Volume-I). This Public Notice was issued by the DGFT in exercise of

powers conferred under para 2.4 of the EXIM Policy. By this Public Notice, paragraph 3.2.6 was inserted below para 3.2.5 of the Handbook of Procedures (Volume-I), which reads as under:

> "The scheme will be applicable to status holders who were also status holders as on 31.3.2003 and who had achieved minimum export turnover of 25 crores in the year 2003-04:
>
> I. For direct as well as third party exports, the Export documents viz. Export Order, Invoice, GR Form, Bank Realization Certificate should be in the name of applicant only. However, for the third party exports, where goods have been procured from a manufacturer, the shipping bill should contain the name of the exporter as well as the supporting manufacturer.
>
> II. Goods allowed to be imported under this scheme shall have a nexus with the products exported and a declaration in this regard shall be made by the applicant in Appendix 17D.
>
> III. The licensing authority shall at the time of issuance of the duty free credit entitlement certificate endorse the name of the associate manufacturer/supporting manufacturer/ job worker on the certificate as declared by the applicant. Goods imported against such entitlement certificate shall be used by the status holder or his supporting manufacturer/job worker in proportion to the value of their direct contribution to the entitlement.
>
> IV. The last date for filing of such applications shall be 31 st December.
>
> V. The duty free credit entitlement certificate shall be issued with a single port of registration. For each duty free credit entitlement certificate, split certificates subject to a minimum of Rs.5 lakh each and multiples thereof may also be issued. A fee of Rs.1000/- each shall be paid for each split certificate. However, a request for issuance of split certificate(s) shall be made at the time of application only and shall not be considered at a later stage.
>
> VI. The duty free credit entitlement certificate shall be

> valid for a period of 12 months from the date of issue. The status holder shall within one month of the last imports made under this certificate or within one month of expiry of the certificate whichever is earlier, submit a statement of imports/utilization made under the certificate as per Appendix 17E, to the jurisdictional Regional Licensing Authority who has issued the certificate with a copy to the jurisdictional excise authorities.
>
> It also provided that:
>
> In terms of para 3.2.5 of Handbook of Procedures (Volume 1), the following items would not be taken into account for computation of entitlement and export performance under Duty Free Credit Entitlement Scheme for Status Holders:
>
> a) Rough, uncut and semi polished diamonds.
>
> b) Gold, silver in any form including plain jewellery thereof.

c) Good grains sourced from central pool maintained by FCI.

d) Items exported under free shipping bills.

3. In terms of para 3.2.5 of Handbook of Procedures (Volume 1) the following items would not be allowed for imports under Duty Free Entitlement Certificate for Status Holders:
a) Agricultural products, which fall under Chapters 1-24 of ITC (HS) classification of Export and Import items."

32) We would like to mention at this stage itself that as per the Government rationale for the amendment brought out by Notification No.28 dated 28.01.2004 and Public Notice No.40 dated 28.01.2004 are as under:

S. No.	Exclusion	Rational for exclusion
Note 1 (i)	Re-export of imported goods or exports made through transshipment;	Such goods are imported under the customs bond and re-exported with little value addition. Such exports come from country A and go to country B via India and are only pass through exports and not considered exports made in India.
(ii)	Export turnover of units operating under SEZ/ EOU/EHTP/STPI Schemes or products manufactured by them and exported through DTA units;	DFCE would be of no use to Export Oriented Units (EOU) as they are already entitled to import duty free. And since a firm is not allowed to transfer or sell its DFCE entitlements or goods, it cannot benefit from it. Notification 28 and Public Notice 40, kept the above logic in mind while excluding 100% EOU from the said scheme. EXIM Policy makes a very clear distinction between the exports from an Export Oriented Units (EOU) and other exports (called Domestic Tariff Area or DTA exports) primarily because of the difference in nature of support required by the two sectors. EOUs have been allowed zero duty facilities, besides availing industrial licensing exemptions. Since these exemptions are not available to DTA exporters, specific schemes like DFCE been formulated.
(iii)	Deemed exports	Goods do not leave the country and are not considered physical exports.
(iv)	Service exports	The DFCE scheme was available only for physical goods.
(v)	Supplies made by one status holder to another status holder;	The benefits of DFCE Scheme were not applicable to all the status holders but only to those status holders meeting the growth and turnover criteria.
(vi)	Export performance made by one status holder on behalf of other status holder will not be eligible	More than 1300 crores of the exports of M/s Adani Exports were accounted by the supplies taken from the status holders who supplied to the petitioners

	for entitlement under the scheme.	because they were not meeting the minimum turnover and/or growth criteria required to take benefit under the scheme. Claiming other firms export would mean that the country's export turnover would remain constant while applicant firms' turnover will sky rocket. This would not lead to the stated objective of accelerating the rate of incremental growth of country's exports.
(vii)	Supplies made or export performance effected by a non-status holder (Merchant exporter/Manufacturer with any export performance in 2003-04) to a status holder if the applicant as well as the non status holder have less than 25 per cent incremental growth over their respective previous years direct export turnover.	
(viii)	The exports made by an applicant within a group and the group to which it belongs has individually less than 25 per cent incremental growth of export.	M/s Reliance Industries Limited manipulated the export turnover of its group company IPCL to maximize its DFCE and Target plus entitlements. All this led to artificially increasing the export performance which was against the basic principle of the DFCE and hence excluded.
Note 2	Note 2. - The incremental growth of exports by an exporter shall not, directly or indirectly, be transferred to any other exporters.	The scheme explicitly was based on individual exporters performance. Claiming other firm's exports would mean that the country's export turnover would remain constant while applicant firm's turnover will skyrocket. If the firm had focused on increasing their exports, both the firm and the country would have gained in terms of export turnover, however, the firms chose to focus on people who were already exporting (but were not entitled for this benefit). Thus, the firm's turnover in the past year grew at astronomical rate whereas country's export growth was just average.

S. No.	Exclusion	Rational for exclusion
a	Rough, uncut and semi polished diamonds	Rough diamonds are not produced in India (Except for a trickle from Panna). Exporting rough diamonds from India is like exporting ostrich or giraffes from India. India imports rough diamonds polished them and exports to the world. The scheme ban rough diamond while fully allowing polished diamonds. Together, the export of diamonds and supplies taken from other status holders accounted for 81.4% of the exports of M/s Adani Exports Ltd. during the year 2003-04. Of these

			2475 crores were accounted for by the export of rough and re-exported polished diamonds. The fact that the petitioners were exporting rough diamonds merely to take the benefits of DFCE Scheme is proved beyond doubt by the fact that firm stopped exporting the rough diamonds the moment the Notification was issued in January, 2004 and have not exported any rough diamonds during January - March, 2004.
b	Gold, silver in any form including plain jewellery thereof	10% DFCE benefits allowed the exporters to experiment in commodities like gold wherein India does not have comparative advantage. Gold coins and jewellery was exported by M/s. Adani Exports and M/s Rajesh Exports largely to ports like Dubai where it was melted and brought back to India to be exported again and again. The entire operation can be profitably financed through the proceeds under the Scheme. With the exports taking place within two days of the imports, 60 tonnes of gold could be re-circulated 80-90 times in a year. That means with a little working capital, the country can lose Rs.1500 for every Rs.100 invested by an unscrupulous exporter. Such exports will show an increase in India's exports, but this will be unsustainable increase and is ultimately a drain on country's finances.	
c	Food grains sourced from central pool maintained by FCI	Food grains sourced from the open market were allowed for benefit under the Scheme. FCI is under Government control where prices are already subsidised. As the Government did not want to further subsidize the food grains sourced from the central pool maintained by FCI, such exports were excluded.	
d	Items exported under free shipping bills	Free (also called white) shipping bills do not mandatorily require verification of valuation by Customs authority (as per Customs Circular No.6/2002 dated 23/1/2002). Firms export under free shipping bills when they do not apply for any Government incentives subsequently. Government received intelligence reports that the export of high value items like rough diamonds were taking place under Free shipping bills where value of the goods may be easily inflated as there was no customs valuation, Government excluded these from the DFCE	

scheme.

33) M/s Adani Export Limited, on February 07, 2004, filed S.C.A. No.1676 of 2004 in the High Court of Gujarat at Ahmedabad challenging the validity

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of the Notification No. 28 and Public Notice No. 40 dated January 28, 2004.

34) Thereafter, as noted above, Notification No. 38 dated April 21, 2004 was issued vide which Note 6 and 7 were inserted in para 3.7.2.1 of the EXIM Policy. It may be recalled that first five notes were inserted by Notification No. 28 dated January 28, 2004. By Note 6, certain products and category of products were excluded from entitlement under duty free entitlement certificate for status holders, whereas under Note 7, certain items were not allowed for imports under duty free entitlement certificate for status holders. These Notes read as under:

> "Note 6 - The export of the following products and categories of products would not be permitted for counting entitlement under the Duty Free Entitlement Certificate for Status Holders:
>
> e) Rough, uncut and semi polished diamonds
>
> f) Gold, silver in any form including plain jewellery thereof
>
> g) Good grains sourced from central pool maintained by FCI
>
> h) Items exported under free shipping bills.
>
> Note 7 - The following items would not be allowed for imports under Duty Free Entitlement Certificate for Status Holders:
>
> Agricultural products, which fall under Chapters 1-24 of I T C (HS) classification of Export and Import items."

Note 6 added in para 3.7.2.1 of the EXIM Policy was earlier inserted as part of para 3.2.6 in the Handbook of Procedures (Volume-I) and is

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subject matter of controversy.

35) On July 23, 2004, the High Court of Gujarat partly allowed Special Civil Application No. 1676 of 2004 holding that "so far as Note 6 to Para 3.7.2.1 of the EXIM Policy as inserted by the Government notifications dated April 21 and 24, 2004 and the D.G.F.T.’s public notice dated 28.01.2004 exclude the following exports from the benefit of the duty

free import entitlement for the export status holders as contained in Para 3.7.2.1 of the EXIM Policy 2002-2007:-

(i) Items exported under free shipping bills.

(ii) Gold, Silver in any form including plain jewellery thereof, insofar as the import of capital goods and office equipment for the factory of the associate/supporting manufacturer/ job worker of the petitioner Company is concerned.

The High Court also clarified that the exports effected by a non status holder (without any export performance in the year previous to 2003-04) are eligible for the benefits under the Special Scheme irrespective of the fact that such exporters did not have any incremental growth in exports, for obvious reason that they had made no exports in the previous years, in the first place.

36) Aggrieved by the judgment and order of the High Court of Gujarat in Special Civil Application No. 1676 of 2004, M/s Adani Exports on

October 30, 2004 filed Special Leave Petition (Civil) No...CC 6638 of 2005.

37) On April 07, 2005 in exercise of the powers conferred under paragraph 2.4 of the Export & Import Policy 2002-2007, the Director General of Foreign Trade amended the first three lines of Para 3.2.6 of the Handbook of Procedures. The amended provision provided that:

> "The scheme will be applicable to the status holders/star export houses who have achieved a minimum export turnover of Rs.25 crores in the year 2003-2004".

It also replaced the earlier appendix 17D prescribing the application format for claiming the Duty Free Credit Entitlement.

38) On July 04, 2005 Writ Petition No. 2397 of 2004 filed by M/s. Kanak Exports before the High Court of Judicature at Bombay challenging the Notification No. 28(RE-2003)/2002-2007 dated January 28, 2004, Public Notice No. 40(RE-2003)/2002-2007, Notification No. 38(RE-2003)2002-2007, came up for hearing before a Division Bench of High Court and upon hearing the parties, the High Court of Judicature at Bombay upheld the validity of Notification No. 28(RE-2003)/2002-2007

dated January 28, 2004. However, it set aside the Public Notice No. 40 dated January 28, 2004 and further held that the Notifications dated April 21 and 23, 2004 have only prospective operation which means that exports made by the exporters respondent prior to April 21, 2004 in respect of the classes of goods covered by Notifications dated April

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21/23, 2004 were entitled to be computed for the purposes of determining the entitlement of Duty Free Imports.

39) On October 21, 2005, this Court issued notice on the Special Leave Petition as well as on application for condonation of delay in the Special Leave Petition (C) (CC NO.6638 of 2005) filed by M/s. Adani Export Ltd.

40) On December 13, 2005, aggrieved by the order of Bombay High Court dated July 04, 2005 in W.P. No.2397 of 2004 upholding the validity of the Notification No.28 of 2004 dated January 28, 2004, M/s. Kanak Exports filed Special Leave Petition (Civil) No. 26123 of 2005.

41) Aggrieved by the order of the Bombay High Court dated July 04, 2005 in Writ Petition No.2397 of 2004, the appellant/Union of India and DGFT filed Special Leave Petition (Civil) No.1331 of 2006.

42) On January 13, 2006 Special Leave Petition (C) No. 26123 of 2005 filed by M/s. Kanak Exports and Special Leave Petition (Civil) No.1331 of 2006 filed by the appellants/Union of India and DGFT challenging the order of the Bombay High Court dated July 04, 2005 in W.P.(C) No. 2397 of 2004 came up for hearing before this Court.
This Court upon hearing the parties granted leave in the Special Leave Petition (C) No. 1331 of 2006 and in the meantime stayed the operation of the impugned order in Civil Appeal arising out of S.L.P.(C) No.1331 of

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2006.

43) On February 17, 2006, the Union of India and DGFT aggrieved by the judgment and order of the High Court of Gujarat at Ahmedabad in Special Civil Application No.1676 of 2004 dated July 23, 2004 filed the Special Leave Petition.

44) The High Court of Gujarat, in the lead case Adani Exports Limited &

Anr. v. Union of India & Anr.1, had rendered its judgment on July 23, 2004, which was available with the High Court of Bombay when it gave its decision on July 04, 2005. Insofar as the Gujarat High Court is concerned, it partly allowed the petition quashing Public Notice dated January 28, 2004 and Note 6 to Para 3.7.2.1 of the EXIM Policy, as inserted by the Government Notifications dated April 21 and 23, 2004 and rejected the challenge on all other counts. The Bombay High Court substantially followed the same line of action, except differing with the Gujarat High Court to a limited extent thereby granting some more relief to these petitioners. Since these two judgments are the subject matter of these appeals, it would be apposite to scan through these judgments to find out what actually is decided by the two High Courts and the reasons in support of their respective decisions.

45) JUDGMENT OF THE GUJARAT HIGH COURT

1 Special Civil Application No. 1676 of 2004

In the Special Civil Application filed by Adani Exports Limited in the Gujarat High Court challenge was laid to the amendment to para 3.7.2.1 of the EXIM Policy vide Notification dated January 28, 2004 whereby five Notes were inserted. It also challenged insertion of Note 6 vide Notification dated April 21, 2004 read with Notification dated April 23, 2004 and Public Notice dated January 28, 2004 issued by the DGFT. The validity of the aforesaid provisions was questioned on the following premise:

(i) Since Note 4 provided that the guidelines would be applicable to exports made on or after April 01, 2003, Notification was challenged on the ground that it amounted to giving retrospective effect to the amendment Notification dated January 28, 2004 and there was no such power with the Central Government under Section 5 of the Act, or otherwise, to make amendments to the EXIM Policy with retrospective effect, or even retroactively.

(ii) These Notes, particularly Notes 1 to 3, 6 and 7, added by the impugned Notifications were not mere guidelines or clarificatory in nature, but

amounted to making substantial changes by inserting new conditions under the cover of clarification, which was not permissible.

(iii) Note 4 was also violative of the petitioners fundamental rights under Article 14 and 19(1)(g) of the Constitution.

(iv) Doctrine of Promissory Estoppel was also invoked by contending that acting upon the EXIM Policy, which came into effect from April 01, 2003, the petitioners had exported the goods on the promise and assurance contained in sub-para (vi) of Para 3.7.2.1 of the EXIM Policy and fulfilled the conditions set out therein, thereby achieving the target of incremental exports stipulated in the said para and, thus, became entitled to the benefit conferred therein, namely, 10% duty free imports of the specified items. The petitioner had, therefore, altered its position and the respondents were estopped from going back on their promises and assurances.

(v) Insofar as Public Notice dated January 28, 2004 is concerned, paragraphs 2 and 3, whereby certain items of goods which were exported were excluded from the purview of the special scheme, were challenged on the ground that they were ultra vires the powers of the DGFT as it amounted to usurping the power of the Central Government.

(vi) Insofar as Notification dated January 28, 2004 read with Notifications dated April 21 and 23, 2004 is concerned, challenge laid thereon was on the ground that they could not be made effective retrospectively.

46) The stand of the Union of India/respondents was that Notification dated January 28, 2004 was only clarificatory in nature. Detailed justification

for laying down these ’clarifications’ were given stating that large number of representations were received from Trade Associations/Export Promotion Councils as well as individual exporters seeking clarification on various points relating to the implementation of the Scheme. At the same time, the Government had also received information that many exporters were trying to misuse the same and details thereof, including the investigation/inquiry that followed, were also given and all this

necessitated issuance of Notification dated January 28, 2004, in public interest. Other arguments of the petitioners were also refuted giving various justifications. It was also emphasized that Section 5 of the Act and para 1.1 of the EXIM Policy reserved the right of the Government to amend the Policy in public interest. It was argued that a statutory power to amend the Policy, after noticing the misuse of the Policy, for the purpose for which it was never intended, cannot be frustrated on the plea that the petitioners had a legitimate expectation that they can continue to exploit the Policy for a purpose totally different from the one for which it was intended and then expect that the Government would not take any action whatsoever. It was argued that the writ Court would not sit in appeal over the wisdom of the Government in such economic matters and the Government must have the freedom to experiment and must be allowed to adopt the "trial and error method". It was also argued that economic decision, as contained in the Notifications granting

monetary benefits, can be withdrawn even before the expiry of the period for which the benefit was originally given if the decision of the Government is based on relevant material justifying such clarification or even change of the Policy.

47) After taking note of the aforesaid submissions of both the parties, the High Court stated certain legal principles referring to few judgments of this Court, which it deemed necessary to bear in mind, as they reflected the caveat sounded in those judgments. In this behalf, it quoted the following passage from the judgment of this Court in State of Madhya Pradesh & Ors. v. Nandlal Jaiswal & Ors.2, which guides as to how the Courts have to deal howwith the challenge to a policy decision of the Government in economic matters:

> "34...We had occasion to consider the scope of interference by the Court under Article 14 while dealing with laws relating to economic activities in R.K. Garg v. Union of India [(1981) 4 SCC 675]. We pointed out in that case that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. We observed that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with,

greater play in the joints has to be allowed to the legislature. We quoted with approval the following admonition give by Frankfurter, J. in Morey v. Dond [354 US 457]:

> In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events - self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestial as legislative judgment insofar as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call 'trial and error method' and, therefore, its validity cannot be tested on any rigid 'a priori' considerations or on the application of any straight-jacket formula. The court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or 'play in the joints' to the executive. "The problem of government" as pointed out by the Supreme Court of the United States in Metropolis Theatre Company v. State of Chicago [57 L Ed 730]:

> are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void.

The Government, as was said in Permian Basin Area Rate cases [20 L Ed (2d) 312], is entitled to make pragmatic adjustments which may be called for by particular circumstances. 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."

48) The Court then observed that these principles were reiterated in Zippers Karamchari Union v. Union of India & Ors.3 and in BALCO Employees Union (Regd.) v. Union of India & Ors.4 Thereafter, the High Court referred to the various provisions of the EXIM Policy and the amendments made by the impugned Notifications as well as Public

2 (1986) 4 SCC 566

Notice, which have already been taken note of above.

49) The High Court thereafter adverted to three exclusions under Note 1 to Para 3.7.2.1 which, according to the writ petitioner, had adversely affected their interest and these exclusions are:

(i) Export turnover of units operating under SEZ/EDU/THRP/ STPI Schemes or products manufactured by them and exported through DTA units.

(ii) Supplies made by one status holder to another status holder.

(iii) Export performance made by one status holder on behalf of other status holder.

50) In the light of the above, the Court first discussed the propriety or validity of the Notification dated January 28, 2004 and pointed out that this Notification does not make 'third party exports' illegal or entirely ineligible for getting incentive under the said Incentive Scheme for status holders. On the other hand, basic intention of the Scheme was to encourage the exports of products manufactured by small-scale industry sector, who do not have access to international market because of lack of required

3 (2000) 10 SCC 619

4 (2002) 2 SCC 333

international marketing experience and the optimum resources to have presence in the international market arena. Therefore, the Scheme was not intended to encourage a status holder/export house to pool the exports made by existing exporters, i.e. who have exported in previous years as well, for the purpose of showing incremental growth in exports of the status holder. Similarly, supply of goods by a status holder, who is having the required marketing skill and has been exporting in previous years as well, to another status holder does not advance the purpose of the Scheme. Similarly, transferring export turnover of the supplier/exporter, who is the original export order holder, to the status holder for artificially enhancing the incremental growth of exports of the status holder will not further the object of the incentive scheme. Therefore, the Government stipulated through the impugned Notification dated January 28, 2004 that the condition of 25% incremental growth of exports will apply both to the petitioner/status holder as well as to the

supplier, whether the supplier is a status holder or is an existing supplier/exporter of goods. The clarifications made by the impugned Notification, insofar as they provide that the incremental growth of 25% in FOB value of exports is the criterion applicable both to the status holders as well as to the existing supplier/exporters, will have to be treated as clarificatory if the basic object of the incentive scheme is looked at. The object of the Scheme was to boost exports in actual

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terms and not merely to encourage the existing exporters to pool their exports for the purpose of giving artificial appearance of the incremental growth of exports.

51) On the aforesaid basis, the High Court concluded that the main purpose of the Notification dated January 28, 2004 was to prevent transfer of export orders from one group company to another company belonging to the same group in order to show enhanced export performance of such another company and, therefore, it was clarificatory in nature.

52) The Court then took up for consideration the argument of the writ petitioner that the impugned Notification and Public Notice had the effect of taking away the vested right of the writ petitioner, which was repelled in the following words:

> "17. Under the policy in force prior to the impugned notifications and even thereafter the third party exports are permitted. What the legal earlier is not made illegal at all. For instance, exports of goods manufactured by units in EDU/SEZ zones through status holder are not prohibited but such exports even made between 1.4.2003 and 27.1.2004, are excluded because the benefit of duty free import was already availed for the export of such goods. Chapter 6 of the Exim Policy relates to Exports Oriented Units (EDUs), Electronics Hardware Technology Parks (EHTPs) and Software Technology Parks (STPs). As provided in paras 6.1 and 6.8 of the Exim policy, these units undertake to export their entire production of goods and services, except permissible sales in the Domestic Tariff Area as per the Exim Policy. Para 6.2(b) of the Exim Policy provides that "an EDU/EHTP/STP unit may import without payment of duty all types of goods, including capital goods, as defined in the Policy, required by it for its activities as mentioned in para 6.1..."

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Para 6.10 reads as under:

> "6.10 An EDU/EHTP/STP unit may export goods manufactured/software developed by it through a

> merchant exporter/status holder recognized under this Policy or any other EDU/EHTP/STP/SEZ unit."
>
> The amendments do not impinge upon the right of any party to export its goods in accordance with the Exim Policy. The clarification only excludes exports which were never intended in the first place to be covered by the Special Scheme under consideration.
>
> 18. Secondly, the misuse of the scheme by mere paper growth in exports is not to be countenanced. Hence, it is but natural that the notification dated 28.1.2004 would apply to the exports made from 1.4.2003 onwards. In so far as this Court holds that the Notes 1 and 2 read with Note 4 introduced by the notification dated 28.1.2004 are merely clarificatory, the exports made by the petitioner between 1.4.2003 and 27.1.2003 (sic) would certainly be covered by the said notes. Two views were possible about the expression "incremental growth in exports by 25%" and the Government adopted the interpretation as reflected in the notification dated 28.1.2004 which is quite in consonance with the objects of the Act, Exim Policy and the Incentive Scheme rather than the interpretation canvassed by the petitioner. Hence, there is no substance in the challenge to Notes 1 and 2 read with Note 4."

53) On the aforesaid basis, insofar as Notification dated January 28, 2004 is concerned, its validity has been upheld. The High Court then discussed validity of Public Notice of the even date. Observing that by this Public Notice certain export products from the Incentive Scheme were sought to be excluded and it could not be treated as mere clarifications, the High Court held that DGFT had no power to exclude exports of such groups merely by stating that rough diamonds or food items were to be

excluded.

54) Since Notification dated April 21, 2004 read with Notification dated April 23, 2004 were issued whereby Note 6 was added, which was to the same effect as Public Notice dated January 28, 2004, and since this was held not to be merely clarificatory in nature, the Court went into the issue as to whether Notes 6 and 3 read with Note 4 were retroactive or retrospective. In the process, it dealt with the issue of ’vested right’ and after discussing the aforesaid legal concepts, it came to the conclusion that Notes 3, 6 and 4 were only retroactive in nature and not retrospective and since Notification dated January 28, 2004 (including Note 3 thereof) on exports made from April 01, 2003 was upheld as valid, Notifications dated April 21 and 23, 2004, flowing from the said Note 3 and adopting contents of Public Notice dated January 28, 2004,

could not be faulted with on the ground of retrospectivity.

55) The Court then took the issue of Promissory Estoppel and discussed numerous case law on the subject and concluded that since it was a case of change in economic policy with future effect or retroactive effect only to 'prevent manifest injustice or fraud', such public interest would override individual interest even if the promisee cannot resume his position. On this basis, the argument based on the principle of Promissory Estoppel was rejected.

56) At the same time, exclusion of two items vide Note 6 in Notifications dated April 21 and 23, 2004 and Public Notice dated January 28, 2004 was found to be neither clarificatory nor in public interest and, therefore, bad in law. These are exclusion of following exports from the benefits of duty-free import entitlement for the export status holders:

(i) Items exported under free shipping bills.

(ii) Gold, silver in any form including plain jewellery thereof, in so far as the import of capital goods and office equipment for the factory of the associate/supporting manufacturer/job worker of the petitioner Company is concerned.

The Special Civil Application was allowed to the aforesaid extent directing that the aforesaid items cannot be excluded while computing the duty free import entitlement.

57) JUDGMENT OF THE BOMBAY HIGH COURT

The Bombay High Court, in its impugned judgment dated July 04, 2005, has held as under:

(i) Notification dated January 28, 2004 is valid. It does not seek to amend the policy with retrospective effect but is only clarificatory in nature which was issued to stop the misuse and abuse of the scheme as the main purport of the scheme was to encourage the export of products and not to encourage the status holders/export user to pool the exports made by

other exporters for the purpose of showing incremental growth in the export. Paras 19 and 20 of the High Court containing discussion on this aspect are noted below.

"19. The reasons for making clarifications are contained in para 5 of the impugned Notification. It appears that after the scheme was initiated, on the basis of intelligence gathered the Central Government learnt that the scheme was being misused by certain status holders by entering into contracts with various exporters showing themselves as third party exporters. Such contracts were executed on stamp papers ostensibly showing such status holders as third party exporters holding other parties in obtaining the orders. These contracts were found to have been entered into between the parties as merely a paper arrangement with a view to claim benefits of duty free credit entitlement on the export of others. It also came to notice that the status holders were purchasing exports made by other parties at a premium with a view to show incremental growth of 25% or more in exports without having actually achieved such growth. In the face of this clear abuse of the scheme the Central Government had to intervene and issue the impugned Notification to clarify the correct meaning of the scheme. Note 2 of the Notification provides that incremental growth of exports by an exporter shall not, directly or indirectly, be transferred to any other exporter i.e. exporter's own incremental growth will be counted for entitlement. The appellants have not challenged the validity of Note 2. What is challenged is the validity of Note I which states that for the purpose of calculating the value of certain exports shall not be taken into account in respect of sub-clauses (ii),(v),(vi) and (vii) thereof.

20. It appears that till 2002-2003 the petitioners' export performance was going down steadily. In 2002-2003 the export of the petitioners was hardly Rs.27 crores. In the year 2002-2003 India's export increased by 22% whereas as compared to the petitioners' export of about Rs.27 crores in 2002-2003, it catapulted to more than Rs.1000 crores. The national export growth rate was only 22% while the petitioners' exports grew at more than 3800%. It is obvious that this growth is merely a paper growth and not incremental growth within the meaning of the scheme. Notification dated 28th January 2004 does not make any third party export illegal or entirely ineligible for getting

incentives under the Exim Policy. However, the basic intention of the amended scheme was to encourage the export of products manufactured by small scale units who do not have access to the international market because of lack of required international marketing expertise and optimum resources to have presence in the international marketing arena. The scheme was not intended to encourage the status holder/export house to pool the exports made by other exporters for the purpose of showing incremental growth in the export. The clarification issued by the impugned Notification in so far as it provides that supplies made by one status holder to another status holder or export performance made by one status holder on behalf of another status holder shall not be eligible for entitlement is in consonance with the basic object of the scheme. The export turnover of the units operating under STZ/EOU/EHTP schemes was also excluded as these units are getting all facilities for import without payment of duty on various types of goods including capital goods required by them for their activities. The intention of the makers of the scheme was not to confer double benefit under para 3.7.2.1. Further an exporter is required to export himself and not benefit from export capabilities of STZ/EOU/EHTP etc. This would be only paper growth and amount to abuse of the scheme. Reliance placed by the

> petitioners on Circular No. 16 dated 24tth December 2002 is also of no assistance as the said Circular stating that 3 rd party exports are eligible for all the export promotion schemes was issued long before the special incentive scheme was announced on 31st March 2003. In our opinion, the provisions contained in the impugned Notification dated 28th January 2004 are merely clarificatory and cannot be treated as amendment to the scheme."

In the process, the High Court rejected the contention of the writ petitioners that the said Notification was unreasonable and irrational. The Court held that in complex economic matters every decision is necessarily empiric and is based on experimentation of what one may call trial and error method and, therefore, its validity cannot be tested on

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any rigid prior considerations or on the application of any straightjacket formula.

(ii) Public notice dated January 28, 2004 issued by the DGFT has been held to be without jurisdiction inasmuch as DGFT has no power to do so under Section 5 read with Section 3 of the Act. The Court held that by this Public Notice, four items were sought to be excluded from the purview of the scheme and, therefore, it amounted to amendment of the scheme which could be done by the Central Government only that too by means of Notification under Section 5 of the Notification, clarified that power of the DGFT is only to be exercised for procedural purpose which was evident from para 2.1.4 of the EXIM Policy. On the other hand, para 3.2.6 inserted by Public Notice dated January 28, 2004 went beyond the procedural conditions as these conditions were not found in the Policy. According to the High Court, since the Notification was not clarificatory and it amounted to amendment of the policy which was statutory in nature, this form of delegated or subordinate legislation could be only prospective and not retrospective unless the rule making authority has been vested with the power under the Statute to make rules with retrospective effect.

(iii) Insofar as Notes (vi) and (vii) which were added vide Notifications dated April 21 and 23, 2004, the High Court took the view that they were not

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merely clarificatory in nature. It was pointed out that vide these

Notifications, four items were sought to be excluded from the purview of the scheme and, therefore, could not be treated as merely clarificatory. The High Court, thus, while affirming the validity of these Notifications, came to the conclusion that it can be only prospective in nature. Contention of the Union that the word "amend" used in Section 5 read with Section 3 confers upon the Central Government to regulate, incorporates in its entrustment of the power to make subordinate legislation retrospectively, was turned down by the High Court. The High Court took the view that the word "amend" does not give power to make amendment retrospectively if it is used in relation to the power to make a piece of delegated legislation. The connotation of the word "amend" when it is used of the exercise of power by a legislature cannot be pressed to construe the word "amend" in relation to the power to make delegated legislation. In taking this view, the High Court relied upon the judgment of this Court in Accountant General and Another v. S. Doraiswamy and Others5.

Another contention of the Union predicated on Section 21 of the General Clauses Act to buttress its submission that retrospective effect could be given to the Notification was also repelled. In the opinion of the High Court, Section 21 of the General Clauses Act embodies a realm of construction, nature and extent of application which must inevitably be

5 (1981) 4 SCC 93

governed by relevant provisions of the statute that confers power to issue the notification. The said power must be exercised within the limits prescribed by the provisions conferring such a power and if there was no specific power given to make amendment retrospectively, that could not be assumed on the ground that it was necessitated in public interest. On this aspect, the Bombay High Court did not agree with the view taken by Gujarat High Court which held that Notifications dated April 21 and 24, 2004 were merely retroactive and not retrospective, by giving following reasons:

> "The Division Bench, however, proceeded to hold that the Notifications dated 21st/24th April, 2004 are merely retroactive and not retrospective. We may hasten to add that the Division Bench struck down the Notifications dated 21st/ 23rd April, 2004 as far as the free shipping bills and

> gold, silver and jewellery are concerned on the ground that exclusion of these items was unjustified and unreasonable. With great respect to the learned Judges we are unable to agree with the view that the amendment is merely retroactive. Once it is shown that the Central Government does not have the power to give retrospective effect to the amendment which is introduced in exercise of power conferred by sec. 5 of the Foreign Trade Act then whether the said amendment is retro-active or retrospective is rather immaterial. The amendment has clearly an impact on the rights which are already crystallized. We have therefore no hesitation to hold that the Notifications dated 21st and 23rd April 2004 would have prospective operation only."

OUR ANALYSIS AND CONCLUSIONS

58) The factual matrix, coupled with the arguments advanced before us by both sides, makes it clear that the issues remain the same which were canvassed before the High Courts. Even the position taken by the

parties on either side is predicated on identical legal edifice. Before adverting to the analytical discussion and deciding the validity of impugned Notifications and public notice, keeping in mind the legal principles, we would like to first discuss the background in which they came to be issued. We feel that argument of the Union that these were issued in public interest has to be considered first as that would provide the raison d’etre behind such a move on the part of the Government. Therefore, the first question is:

Whether Notifications were issued in public interest?

59) The main objective of the scheme was to achieve the share of 1% of global trade and accelerated growth in exports. For this purpose, the scheme intended to concentrate on the growth of certain kinds of products treating the same as "thrust sectors". In para 3.10, six such sectors are mentioned as thrust sectors, viz., Electronic hardware, Textile including garments, Auto components/ancillary, Gem and jewellery, Agriculture and service sector. It would be significant to point out that except one, all other writ petitioners belong to Gem and jewellery sector. One writ petitioner has export in Textile/Garments. What is highlighted is that no thrust sector was affected or prejudiced by the impugned Notification and which was primarily Gem and Jewellery exporters who got the hit.

60) As a matter of fact, immediately after the introduction of the scheme, it was found that there was unprecedented sharp rise in the export in Gem and Jewellery articles. It raised certain suspicion in the mind of the authorities as to whether these were genuine exports. The matter was investigated and on the basis of intelligence gathered by the Central Government, it was learnt that there was rampant misuse of the scheme by certain status holders. On October 13, 2003, the then Joint Secretary, Government of India, Central Board of Excise and Customs addressed a letter to the then DGFT stating as follows:

> "It has been reliably learnt that some status holders are trying to show growth in exports so as to avail the benefit of the aforesaid scheme. Such status holders are purchasing exports made by other parties at a premium with a view to show incremental growth of 25% or more in exports without having actually achieved such growth. Similarly some corporate groups having more than one exporting units are reportedly shifting exports in the name of any one status holder group company so as to artificially achieve incremental growth of 25% in exports. You would agree that the objective of DFCEC Scheme is to encourage status holders to achieve substantial growth in exports so that there is corresponding increase in the foreign exchange earnings of the country. It is, therefore, necessary to put suitable safeguards in DFCEC Scheme for Status Holders so that third party exports are not counted for the purpose of calculating the incremental growth in exports. Similarly, in case of corporate houses having more than one exporting companies, incremental growth may be calculated by taking into account the overall exports made by all the companies of that group. You may also like to provide for any other safeguards in DFCEC Scheme for Status Holders to ensure that the benefits of DFCEC Scheme is made available only to those status holders who actually achieve incremental growth of 25% or more in FOB value of exports during the financial year 2003-04 vis-a-vis to financial year 2002-03. One way to disallow DFCEC Scheme benefit to such

> artificial growth may be to define the term "incremental growth in exports" used in para 3.7.2.1(vi) of the EXIM Policy."

61) The said letter dated 14.10.2003 was forwarded to the Office of the Commissioner of Customs, Export Promotions to various Commissioners of Customs and the Commissioner of Customs, Mumbai on 05.11.2003 responded that:

> "The Customs House at Mumbai has noticed exports of sugar by State Trading Corporation of India Ltd. showing account of Adani Export Ltd., Private Merchant Exporter. The invoice is that of State Trading Corporation of India Ltd. Mate Receipt shows receipts of goods from State Trading Corporation of India Ltd. As also the Bill of Lading shows the shipper as State Trading Corporation of India Ltd. However, the bank certificate of export and realization

has been filed by Adani Exports Ltd. In which the exporter is shown as Adani Exports Ltd. Adani House, Navrangpura, Ahmedabad A/c State Trading Corporation of India Ltd. Photocopies of the set of documents is enclosed herewith. It is also to be pointed out that the DEPB benefit available on sugar is only 4% but under the incentive scheme the exporter is entitled to benefit of 4% plus additional 10%.

If purchase of exports from third parties or shifting of exports from one company to the other in the group is inconsistent with the intention and objective of the scheme, then the flaw in the scheme is to be removed. The flaw is that third party exports are being permitted under the Foreign Trade as well as Customs Regulations. The flaw can be removed by amending para 3.7.2.1 of that Policy and the relevant customs notifications to provide that third party exports shall not be taken into account by the DGFT in computing the incremental growth and the FOB value qualifying for grant of Duty Fee Credit Entitlement Certificate.

The scheme may be more precisely stated in the EXIM Policy and the Customs Notifications in accordance with the objectives and intentions of the Government so that what is plainly permitted by the scheme is not regarded

subsequently as misuse or abuse of the scheme.

It is also brought to the notice that it is open to the exporters to export under free Shipping Bill where as per the current instructions there is no scrutiny of Shipping Bills or physical examination of the goods. This would enable the unscrupulous exporters to inflate the FOB Value and get incremental growth and the additional benefit of 10% under DFCEC."

62) In a meeting held with the Officials of the DGFT and the Customs it was suggested as under:

"For calculation of incremental value the following should be excluded:-

- Value of goods exported on re-export basis.

- Since the exports made by a subsidiary of a limited company are counted towards export performance of the limited company for the purpose of recognition, the value of export made by subsidiary company and its limited company shall be taken together to determine the incremental exports.

- In case of EOU/SEZ/STP/EHTP units, this facility shall not be available as such units are already eligible for duty free import of capital goods/raw materials/office equipments etc. Further the status holder which also has a DTA unit along with EOU/SEZ/STP/EHTP unit should be excluded for the purpose of determining of third party export.

- Value of third party export.

- In case of doubt regarding valuation of goods by Customs authorities, the value of goods as determined by Customs authority should be taken

for determining incremental export instead of value declared by exporter.

- Value of exports made in terms of fulfillment of any export obligation under any export promotion scheme such as EPCG, Advance License etc.

Further to plug the loopholes, there is need to incorporate the following safeguards in the scheme.

- It is essential to incorporate a provision in the scheme providing that the status holder availing the benefit of above said scheme and importing raw material shall not avail export incentive by way of drawback/DEPB on foods manufactured using such duty free inputs and their subsequent export.

- The possibility of excluding gems and jewellery exports may also be examined as the duty incidence on gold (less than 2%) silver (5%), rough diamond (0%), rough gemstones (0%), broken or semi-finished cut and polished diamonds (0%), cut and polished diamonds (15%) is low. In addition to low duty, several other incentives such as replenishment licence of 1% FOB Value of export for duty free import vide notification No.41/99-Customs, dated 28-4-2003 are also available.

In addition, we have several schemes such as:

- Exemption to gold/silver/platinum, alloys, findings, and mounting of gold/silver/platinum and plain semi-finished gold/silver/platinum Jewellery by nominated agencies, status holders or exporters of standing under the scheme for export against supply by foreign buyer (notification No. 56/2000-Customs dated 5-5-2000)

- Scheme for providing replenishment license issued order under or in accordance with paragraph 4.4.1 of the EXIM Policy; and Gem Replenishment License issued under in accordance with paragraph 4.4.13 of the EXIM Policy - under these schemes, raw pearls, natural or cultures, and precious or semi-precious stones (other than rough diamonds), unset and uncut are allowed to be imported duty free.

- In addition to above, this sector has large potential to manipulate the value of goods and do the circular trading of goods by doing over-invoicing and under-invoicing. The receipt cases of large scale manipulation of value of rough diamonds is a clear example of this.

- There is need to clearly express in the scheme that value of only physical exports be taken into consideration and not the value of deemed exports.

- The Scheme is open ended and it does not have any linkage with foreign exchange realised. This aspect also needs careful re-examination."

63) On 19.11.2003, the Officer on Special Duty, Government of India, Ministry of Finance, Department of Revenue issued a Circular No. 98/2003 stating that:

"Commissioner of Customs (Export), ACC, Sahar had raised an issue whether under DFCEC Scheme, import of all capital goods including professional equipments could be allowed. This doubt has also been created on account of usage of the words "capital goods" in condition (3) of Customs Notification No. 54/2003. This issue has been examined in consultation with DGFT/MOC. DGFT have confirmed that the objective of DFCEC Scheme for Services Providers is to permit import of aforesaid goods with a view to increase the capability of the services providers so as to enable him to render a better and efficient service. With this in mind import of professional equipments which are required in the profession of the service providers has been allowed. However, insofar as capital goods are concerned, its import to service provider has already been allowed through EPCG route.
Therefore, insofar as DFCEC Scheme is concerned, under the category of professional equipments, import of only those equipments would be permissible under DFCEC Scheme, which are professional equipments required by the Service Provider for the purpose of rendering service & earning free foreign exchange. It is reiterated that import of capital goods which are other than professional equipment or office equipment shall not be allowed under DFCEC Scheme for Service Providers. In order to remove doubts, the words "capital goods" used in condition (3) of 54/2003-Cus dated 1.4.2003 has also been corrected to read as "Professional equipment" by issue of corrigendum.

Suitable Public Notice for Trade and Standing Order for the guidance of customs field may be issued."

64) In furtherance to the communications between the Department of

Revenue and the Customs, a meeting was held in the Office of the DGFT on October 21, 2003 which was attended by ADG(SB), JS(SSR), JDG(MCJ), OSD(RKT) and DDGTM in the Chamber of DGFT under the Chairmanship of DGFT and with regard to the Duty Free Credit Entitlement Scheme a tentative decision was taken on the following lines to safeguard, avoid any fraud or misuse of the Scheme:

(a) The BRC and Shipping Bill and the GR Form should bear the name of the merchant exporter and the associate/supporting manufacturer in case of third party export.

(b) There should be a minimum growth of 25% in the exports of both supporting/associate manufacturers in case of third party export.

(c) For group companies, it was suggested that the export of different companies under a group may be clubbed so as to check the possibility of inter-company transfers within a group for showing artificial growth. However, the matter may be further examined to arrive at a solution.

(d) It was also decided to go through the other additional issues, if any,

in the matter so that the proper guidelines can be issued as early as possible.

65) With regard to the import of capital goods under the Duty Free Credit Entitlement Scheme the matter was deliberated upon and it was decided not to allow all capital goods other than the professional equipment and office equipment mentioned in paragraph 3.8 of EXIM Policy against

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DFCE to service providers.

66) On December 11, 2003, the Additional Director General, Directorate of Revenue Intelligence addressed a letter to the Joint Secretary, (Draw back), Ministry of Finance reiterating the suggestions made in the meeting held with the Officers of the DGFT and the Customs as stated herein above.

67) On December 23, 2003, the Office of the Chief Commissioner of Customs, Bangalore Zone, addressed a Communication to the Joint Secretary (Drawback), Ministry of Finance, Department of Revenue, Central Board of Excise and Customs inter alia indicating:

(i) In order to prevent misuse of the scheme, it is desirable to incorporate the following conditions in paras 3.7.2 and 3.7.2.1 of the EXIM Policy 2002-2007 while issuing the duty free import entitlement certificate.

(ii) White computing the incremental growth in FOB value of exports, only the value of exports, which have been made directly by the status holder as involved in the export documents and for which the export proceeds have been realized in the name of the status holders shall be taken into account.

68) Thereafter, on December 12, 2003, the Chief Commissioner of Customs, Mumbai addressed a communication to the Joint Secretary (Drawback),

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Ministry of Finance, Department of Revenue indicating that:

> "The status holders as well as status holder corporate groups are showing artificial incremental growth of 25% in Exports(.) Even a Govt. of India undertaking, such as S.T.C. Limited have also sold their exports to another status holder(.)
>
> It is felt that the incentive scheme under DFCEC for 25%

incremental growth in Exports during 2003-04 vis-a-vis 2002-03 has spurred this "artificial clubbing of exports"(.) However, the DGFTS clarificatory policy circular of 16/2002 dated 2.12.2002 envisages that allowing third party export is a conscious decision of the Government(.) It appears that in the face of the current policy provisions, the benefits allowed to third party exports cannot be legally denied(.) Hence it is proposed that Ministry may consider prevailing upon the Ministry of Commerce/DGFT to amend the EXIM Policy provisions, so as to incorporate Para 3.7.2.1 (g) that for the purpose of calculating the incremental growth of 25% in exports in 2003-04, vis-a-vis 2002-03 the exports made on behalf of third parties will not be counted(.)

It is further submitted that in order to show 25% incremental growth in the exports during the current financial year 2003-04 vis-a-vis exports made in 2002-03, unscrupulous elements may also resort to over invoicing of free shipping bill by inflating the FOB value in such exports as the same are not subject to rigours of customs assessment and physical examination(.) It may therefore be suggested to the Ministry of Commerce and DGFT that the value of the exports made under Free Shipping Bill may not be counted for the purpose of calculating 25% incremental growth in export under the DFCEC Scheme(.) Alternatively, the exporters claiming for incremental growth against free shipping Bills with the benefit of DFCEC Scheme should declare it in all such Shipping Bills, so that such exports could be put to rigors of customs scrutiny including valuation and physical examination(.)"

69) Based on these Reports an exercise was initiated for carrying out amendments in the Handbook of Procedure (Volume-I) with series of meetings and Open Houses with the Apex Chambers of Commerce and

Industry, Export Promotion Councils, Trade Associations, Commodity Boards. Based on these interfaces the lists of suggestions were compiled and the same discussed threadbare during internal deliberations.

70) There were a series of interactions with the other Ministries involving changes in the procedural aspects of the EXIM Policy as reflected in the Handbook of Procedures (Volume-1).

71) The individual divisions were allocated the task of amending the procedural aspects of the EXIM Policy. Inputs were received from the EPCG division headed by Addl. DGFT (MLB) which carried out changes in Chapter 5 of the Handbook of Procedures (Volume-1), PC II Division carried out changes in the Deemed export chapter and DES IV Division suggested changes in Chapter IV of the Handbook of Procedures (Volume-1).

72) Meetings were held with the (Drawback) Directorates on January 09, 2004 and January 21, 2004 culminating into a presentation to the Hon'ble Prime Minister on January 27, 2004 in the presence of the Commerce and Industry Minister, Finance Minister, Secretary Finance, Secretary Revenue, Secretary DGFT, Additional DGFT (Policy), Joint Secretary etc. wherein it was decided that salient changes should be brought in the Handbook of Procedure (Volume-1) to the following effect:

> "the duty free entitlement for status holders has been fine tuned to obviate any possible misuse such as mandating the insertion of the exporter and third party's name on the export documents, need
>
> to have nexus for import under the certificate vis-a-vis the exports made etc."

73) In the counter affidavit filed by the Union of India, details of the modus operandi used by these exporters are given on the basis of which it is projected that these exporters indulged in inflating their exports by achieving a growth rate from 300% to 3800% when during the same period i.e. 2003-2004, the national growth of export was merely 18%. It is demonstrated by tabulating figures as follows:

S.No.	Firm	Turnover crores - 2002-03	Turnover crores - 2003-04	% Growth
1	Adani Exports Limited, Ahmedabad	377	4657	1135
2	Rajesh Exports, Bangalore	112	2372	2017
3	Kanak Exports, Mumbai	27	1070	3816
4	Survanshi Exports, Hyderabad	1007	5495	335
5	Vishal Exports, Ahmedabad	318	1495	370

> "It is submitted that in case of M/s. Kanak Exports and M/s. Rajesh Exports, their export growth exceeded a growth rate of 2000% and their entire export comprises of gold coins and plain Jewellery. The relevant turnover of these companies for the year 2002-2003 and 2003-2004 is as under:

Firm	Turnover 2002-03	Turnover 2003-04	% Growth	Share of Gold coins and Plain jewellery in total Exports
Rajesh Exports, Bangalore	112	2372	2017	100
Kanak Exports, Mumbai	27	1070	3816	100

That in case of M/s. Adani Exports, the Petitioner herein, their exports have grown by nearly 1135% and over 80% of their exports came from diamonds and supply taken from other status holders not meeting the minimum turn over of growth criteria. The said fact is clear from the following chart:

	Adani Exports Limited, Ahmedabad	Exports (crores)
	Total exports for the year 2003-04 of which	4657
1	Rough, and re-exported polished diamonds	2475
2	Supplies taken from status holders not meeting the minimum turnover and growth criteria	1316
	Share of the above 2 categories in the total exports	81.4%

Export surge of 1135% for M/s. Adani Exports came in 2003-04 while for the past 6 years their exports were declining.

The above said growth rate of the companies who have challenged the Notifications and the Public Notices, has been achieved on account of the following:

I-Purchase of exports

Purchase of the exports of other firms (who were not eligible to get the benefit of the scheme) by M/s. Adani Exports Ltd. to inflate their turnover. For this

contracts were signed between the petitioners and other exporters.

II-Export of rough diamonds

Export of rough diamonds by M/s. Adani Exports Ltd. Even through India is not a rough diamond producing country.

These exports stopped the moment DFCE benefits were disallowed.

Export of such rough diamonds earlier never been part of the normal commercial operations and has taken place just to take advantage of the Scheme.

According to Gems and Jewellery export promotion council, "India is not a rough exporting country. Rough diamonds which are unsustainable for cutting in India are re-exported." Such exports stopped the moment benefit was explicitly withdrawn.

In the present case also the respondent herein M/s Adani Exports Limited had stopped exporting the rough diamonds the moment the Notification was issued in January, 2004 and according to Gems and Jewellery export promotion council, "Party has not exported rough diamonds during Jan/March 2004."

III-Export of gold coins, Jewellery-Circular trading and Exports to related companies

Most notorious misuse of the scheme was carried

out by few firms who exported Gold medallion and studded jewellery. Key firms included M/s. Kanak Exports, M/s. Rajesh Exports Ltd. And M/s. Adani Exports Limited.
Petitioners exported to their own counterparts in Dubai and Sharjah. Since the jewellery attracted 5% import duty at Dubai, the consignments which were declared as jewellery in India were declared as scrap in Dubai to avoid the import duty.

The export goods have been declared as "Studded gold jewellery/CE Bangles" at the Indian port, whereas at the port of destination they were cleared as gold scrap.

In few consignments belonging to M/s Adani

Exports Ltd. and produced by M/s Rajesh Exports as supporting manufacturer, the export products declared as ’Bangles’ were nothing but strips of gold formed into the shape of bangle and studded with cheap imitation stone.

That as it was difficult for them to achieve the value addition prescribed by the Policy through craftsmanship, they added extra gold to get the value addition. However, in this process strangely enough per unit price of the gold exported was less than per unit price of gold imported.

Thereby implying/demonstrating that there is a collusion between M/s. Adani Exports, Petitioner herein and M/s. Rajesh Exports, appellant before the Karnataka High Court in order to misuse the policy.

With the exports taking place within a day of the imports, gold can be circulated more than 100 times in a year. That means that an unscrupulous exporter can expect to earn Rs.1500 for every Rs.100 invested. As these are not commercial operations and export and import takes place between related parties, the illegitimate earnings are at the expense of the country.

IV-Export of cut and polished diamonds-Circular trading and Exports to related companies

According to reliable information the same sets of diamonds were rotating and these never entered the Indian domestic territory or to the end consumers abroad. The value of such exports in the past three years may exceed Rs.15,000 crores. Government has detailed report of the modus operandi of the firms involved.

Exports of cut and polished diamonds took place from small rooms of 10X12 feet where manufacturing activity was not allowed.

Firms like M/s. Adani Exports imported their consignments on re-export basis with artificial value addition and to buyers related to them.

Page 51 of Annual report 2001-02 of M/s. Adani Exports mentions the name of M/s. Gudami International

of Singapore as the related party and associate entity.

M/s. Adani Exports exported cut and polished diamonds to this entity. This indicates that the suppliers, exporters and importers were linked and hence the possibility of manipulating value addition.

According to one estimate the same set of diamonds were rotating and these never entered the Indian domestic territory or to the end consumers abroad."

74) It is also stated in the counter affidavit that the misuse of the scheme had also come to the notice of DRI and other intelligence officials who had gathered the necessary information and collected supported documents. Based on the intelligence gathered, a note on the misuse of Duty From Credit Entitlement (DFCE) and Target Plus Scheme was prepared which is annexed with the counter affidavit. At the time of arguments, Mr. Adhyaru, learned senior counsel extensively read and profusely relied upon this note with his passionate plea that all these writ petitioners have indulged in sharp practices in trying to take undue advantage of the scheme and, therefore, they should not be held entitled to the benefit of the scheme. It was also submitted that this material would clearly support the plea of the Government that the Notifications were issued to curb the misuse and were clearly in public interest. Exact summary and details of misuse as mentioned in the said note are as under:

"Executive Summary

The following note is based on the intelligence

gathered by the government. If needed copies of supporting documents may be produced.

Since the Scheme was based on growth of individual exports, many unscrupulous exporters resorted to inflating their export turnover mainly by following type of activities.

M/s. Adani Exports and few other exporters purchased the exports of other firms to inflate their turnover. Contracts have been signed between the petitioners and other exporters that petitioner will provide marketing and other services and act as third party exporter. According to the Department of Revenue, Status Holders were purchasing exports made by other parties by paying money with a view to show incremental growth of 25% or more in their own exports. Claiming other firm’s exports through such mechanism would mean that the country’s export turnover would remain constant while applicant firm’s turnover will skyrocket.

Export of rough diamonds even though India is

not a rough diamond producing country. These exports stopped the moment DFCE benefits were disallowed.

Few firms who exported Gold medallion and studded jewellery indulged in the most notorious misuse of the Policy. Key firms included M/s. Kanak Exports, M/s. Rajesh Exports Overseas and M/s. Adani Exports Limited. According to DRI reports many of these exporters exported to their own counterparts in Dubai and Sharjah. Since the jewellery attracted 5% import duty at Dubai, the consignments which were declared as jewellery in India were declared as scrap in Dubai to avoid the import duty. Since these companies were producing shoddy products in a 12 hour operation, it was difficult for them to achieve the value addition prescribed by the Policy through craftsmanship and hence they added extra gold to get the value addition. However, in this process strangely enough per unit price of the gold exported was less than per unit price of gold imported. Government has secured key documents from UAE Customs.

Cut and polished diamonds were imported, stored inside a bond and re-exported with artificial value addition. Few large firms led by M/s. Adani Exports Ltd.

exported these products to buyers related to them. According to one estimate the same set of diamonds were rotating and these never entered the Indian domestic territory or to the end consumers abroad. The value of such exports in the year 2003-04 and 2004-05 may exceed Rs. 15,000 crores. This report contains observations of DRI, which describes the modus operandi and the firms involved in graphic details.

DETAILS OF THE MISUSE OF DUTY FREE CREDIT ENTITLEMENT (DFCE) & TARGET PLUS SCHEME BY THE PETITIONERS

Background of Policy changes

Intent of the Government has been to accelerate India’s exports and towards this intent DFCE scheme was launched. The scheme envisaged rewarding genuine export growth with the specific objective of accelerating the incremental growth in exports and to facilitate India emerging as a major base for different source of products and services for the rest of the world.

The reward was supposed to motivate and spur exporters in increasing their export turnover. However, the scheme could not have envisaged at the time of its launch that certain exporters would employ non-commercial and unlawful tactics in a manner that would be injurious to the revenue interest and to derive undeserved benefits without actually having positive effect on the overall export effort of the country.

DGFT started getting the reports of misuse of the Scheme predominantly on account of buying of exports from the parties who would otherwise not be eligible under the Scheme. To plug the misuse and also to provide clarification on the details of the Scheme, Notification 28 and Public Notice 40 were issued on 28.1.2004.

I-Purchase of exports

One of the major misuses reported was that many Status holders were entering into contracts with various exporters for arrangements showing themselves as third party exporters. Such contracts were executed on stamp paper. Ostensibly such status holders indicated themselves as third party exporters helping the other

party in obtaining export orders, production of goods as per international standards etc. This legal contract has been entered merely as paper arrangement so as to claim the benefit of duty free import entitlement on the export of others. M/s. Adani Exports Limited was one of the parties in many such contracts.

According to the Department of Revenue Status Holders were purchasing exports made by other parties at a premium with a view to show incremental growth of 25% or more in exports without having actually achieved such growth.

973 crores worth of exports of M/s. Adani Exports Limited came from the supplies from large exporters (status holders). Status holders are large sized exporters who export their goods directly. In this case the benefits of DFEC Scheme were not applicable to all status holders but only to those status holders who were meeting the incremental growth and turnover criteria. It is anybody guess that if the status holders were not meeting the growth criteria they would not have got any benefit under the Scheme. The petitioners channeled such supplies to gain benefit under the Scheme.

Claiming other firm’s exports through such mechanism would mean that the country’s export turnover would remain constant while applicant firm’s turnover will skyrocket. If the firm had focused on increasing their exports, both the firm and the country would have gained in terms of export turnover, however, the firms chose to focus on people who were already exporting (but were not entitled for this benefit). Thus, the firm’s turnover in the past year grew at astronomical rate whereas country’s export growth was just average."

The Government has, thus, demonstrated that based on the aforesaid exercise undertaken, Notification dated January 28, 2004 as well as Public Notice of the even date were issued.

75) Notwithstanding strenuous efforts made by learned counsel for the wit petitioners to show that the exports by them were genuine and there was no misuse, we have no hesitation in accepting the plea of the Union that

the purport behind Notifications was bona fide which was actuated with the conditions of public interest in mind. We answer the question in the affirmative.

76) Let us now discuss the validity of the Notification dated January 28, 2004. The issue that arises for determination is as to:

Whether Notification No.28 dated January 28, 2004 vide

which Notes 1 to 5 to para 3.7.2.1 were inserted in the EXIM Policy 2002-2007 was only clarificatory in nature or it amounted to amendment of the provisions of para 3.7.2.1 of the EXIM Policy?

77) In order to discuss this question in proper perspective, it would be necessary to take note of those portions of the provisions contained in the original Scheme which are relevant for our purposes. Here, we are concerned with para 3.7.2.1 of the Scheme, which we reproduce again for ready reference:

> "3.7.2.1 The status holders shall be eligible for the following new/ special facilities:
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> (i) Licence/certificate/permissions and Customs clearances for both imports and exports on self-declaration basis;
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> (ii) Fixation of Input-Output norms on priority within 60 days;
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> (iii) Exemption from compulsory negotiation of documents through banks. The remittance, however, would continue to be received through banking channels;
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> (iv) 100% retention of foreign exchange in EEFC account;
>
> (v) Enhancement in normal repatriation period from 180 days to 360 days;

> (vi) Duty free import entitlement for status holders having incremental growth of more than 25% in FOB value of exports (in free foreign exchange) subject to a minimum export turnover of Rs.25 crore (in free foreign exchange). The duty free entitlement shall be 10% of the incremental growth in exports. Such entitlement can be used for import of capital goods, office equipment and inputs for their own factory or the factory of the associate/supporting manufacturer/job worker. The entitlement/goods shall not be transferable."

78) Vide Notification dated January 28, 2004, 5 Notes were added to the aforesaid para. We are concerned with Note 1 which contained 8 sub-notes, and it reads as under:

> "Note 1 - For the purpose of calculating the value of exports, the following exports shall not be taken into account, namely:-
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> (i) re-export of imported goods or exports made through transshipment;
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> (ii) export turnover of units operating under SEZ/EOU/EHTP/STPI Schemes or products manufactured by them and exported through DTA units;
>
> (iii) deemed exports (even when payments are received in

Free Foreign Exchange) and payment from EEFC account;

(iv) service exports;

(v) supplies made by one status holder to another status holder;

(vi) export performance made by one status holder on behalf of other status holder will not be eligible for entitlement under the scheme;

(vii) Supplies made or export performance effected by a non-status holder (Merchant exporter/ Manufacturer with

any export performance in 2003-2004) to a status holder if the applicant as well as the non status holder have less than 25 per cent incremental growth over their respective previous years direct export turnover;

(viii) the exports made by an applicant within a group and the group to which it belongs has individually less than 25 per cent incremental growth of export."

79) There was no serious challenge to sub-notes (i), (iii), (iv) and (viii). Before we discuss the effect and impact of the aforesaid sub-notes of Note 1, let us find out as to how the Bombay High Court and Gujarat High Court in their respective judgments have dealt with this issue.

80) So far as the Bombay High Court is concerned, after specifically posing the question as to whether Notification dated January 28, 2004 has the effect of introducing a new condition or term or it is merely in the nature of clarification to the existing policy. The High Court referred to the basic objective of the scheme as contained in Commerce and Industry Minister's speech on introducing new EXIM Policy 2002-2007. It reads as under:

"We recognize that the status holders will continue to play a significant and increasing role in boosting exports, particularly from the small scale sector, as most of the small scale units will not be in a position to directly access the international markets. Moreover, it will be our endeavor to facilitate India emerging as a major base for out sourcing products and services for the rest of the world. They are also critical to our strategy for accelerating the rate of incremental growth of export. Therefore, we intend to give a premium to the status holders who achieve high growth rate in their exports. It is proposed to give a duty free entitlement to them for import of capital goods, spares, office

equipments and consumables. This will be available to status holders who achieve a growth rate of 25% or more in the current year with a minimum export performance of Rs.25 crores. They would be entitled to a duty free entitlement of 10% of the incremental

> growth in exports during the current financial year. This entitlement would be subject to actual user condition which can be passed on to associate manufactures".

81) The High Court thereafter pointed out that after the aforesaid Scheme was initiated, the Central Government learnt, on the basis of intelligence gathered, that there was a rampant misuse of the scheme by entering into contacts with various exporters showing themselves as third party exporters. These contracts were executed on stamp papers ostensibly showing such status holders as third party exporters helping other parties in obtaining the orders. It was found that these were merely paper arrangement with a view to claim benefits of duty free credit entitlement on the export of others. Insofar as case of writ petitioner Kanak Exports is concerned, the High Court noticed that in the year 2002-2003, the export of this petitioner was hardly Rs.27 crores which took a big leap and quantum jump in the year 2003-2004 when the exports of this petitioner catapulted to more than Rs.1000 crores. The national export growth rate was only 22% over the last year whereas exports of Kanak Exports grew at more than 3800%. According to the High Court, it was merely a paper growth and not incremental growth within the meaning of the scheme and the scheme was not to encourage the status holder/export house to pool the exports made by other

exporters for the purpose of showing incremental growth. On that basis, the High Court held that the Notification dated January 28, 2004 was merely clarificatory and cannot be treated as amendment to the scheme and backed this conclusion with the following reasons:

> "....However, the basic intention of the amended scheme was to encourage the export of products manufactured by small scale units who do not have access to the international market because of lack of required international marketing expertise and optimum resources to have presence in the international marketing arena. The scheme was not intended to encourage the status holder/export house to pool the exports made by other exporters for the purpose of showing incremental growth in the export. The clarification issued by the impugned Notification in so far as it provides that supplies made by one status holder to another status holder or export performance made by one status holder on behalf of another status holder shall not be eligible for entitlement is in consonance with the basic object of the scheme. The export turnover of the units operating under STZ/EOU/EHTP schemes was also excluded as these units are getting all facilities for import without payment of duty on various types of goods including capital

goods required by them for their activities. The intention of the makers of the scheme was not to confer double benefit under para 3.7.2.1. Further an exporter is required to export himself and not benefit from export capabilities of STZ/EOU/EHTP etc. This would be only paper growth and amount to abuse of scheme. Reliance placed by the petitioners on Circular No. 16 dated 24 th December 2002 is also of no assistance as the said Circular stating that 3rd party exports are eligible for all the export promotion schemes was issued long before the special incentive scheme was announced on 31 st March 2003. In our opinion, the provisions contained in the impugned Notification dated 28th January 2004 are merely clarificatory and cannot be treated as amendment to the scheme."

82) The Gujarat High Court, likewise, had come to the same conclusion in

the writ petition of Adani Exports Limited. In fact, paras 17 and 18 of the judgment of the Gujarat High Court is reproduced by the Bombay High Court in its judgment which reflects the mind of the Gujarat High Court in coming to the same conclusion. These paras read as under:

"17. Under the policy in force prior to the impugned notifications and even thereafter the third party exports are permitted. What was legal earlier is not made illegal at all. For instance, exports of goods manufactured by units in EOU/SEZ zones through status holder are not prohibited but such exports even made between 1.4.2003 and 27.1.2004 are excluded because the benefit of duty free import was already availed for the export of such goods. Chapter 6 of the EXIM policy relates to Export Oriented Units (EOUs). Electronics Hardware Technology Parks (EHTPs), and Software Technology Parks (STPs). As provided in paras 6.1 and 6.8 of the EXIM Policy, these units undertake to export their entire production of goods and services, except permissible sales in the Domestic Tariff Area as per the EXIM Policy. Para 6.2(b) of the EXIM policy provides that "an EOU/EHTP/STP unit may import without payment of duty all types of goods, including capital goods, as defined in the policy, required by it for its activities as mentioned in para 6.1..." Para 6.10 reads as under:

"6.10 As EOU/EHTP/STP unit may export goods manufactured/software developed by it through a merchant export/status holder recognized under this policy any other EOU/EHTP/SEZ unit".

The amendments do not impinge upon the right of any party to export its goods in accordance with the EXIM policy. The clarification only excludes exports which were never intended in the first place to be covered by the Special Scheme under consideration.

18. Secondly, the misuse of the scheme by mere paper growth in exports is not to be countenanced. Hence, it is but natural that the notification dated 28.1.2004 would apply to the exports made from 1.4.2003 onwards. In so far as this court holds that the Notes 1 and 2 read with Note 4 introduced by the notification dated 28.1.2004

> are merely clarificatory, the exports made by the petitioners between 1.4.2003 and 27.1.2003 would certainly be covered by the said notes. Two views are possible about the expression "incremental growth in exports by 25%" and the Government adopted the interpretation as reflected in the notification dated 28.1.2004 which is quite in consonance with the object of the Act, EXIM policy and the incentive scheme rather than the interpretation canvassed by the petitioner. Hence, there is no substance in the challenge to a Notes 1 and 2 read with note 4."

83) Sub-note (ii) of Note 1 now provides that export turnover of units pertaining to SEZ/EOU/EHTP/STP or products manufactured by them and exported through DTA units are not to be included and taken into account for the purpose of calculating the value of exports. Both the High Courts in the impugned judgments have held it to be clarificatory on the ground that such export turnover was excluded as these units, namely, those pertaining to SEZ/EOU/EHTP/STP schemes are getting all facilities for import without payment of duty on various types of goods including capital goods required by them for their activities and there was no intention in the original scheme also to confer double benefit under para 3.7.2.1. This question by the writ petitioners by referring to paras 6.10, 7.1 and 7.8 of the EXIM Policy which permitted, inter alia, export through status holders. On that basis, it was argued by the learned counsel appearing for these writ petitioners that sub-note (ii) of Note 1 which stipulated that such exports would not be counted for the purpose of entitlement was not clarificatory but an amendment to the scheme. It

is difficult to accept the aforesaid submission. No doubt, such EOU/EHTP/STP schemes are allowed to export goods manufactured by them through a merchant exporter/status holder recognised under the EXIM Policy. Likewise, SEZ is also authorised to export its goods through a status holder. The permission to make exports through status holder is one thing. Taking into account these exports by the status holders for the purpose of calculating the value of exports for availing the benefits of the entitlement given under the scheme is altogether different thing. The counsel for the petitioners could not refute or deny that such SEZ/EOU//EHTP/STP are getting the benefit of the exports made by them in the form of facilities for import without payment of duty on various types of goods including capital goods required by them for their

activities. Therefore, exactly the same benefit which is sought to be given to the status holders for achieving incremental growth as provided in the scheme was already conferred upon. Obviously, purpose of the scheme was not to give double benefit for same exports. In fact, if that is allowed, it would be a clear case of misuse of the scheme inasmuch as for the same export turnover units operating under SEZ/EOU/EHTP/STP would get the certain incentives and the status holders also manage to extract the same benefits exploiting the scheme by exporting the goods manufactured by these STZ/EOU etc. On considering the issue in this hue, we agree with the opinion of the High

Court that such a sub-note (ii) was merely clarificatory in nature.

84) Sub-note (v) to Note 1 stipulates that if the supply were made by one status holder to another status holder, these shall also be excluded while calculating the value of exports. Likewise, sub-note (vi) of Note 1 excludes the export performance made by one status holder on behalf of other status holder. High Courts have treated it as clarificatory on the ground that the Scheme was not intended to encourage the status holders/export house to pool the exports made by other exporters for the purpose of showing incremental growth in the exports and, therefore, the addition of sub-note (v) to Note 1 was in consonance with the basic objective of the scheme as originally envisaged. Having regard to the nature of this sub-note (v) and when we keep in mind the fact that the two status-holders if they carry out the exports and made the target as per the Scheme were entitled to the benefit of the Scheme, we agree with the High Courts that even insertion of these clauses is clarificatory in nature inasmuch as it only states that the supply made by one status-holder to another status-holder will not be counted. This clarification was issued, as rightly pointed out by the High Courts, to ensure that two status-holders belonging to the same group may not start pooling and try to take undue advantage.

85) Insofar as sub-note (vii) of Note 1 is concerned, it stipulates that supplies made or export performance affected by a non status holder to a status

holder will not be taken into account for the purpose of calculating the

value of exports, if the applicant as well as the non status holder have less than 25% incremental growth over their respective previous years. This appears to be clearly clarificatory in nature inasmuch as the purpose of the Scheme was to give benefit to those who are able to achieve incremental growth of 25%. Thus, each such status holder has to independently attain the growth target stipulated in the scheme to avail the benefit. Obviously, if it has not been able to achieve 25% incremental growth, such export house cannot take the advantage by including exports of a non status holders to show that it has achieved 25% incremental growth.

Aforesaid discussion leads us to conclude that the Notification dated January 28, 2004 was clarificatory in nature and its validity stands upheld.

86) Next issue relates to the validity of the Public Notice dated January 28, 2004. The question that is posed for determination on this issue is as to:

> Whether Public Notice dated January 28, 2004, issued by the 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 Public Notice dated January 28, 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 January 28, 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 for inflating their export turnover by adopting dubious methods. He emphasized the rational 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 cluck 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 April 21, 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 January 28, 2004 is only an amendment to Handbook of Procedure 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 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, Central Government is authorised to appoint DGFT as per Section 6 of the Act. Main functions of the 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 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 March 31, 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 (No.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 April 01, 2002 and shall remain in force upto March 31, 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 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. License/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 Order 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 the 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 2 Section 3 and sub-section 2 of the Gazette of India. On that basis, justification is sought to be given that the Notification No.28(RE-2003)/2002-2007 dated January 28, 2004, Notification No.38/(RE-2003) 2002-2007 dated April 21, 2004 were

published in the Gazette of India under Part 2 and 3(II), while Public

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Notice No.40 dated January 28, 2004 was published in the Gazette of India under Part 1 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 January 28, 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 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 the DGFT had no power in this behalf, he could not have excluded such items from the purview of 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 public notice goes beyond the procedural conditions.

95) In fact, the Government itself realised the same, namely, the DGFT had

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no such power. It is for this reason that what was sought to be achieved by the said Public Notice, was formalised 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.

97) Now, we advert to the issue pertaining to Notification dated April 28, 2004. The question here is as to:

Whether subsequent Notification dated April 21, 2004, read with Notification dated April 28, 2004, seeking to exclude the export performance related to class of goods covered by para 2 of the Public Notice dated April 28, 2004, by way of Notes 6 to para 3.7.2.1 of the EXIM Policy, would relate back to the date of Public Notice dated January 28, 2004 or is to be given prospective effect from the date of issuance of Notifications on April 21 and 23, 2004.

98) It is no doubt that the Central Government has the power to amend the Policy and, therefore, it could do so vide Notifications dated April 21 and 23, 2004. The only question is as to whether these Notifications are bad in law on the ground that they seek to apply retrospectively.

99) We start with the premise that there was complete justification for excluding the four items insofar as grant of benefit under scheme is

concerned. The Union of India has been able to demonstrate the same in full measure. This aspect has already been discussed in detail at the outset itself.

100) However, at the same time, as already been pointed out above, this Notification is not clarificatory in nature unlike Notification dated January 28, 2004. Therefore, the issue of retrospectivity becomes important. The contention of Mr. Adhyaru is that the Notification is not retrospective but retroactive in nature. In the alternative, it is submitted that even it is treated as retrospective, the Government has right to do so under the given circumstances inasmuch as grant of concession or incentive is the privilege of the Central Government which can always be withdrawn and in the present case, it is withdrawn for justifiable reasons and in public interest which is the paramount consideration and over rights all private considerations. Therefore, it is argued, the question of retrospectivity of Policy by the impugned Notification does not arise at all. Mr. Adhyaru also argued that there was an implied power vested with the Central Government to amend the Policy retrospectively.

101) We may state, at the outset, that the incentive scheme in question, as promulgated by the Government, is in the nature of concession or incentive which is a privilege of the Central Government. It is for the Government to take the decision to grant such a privilege or not. It is

also trite law that such exemptions, concessions or incentives can be withdrawn any time. All these are matters which are in the domain of policy decisions of the Government. When there is withdrawal of such incentive and it is also shown that the same was done in public interest, the Court would not tinker with these policy decisions. This is so laid down by catena of judgments of this Court and is now treated as established and well grounded principle of law. In such circumstances, even the Doctrine of Promissory Estoppel cannot be ignored.

102) We may suitably refer to the judgment of this Court in Kasinka Trading v. Union of India[6]. In that case, Government of India had issued Notification under Section 25(1) of the Customs Act, 1962 in 'public interest' granting exemption from whole of the customs duty on import of PVC resin. This Notification was to remain in force till March 31, 1981. However, even before the said date, by another Notification dated October 16, 1980, the full exemption from custom duty was withdrawn and it was reduced to the exemption from custom duty as is in excess of 40% ad valorem. The importer had contended that relying on the exemption notification dated March 15, 1979, it had placed orders for the import of PVC resins on the understanding that the commodity was totally exempt from customs duty, the Government must be held bound by the representations contained in the notification dated March 15,

6 (1995) 1 SCC 274

1979 and the Government was estopped on the basis of promissory estoppel to go back on its promise. The Government justified the withdrawal of exemption on the ground that the Government had issued notification dated March 15, 1979 with a view to equalizing sale prices of the indigenous and the imported material and to make the commodity available to the consumer at a uniform price, keeping in view the trends in the supply of the material. Subsequently, it was realized that the international prices of the product were falling and consequently the import prices had become lower than the ex-factory prices of the indigenous material. Hence, it was decided in "public interest" to withdraw the exemption notification.

This Court held that, "the reasons given by the Union of India justifying withdrawal of the exemption notification, in our opinion, are not irrelevant to the exercise of the power in public interest nor are the same shown to be insufficient to support the exercise of that power". The Court also observed that, the power to grant exemption from payment of duty flows from the provisions of Section 25(1) of the Customs Act. The power to exempt includes the power to modify or withdraw the same. Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the public interest is an

exercise of the statutory power of the State under the law itself as is obvious not merely from the language of Section 25 of the act, but also from the General Clauses Act under which the authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in the like manner. The Court also examined the case of the appellant-petitioners that relying upon the notification dated March 15, 1979, they had acted and the Government could not be permitted to go back on its assurance otherwise they would be put to huge loss. The Court dealt with this contention in the following words:

> "The Courts have to balance equities between the parties and indeed the Courts would bind the Government by its promise to prevent manifest injustice or fraud".

The Court also quoted with approval the following observations from Malhotra & Sons v. Union of India7:

> "The Courts will only bind the Government by its promises to prevent manifest injustice or fraud and will not make the Government a slave of its policy for all times to come when the Government acts in its Governmental, public or sovereign capacity."

103) The above decision was followed by this Court in Shrijee Sales Corporation v. Union of India8 where also the same notifications were considered. In that case also, the appellants-petitioners had alleged that they would not have imported the PVC resin without the exemption as that would have been unviable and uneconomical and further that many

7 AIR 1976 J&K 41

8 (1999) 3 SCC 398

persons took full advantage of the exemption. The Court held that the facts of the economic situation explained in the judgment rendered in Kasinka Trading's case were not contravened nor was it alleged that public interest did not call for supersession of the exemption notification. The Court also examined the question whether the fact that the notification dated 15.03.1979 mentioned the period during which it was to remain in force would make any difference to the situation. The Court then held that - 'once public interest is accepted as the superior equity which can override individual equity, the principles should be applicable even in cases where a period has been indicated'.

104) Therefore, it cannot be denied that the Government has a right to amend, modify or even rescind a particular Scheme. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore its validity cannot be tested on any rigid prior considerations or on the application of any straight-jacket formula. In Balco Employees Union (regd.) v. Union of India and Ors. 9, the Supreme Court held that Laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc., that the legislature should be allowed some play in the joints because it has to

9 (2000) 2 SCC 333

deal with complex problems which do not admit of solution through any doctrine or straightjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature. The question, however, is as to whether it can be done retrospectively, thereby taking away some right that had accrued in favour of another person?

105) The case of the exporters is that by achieving the target contained in the Scheme in respect of incremental exports, these exporters had right

accrued in their favour to claim the benefits provided for achieving this target. It was submitted in this behalf that the Scheme came into force w.e.f. April 01, 2003 and from April 01, 2003 to March 31, 2004 i.e. during these 12 months, the status holders were entitled to make the exports and once the targets as set out in the clause 3.2.7.1 (vi) were achieved, the exporters became entitled to get duty free import to the extent of 10% of the incremental growth in exports. According to them, the moment a particular exporter fulfilled the target of incremental growth of more than 25% of FOB value in exports with minimum export value turnover of 25 crore, said exporter got right to have duty free entitlement equivalent to 10% of incremental growth in exports. The only condition was that this entitlement was to be used w.e.f. April 01, 2004 for import of items specified in the said clause. On that basis, it was argued that

the effect of the impugned Notification was to take away this vested right accrued away in their favour and it amount to giving retrospective operation to the said circular which was not permissible. Following judgments were cited in support of the plea that there was no such power to make provision with retrospective effect in exercise of power of delegated legislation:

(i) Union of India & Ors. v. Asian Food Industries10

> "48. The Delhi High Court, however, in our view correctly opined that the Notification dated 4-7-2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof."

(ii) State of Rajasthan & Ors. v. Basant Agrotech (India) Ltd.11

> "21. There is no dispute over the fact that the legislature can make a law retrospectively or prospectively subject to justifiability and acceptability within the constitutional parameters. A subordinate legislation can be given retrospective effect if a power in this behalf is contained in the principal Act. In this regard we may refer with profit to the decision in Mahabir Vegetable Oils (P) Ltd. v. State of Haryana (2006) 3 SCC 620, wherein it has been held that:
>
> "41. We may at this stage consider the effect of

omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making

10 (2006) 13 SCC 542

11 (2013) 15 SCC 1

power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.

42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

(iii) Keshavlal Jethalal Shah v. Mohanlal Bhagwandas & Anr.12

"13. Counsel for the respondent also submitted that Section 29(2) as amended was intended to have retrospective operation, because the Amending Act was in the nature of explanatory legislation. There is nothing in the language of Section 29(2) as amended, which may indicate that it was intended to be retrospective in operation. Section 29(2) as amended in terms confers jurisdiction upon the High Court to call for the record of a case for the purpose of satisfying itself that the decision in appeal was according to law, which the High Court did not possess before the date of the Amending Act. The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 Code of Civil Procedure, and the legislature has by the Amending Act attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. Section 29(2) before it was enacted, was precise in its implication as well as in its expression: the meaning of the words used was not in doubt, and there was no omission in its phraseology which was required to be supplied by the amendment."

(iv) Commissioner of Income Tax v. Vatika Township Private Ltd.13

"28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current

12 (1968) 3 SCR 623

13 (2015) 1 SCC 1

activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow’s backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been

retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips vs. Eyre14, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita- Shinnihon Steamship Co. Ltd. 15 Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

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33. A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas & Anr.16, while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows:

"The amending clause does not seek to explain any

14 (1870) LR 6 QB 1

15 (1994) 1 AC 486

16 (1968) 3 SCR 623

pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from s. 115, Code of Civil Procedure, and the legislature has by the amending Act attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

(v) Trimbak Damodhar Rajpurkar v. Assaram Hiraman Patil & Others17

"8. Besides, it is necessary to bear in mind that the right of the appellant to eject the respondents would arise only on the termination of the tenancy, and in the present case it would have been available to him on March 31, 1953 if the statutory provision had not in the meanwhile extended the life of the tenancy. It is true that the appellant gave notice to the respondents on March 11, 1952 as he was then no doubt entitled to do; but his right as a landlord to obtain possession did not

accrue merely on the giving of the notice, it accrued in his favour on the date when the lease expired. It is only after the period specified in the notice is over and the tenancy has in fact expired that the landlord gets a right to eject the tenant and obtain possession of the land. Considered from this point of view, before the right accrued to the appellant to eject the respondents amending Act 33 of 1952 stepped in and deprived him of that right by requiring him to comply with the statutory requirement as to a valid notice which has to be given for ejecting tenants.

9. In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. As observed by Buckley, L.J. in West v. Gwynne retrospective operation is one matter and interference with existing rights is another. "If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain

17 (1962) Supp. 1 SCR 700

provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law." These observations were made in dealing with the question as to the retrospective construction of Section 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). In substance Section 3 provided that in all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent. It was held that the provisions of the said section applied to all leases whether executed before or after the commencement of the Act; and, according to Buckley, L.J., this construction did not make the Act retrospective in operation; it merely affected in future existing rights under all leases whether executed before or after the date of the Act. The position in regard to the operation of Section 5(1) of the amending Act with which we are concerned appears to us to be substantially similar.

10. A similar question had been raised for the decision of this Court in Jivabhai Purshottam v. Chhagan Karson- Civil Appeal No 153 of 1958 decided on 27-3-1961 in regard to the retrospective operation of Section 34(2)(a) of the said amending Act 33 of 1952 and this Court has approved of the decision of the Full Bench of the Bombay High Court on that point in Durlabbhai Fakirbhai v. Jhaverbhai Bhikabhai (1956) 58 BLR 85. It was held in Durlabbhai case that the relevant provision of the amending Act would apply to all proceedings where the period of notice had expired after the amending Act had come into force and that the effect of the amending Act was no more than this that it

imposed a new and additional limitation on the right of the landlord to obtain possession from his tenant. It was observed in that judgment that "a notice under Section 34(1) is merely a declaration to the tenant of the intention of the landlord to terminate the tenancy;

> but it is always open to the landlord not to carry out his intention. Therefore, for the application of the restriction under sub-section 2(a) on the right of the landlord to terminate the tenancy, the crucial date is not the date of notice but the date on which the right to terminate matures; that is the date on which the tenancy stands terminated".

(vi) Sakuru v. Tanaji[18]

> "4. Our attention was drawn to the fact that subsequent to the decision of the High Court, the State Legislature has enacted the Andhra Pradesh Tenancy Laws (Amendment) Act, 1979 - Act 2 of 1979, whereby Section 93 of the Act has been amended and the provisions of Section 5 of the Limitation Act, 1963 have now been expressly made applicable to appeals and revisions preferred under Sections 90 and 91 of the Act. We see no force in the contention advanced on behalf of the appellant that the said amendment is clarificatory in nature. The provisions of Section 93 as they stood prior to this amendment were free from any ambiguity and called for no clarification. The Legislature has also not given any indication of any intention to clarify but, on the other hand, what has been done by it is to amend the section with only prospective effect. The amended provisions of Section 93 are, therefore, of no assistance to the appellant in this case which is governed by the section as it was originally enacted."

(vii) Union of India v. N.R. Parmar[19]

> "35. Having examined the matter thus far, it is necessary to refer to the Ministry of Finance, Department of Revenue’s Letter dated 11-5-2004 (hereinafter referred to as "the Letter dated 11-5-2004"). The aforesaid letter is being reproduced below:
>
> "New Delhi, 11-5-2004
> To,
> The Chief Commissioner of Income Tax (CCA),
> Chandigarh

18 (1985) 3 SCC 590

19 (2012) 13 SCC 340

Subject: Fixation of inter se seniority of DR and promotee Income Tax Inspectors in view of clarification given by DoP&T in r/o OM dated 3-7-1986

Sir,

I am directed to refer to your Letter F.No.CC/CHD/2003-04/935 dated 4-12-2003 on the above subject and to say that the matter has been examined in consultation with DoP&T and necessary

clarification in the mater is given as under:

Point/query raised	Clarification
Whether direct recruit Inspectors should be given seniority of the year in which selection process initiated or vacancy occurred or otherwise.	'It is clarified by DoP&T that direct recruits' seniority via-a-vis the promotees is reckoned from the year in which they are actually recruited. DRs cannot claim seniority of the year in which the vacancies had arisen. The question of grant of seniority to DRs of the period when they were not even in service does not arise.'

3. The representations may please be disposed of accordingly.

Yours faithfully,
sd/-
Under-Secretary to the Government of India"

36. A perusal of the Letter dated 11-5-2004 reveals that it adopts a position in clear conflict with the one expressed in the OMs dated 7-2-1986 and 3-7-1986, as well as, in the OMs dated 20-12-1999 and 2-2-2000. In the aforesaid Letter dated 11-5-2004 it was sought to be "clarified", that the seniority of direct recruits vis-a-vis promotees, would be determined with reference to the year in which the direct recruits are appointed. And further, that direct recruits cannot claim seniority with reference to the year in which the vacancies against which they are appointed had arisen. In our considered view reliance on the Letter dated 11-5-2004, for the determination of the present controversy, is liable to

outright rejection. This is so because, the Letter dated 11-5-2004 has been styled as a "clarification" (see heading in right hand column). One of the essential ingredients of a clarification is, that it "clarifies" an unclear, doubtful, inexplicit or ambiguous aspect of an instrument. A "clarification" cannot be in conflict with the instrument sought to be clarified. The Letter dated 11-5-2004 breaches both the essential ingredients of a "clarification" referred to above. That apart, the Letter dated 11-5-2004 is liable to be ignored in view of two subsequent Letters of the Ministry of Finance, Department of Revenue dated 27-7-2004 and 8-9-2004.

37. The Letter dated 27-7-2004 is reproduced hereunder:

" New Delhi, 27-7-2004

To,
The Chief Commissioner of Income Tax (CCA),
Chandigarh

Subject: Fixation of inter se seniority of DR and promotee Income Tax Inspectors in view of clarification given by DoP&T in r/o OM dated 3-7-1986.

Sir,

I am directed to refer to the Board's letter of even

number dated 11-5-2004 on the above subject and to request that the application of this clarification may be kept in abeyance till further orders.

Yours faithfully,
sd/-
Under-Secretary to the Government of India

A perusal of the Letter dated 27-7-2004 reveals that the allegedly clarificatory Letter dated 11-5-2004 had been kept in abeyance.

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41. Before examining the merits of the controversy on the basis of the OM dated 3-3-2008, it is necessary to examine one related submission advanced on behalf of the direct recruits. It was the contention of the learned counsel, that the OM dated 3-3-2008 being an executive order issued by the Department of Personnel and Training, would apply only prospectively. In this

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behalf it was pointed out, that the disputed seniority between rival parties before this Court was based on the appointment to the cadre of Income Tax Inspectors, well before the OM dated 3-3-2008 was issued. As such, it was pointed out, that the same would not affect the merits of controversy before this Court. We have considered the instant submission. It is not possible for us to accept the aforesaid contention advanced at the hands of the learned counsel. If the OM dated 3-3-2008 was in the nature of an amendment, there may well have been merit in the submission. The OM dated 3-3-2008 is in the nature of a "clarification". Essentially, a clarification does not introduce anything new, to the already existing position. A clarification, only explains the true purport of an existing instrument. As such, a clarification always relates back to the date of the instrument which is sought to be clarified."

106) In nutshell, it was submitted that once there is a vested right and not merely existing right, taking away that right amounts to giving retrospective effect to the Notification which was impermissible. In the same breath, it was argued that it cannot be treated as retroactive operation of the Notification.

107) Learned senior counsel appearing for the Revenue, on the other hand, argued that no such right got crystallized in favour of the exporters as entitlement for export was to take effect from April 01, 2004. It was submitted that at the most with achieving of the export targets, they became eligible to avail the benefit of the Scheme but before this benefit could be availed of, for which the effective date was April 01, 2004, impugned Notification was issued on January 28, 2004. On this basis, it was argued that the Notification given only retroactive effect and not

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retrospective effect.

108) We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless rule making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, 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. This legal position is rightly discussed by the Bombay High Court in the impugned judgment in the following words:

> "We are unable to accept the submissions of learned Additional Solicitor General. The word "amend" does not give power to make amendment retrospectively if it is used in relation to the power to make a piece of delegated legislation. The connotation of the word "amend" when it is used for the exercise of power by a legislature cannot be pressed to construe the word "amend" in relation to the power to make delegated legislation. In this regard the following observations of the Supreme Court in Accountant General and another v. Doraiswamy (1981) 4 SCC 93 are pertinent:
>
> > "The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In B.S. Vadera v. Union of India AIR 1969 SC 118, this Court held that the rules framed under the proviso to Article 309

of the Constitution could have retrospective operation. The conclusion followed from the circumstance that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a law on the subject-matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that "any rules so made shall have effect subject to the provisions of any such Act". Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148 confers power on the President to frame rules operating prospectively only. Clearly then, the

Rules of 1974 cannot have retrospective operation, and therefore sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on July 27, 1956 must be held ultra vires."

The reliance placed on the power to regulate under Section 3 of the Act is equally misconceived. Section 5 gives express power to formulate the policy and to amend it. This is specific power. The power to regulate therefore cannot be read as a power to amend when a specific power to amend is given. If the power to regulate does not include the power to amend retrospectively such a power cannot be read into Section 3 of the Act.

Section 21 of the General Clauses Act on which reliance is placed by learned Additional Solicitor General is also of no assistance to sustain the retrospective operation of the notification. Section 21 of the General Clauses Act embodies a rule of construction, nature and extent of application of which must inevitably be governed by the relevant provisions of the statute which confers power to issue the notification. The said power must be exercised within the limits prescribed by the provisions conferring the said power. (See Gopichand v. Delhi Administration, AIR 1959 SC 609, Lachmi Narayan and Ors. v. Union of India and Ors. (1976) 2 SCC 953 and State of Kerala and Ors. v. K.G. Madhavan Pillai and Ors. (1988) 4 SCC 669.

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The ratio in H.C. Suman's case also cannot be applied because in that case it was found that Section 88 of the Delhi Cooperative Societies Act, 1972 contained the power to exempt and if the provisions of Section 12 of the said Act were to be exempted the provisions which provided that byelaws are effective from the date of registration. The notification issued under Section 88 would exempt it and Section 88 would contain the power to exempt retrospectively. Similarly, Section 14 of the General Clauses Act has no application as it merely provides that where any power is conferred on the Government, then that power can be exercised from time to time as occasion requires.

Under that Scheme the status holder is eligible for benefits upon achieving the incremental growth of 25% of the FOB value of exports in the current year over the previous year. It therefore follows that no sooner the status holder achieves 25% incremental growth, the status holder would be entitled to the benefits under the Scheme. Immediately upon attaining the prescribed incremental growth, the status holder becomes eligible to certificate for duty free import and thereby a right vests in the exporter to receive the same."

109) So far so good. The effect of the aforesaid discussion would be that if the Status Holders had achieved 25% incremental growth in exports, they acquired the right to receive the benefit under the Scheme, which could not be taken away. The pertinent and crucial question is as to whether these exporters/writ petitioners acquired any such right? Let us sharpen this question before we answer the same by formulating it in the following words:

Whether, in the cases of these exporters, the exports shown by them can be treated as actual exports entitling them to avail the benefit of the Scheme?

110) This issue would be inter-twined with other related issue, namely, whether the notification has retroactive operation or it is retrospective in

nature. Both these aspects are to be dealt with simultaneously in order to provide suitable and right answer to the question posed. The case of the exporters, as noticed above, is that since they had already fulfilled the requirement of ’incremental growth in exports’ which they were require to fulfill between April 01, 2003 to March 31, 2004, a vested right accrued in their favour to get the special incentive in terms of the scheme which, of course, was to be availed from April 01, 2004. The case of the Government, on the other hand, is that the benefit was to accrue to these exporters only from April 01, 2004 and before that it was withdrawn and, thus, no vested right accrued in their favour. It was also argued that in the policy, which provides special incentives to status holder, the term "incremental growth in export" was not defined/clarified at the time when the policy was issued. By the impugned notification, the blanks/gaps were filled and the term incremental growth in export was defined and it was clarified as to how the incremental growth in export is to be actually worked out. This was also done before the question of actual working out of the incremental growth in exports arose and hence, no retrospective effect.

111) An astute and penetrative examination of the record, with reference to the results of the investigation, which had prompted the Central Government to issue these Notifications, provides a very tidy answer to the question posed above is that the so-called targets achieved were

only on paper through fraudulent means and, therefore, it cannot be said that any vested right accrued in favour of these exporters.

112) We have referred to such material in detail while upholding the contention of the Union that Notifications were issued in public interest to ensure that their misuse is not allowed. To recapitulate, the inquiry conducted by the Government revealed that there were exports of rough diamonds even though India is not a rough diamond producing country. These exports stopped the moment DFCE benefits in respect of rough

diamond were disallowed. It was also found that cut and polished diamonds were imported, stored inside a bond and re-exported with artificial value addition. Many of these exporters exported to their own counterparts in Dubai and Sharjah and when this consignments reached those destinations, they were declared as scrap to avoid import duty. Following statistics given by the Government in respect of so-called exports by these exporters makes out startling revelations:

Growth exceeding 2000% for two petitioners came from 100% export of gold coins and plain jewellery

Firm	Turnover 2002-03	Turnover 2003-04	% Growth	Share of Gold coins and Plain jewellery in total exports
Rajesh Exports, Bangalore	112	2372	2017	100
Kanak Exports, Mumbai	27	1070	3816	100

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For M/s Adani Exports, over 80% of export turnover came for diamonds and Supplies from status holders not meeting the minimum turnover and growth criteria

	Adani Exports Limited, Ahmedabad	Exports (crores)
	Total exports for the year 2003-04 of which	4657
1	Rough, and re-exported polished diamonds	2475
2	Supplies taken from status holders not meeting the minimum turnover and growth criteria	1316
	Share of the above 2 categories in the total exports	81.4%

Export surge of 1135% for M/s. Adani Exports came in 2003-04 while for the past six years their exports were declining.

It is pertinent to note that except the above mentioned persons no other exporter in the country has challenged the said Notifications or the Public Notices dated January 28, 2004 and April 21, 2004 respectively.

It was also brought to the notice of the DGFT that some of the exporters have procured rough diamonds from local firms and exported the same by a 5% loss as they were confident of covering up the loss by receiving the 10% DFCE incentives offered by the Government. All

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these aspects are discussed in much details earlier and need not be repeated. We would like to recapitulate the following stark features/practices which have surfaced on record as a result of investigation:

113) Mr. Adhyaru has successfully demonstrated that the following methods were found to be resorted to by these exporters to inflate their export turnovers:-

(i) Export of rough diamonds even though India is not a rough diamond producing country. These exports stopped the moment DFCE benefits were disallowed.

Export of such rough diamonds earlier has never been part of the normal commercial operations and has taken place just to take advantage of the Scheme.

According to Gems and Jewellery Export Promotion Council, "India is not a rough exporting country. Rough diamonds which are unsustainable for cutting in India are re-exported." Such exports stopped the moment benefit was explicitly withdrawn.

(ii) In the present case also the respondent M/s Adani Exports Limited had stopped exporting the rough diamonds the moment the Notification was issued in January, 2004 and according to Gems and Jewellery Export Promotion Council, "Party has not exported rough diamonds during January/March 2004".

(iii) Cut and polished diamonds were imported, stored inside a bond and re-exported with artificial value addition. Few large firms including the petitioners exported these products to buyers directly related to them.

(iv) According to reliable information the same sets of diamonds were rotating and these never entered the Indian domestic territory or to the end consumers abroad. The value of such exports in the past two years may exceed Rs. 15,000 crores. Government has detailed report of the modus operandi of the firms involved.

(v) Most notorious misuse of the Scheme was carried out by few firms who exported Gold medallion and studded jewellery. Key firms included M/s. Kanak Exports, M/s. Rajesh Exports Ltd. and M/s. Adani Exports Ltd.

(vi) Many of these exporters exported to their own counterparts in Dubai and Sharjah. Since the jewellery attracted 5% import duty at Dubai, the consignments which were declared as jewellery in India were declared as scrap in Dubai to avoid the import duty.

(vii) As it was difficult for them to achieve the value addition prescribed by the Policy through craftsmanship, they added extra gold to get the value addition. However, in this process strangely enough per unit price of the gold exported was less than per unit price of gold imported.

(viii) Few exporters including petitioners have purchased exports of other firms to inflate their turnover. Contracts have been signed between the petitioners and other exporters that petitioner will provide marketing and other

services and act as third party exporter. According to reports status-holders were purchasing exports made by other parties at a premium with a view to show incremental growth of 25% or more in exports without having actually achieved such growth.

114) In such a scenario, a sagacious approach with practical sense leads us to conclude that these writ petitioners/exporters had actually achieved the targets set down in the original Scheme and thereby acquired any "vested right". It was pernicious and blatant misuse of the provisions of the Scheme and periscopic viewing thereof establishes the same. Thus, the impugned decision reflected in the notifications dated April 21 and 23, 2004, did not take away any vested right of these exporters and amendments were necessitated by over-whelming public interest/ considerations to prevent the misuse of the Scheme.

Therefore, we are of the opinion that even when impugned Notification issued under Section 5 could not be retrospective in nature, such retrospectivity have not deprived the writ petitioners/exporters of their right inasmuch as no right had accrued in favour of such persons under the Scheme. This Court, or for that matter the High Court in exercise of its writ jurisdiction, cannot come to the aid of such petitioners/exporters who, without making actual exports, play with the provisions of the Scheme and try to take undue advantage thereof. To this extent, direction of the Bombay High Court granting these exporters benefit of the Scheme for the past period is set aside.

115) One incidental issue remains to be discussed. This pertains to imposition of fee sought to be levied by Public Notice No. 18 dated July 24, 2003. The exporters are right in their submission that fee could not be imposed by a Public Notice and it was necessary to have recourse to Section 5 of the Act to impose such a fee. Notification dated July 24, 2003 insofar as it relates to imposition of fee is, therefore, set aside.

116) Thus, appeals and transfer cases stand disposed of in terms of aforesaid answers provided by this Court to the various questions formulated. To put it precisely, the effect of the aforesaid discussion would be to uphold the decision of the Gujarat High Court, though on different grounds, thereby dismissing the appeals of the exporters against the said judgment except to the extent indicated in para 114 above while the appeals of the Government are allowed. Likewise, appeals of the Union of India against the judgment of the Bombay High Court are allowed to the aforesaid extent and the appeals of the exporters/writ petitioners are dismissed.

Writ Petition (Civil) No. 27 of 2008
Transfer Case (Civil) No. 32 of 2007
Transfer Case (Civil) No. 33 of 2007
Transfer Case (Civil) No. of 2015
(arising out of Transfer Petition (Civil) No. 568 of 2014)

117) For the reasons mentioned in Transfer Petition (Civil) No. 568 of 2014,

the same is allowed and LPA No. 290 of 2007, entitled ’Union of India & Ors. v. M/s. Welspun India Limited’, pending in the High Court of Gujarat at Ahmedabad is transferred to this Court. Since the challenge laid in the case is identical with that involved in the rest of the batch matters, summoning of the records of the case is dispensed with and the matter is heard on the basis of the record already available before the Court.

118) In these cases, challenge is to the constitutional validity of para 3.7.8 of the EXIM Policy 2004-2009 as well as Notification No. 48/2005 dated February 20, 2006 and Notification No. 8/2006 dated June 12, 2006 by which certain amendments in the aforesaid EXIM Policy were made. Though it involves a different Scheme, known as ’Target Plus Scheme’, since the provisions and amendments are again primarily challenged on

the ground that these amendments are given retrospective effect from April 01, 2005, these matters were also analogously heard with the other batch of cases which have already been dealt with above.

119) As already noted above, the Government had announced EXIM Policy 2004-2009. In this Policy various schemes and incentives to promote exports were promulgated. One such scheme was known as 'Target Plus Scheme' (TPS) for the aforesaid period of EXIM Policy, i.e. April 2004 to March 2009. This TPS was contained in para 3.7 of the said EXIM Policy and reads as under:

"3.7 TARGET PLUS SCHEME

3.7.1 Objective
The objective of the scheme is to accelerate growth in exports by rewarding Star Export Houses who have achieved a quantum growth in exports. High performing Star Export Houses shall be entitled for a duty credit based on incremental exports, substantially higher than the general annual export target fixed (Since the target fixed for 2005-06 is 17%, the lower limit of performance for qualifying for rewards is pegged at 20% for the current year).

3.7.2 Eligibility Criteria
All Star Export Houses (including Status Holders as defined in Para 3.7.2.1 of Exim Policy 2002-07) which have achieved a minimum export turnover in free foreign exchange of Rs.10 crores in the previous licensing year are eligible for consideration under the Target Plus Scheme.

3.7.3 Entitlement
The entitlement under this scheme would be contingent on the percentage incremental growth in FOB value of exports in the current licensing year over the previous licensing year, as under:

Percentage incremental growth	Duty Credit Entitlement (as a % of the incremental growth)
20% and above but below 25%	5%
25% or above but below 100%	10%
100% and above	15% (of 100%)

Note: (1) Incremental growth beyond 100% will not qualify for computation of duty credit entitlement.

(2) For the purpose of this scheme, the export performance shall not be transferred to or transferred from any other exporter. In the case of third party exports, the name of the supporting manufacturer/manufacturer exporter shall be declared.

(3) Exporters shall have the option to apply for benefit

either under the Target Plus Scheme or under the Vishesh

Krishi Upaj Yojana, but not both in respect of the same exported product/s. Provided that in calculating the entitlement under Para 3.7.3 the total eligible exports shall be taken into account for computing the percentage incremental growth but the duty credit entitlement shall be arrived at on the eligible exports reduced by the amount on which the benefit is claimed under para 3.8.2.

(4) All exports including exports under free shipping bill verified and authenticated by Customs and Gems & Jewellery shipping bills but excluding exports specified under para 3.7.5, shall be eligible for benefits under the Target Plus Scheme.

(5) In respect of export of Cut & Polished diamonds only those shipments would be taken into account for computation of eligible exports under the scheme where a minimum of 10% value addition has been achieved.

3.7.4 Applicant Companies
Companies which are Star Export Houses as well as part of a Group company shall have an option to either apply as an individual company or as a Group based on the growth in the Group’s turnover as a whole. (For the purpose of this scheme the definition of Group Company as given in Chapter 9 will be applicable. Furthermore, only such companies of the Group as are Star Export Houses will be considered).

If a Group company chooses to apply based on the export of one or more of its individual Star Export House companies, the entitlement would be calculated considering the export performance of the applicant company during the previous licencing year and current licencing year. It shall be necessary that the adjusted export performance of all the Star Export House companies of the Group during the current licencing year does not fall below the combined performance of all Star Export House companies of the Group in the previous licencing year.

In case the Group chooses to apply based on the overall growth in Group’s turnover (i.e. the turnover of all the Star Export House companies), any one of the Star Export House companies of the Group may file an application on behalf of all the Star Export House companies of the Group.

3.7.5 The following exports shall not be taken into account for calculation of export performance or for computation of entitlement under the scheme:

(a) Export of imported goods covered under Para 2.35 of the Foreign Trade Policy or exports made through transshipment.

(b) Export turnover of units operating under SEZ/EOU/EHTP/STPI/BTP Schemes or products manufactured by them and exported through DTA units.

(c) Deemed exports (even when payments are received in Free Foreign Exchange and payment is made from EEFC account).

(d) Service exports.

(e) Rough, uncut and semi polished diamonds and other precious stones.

(f) Gold, silver, platinum and other precious metals in any form, including plain and studded Jewellery.

(g) Export performance made by one exporter on behalf of another exporter.

3.7.6 Imports allowed
The Duty Credit may be used for import of any inputs, capital goods including spares, office equipment, professional equipment and office furniture provided the same is freely importable under ITC (HS) Classification of Export and Import items, for their own use or that of supporting manufacturers as declared in 'Aayat Niryaat Form'.

Import of agricultural Products listed in Chapter 1 to 24 of ITC (HS) Classification of Export and Import items except the following shall be allowed:

(i) Garlic, Peas and all other Vegetables with a Duty of more than 30% under Chapter 7 of ITC (HS) Classification of Export and Import items.

(ii) Coconut, Areca Nut, Oranges, Lemon, Fresh Grapes, Apple and Pears and all other fruits with a Duty of more than 30% under Chapter 8 of ITC (HS) Classification of Export and Import items.

(iii) All spices with a Duty of more than 30# under Chapter 9 of ITC (HS) Classification of Export and Import items (except Cloves).

(iv) Tea, Coffee and Pepper as per Chapter 9 of ITC (HS) Classification of Export and Import Items.

(v) All Oil Seeds under Chapter 12 of ITC (HS) Classification of Export and Import Items.

Further, Natural Rubber as per Chapter 40 of ITC (HS) Classification of Export and Import items shall also not be allowed for import under the Scheme.

Import of all edible oils classified under Chapter 15, shall be allowed under the scheme only through STC and MMTC.

3.7.7 Cenvat/Drawback
Additional customs duty/excise duty paid in cash or through debit under Target Plus shall be adjusted as CENVAT Credit or Duty Drawback as per rules framed by the Department of Revenue.

3.7.8 Special Provision
Government reserves the right in public interest, to specify from time to time the category of exports and export products, which shall not be eligible for calculation of incremental growth/entitlement.

Further the Government shall have the right to change the eligibility criteria and rate of entitlement under the scheme effective from the date of notification of this policy.

Similarly, Government may from time to time also notify

the list of goods, which shall not be allowed for import under the duty credit entitlement certificate issued under the scheme.

120) Provisions relating to star export houses were contained in para 3.5 of Chapter 1A of the said Policy, which enumerated the Status Category as well as the privileges which were to be enjoyed by these star export houses. Said para 3.5 is as under:

"3.5 STAR EXPORT HOUSES

3.5.1 Star Export House
Merchant as well as Manufacturer Exporters, Service Providers, Export Oriented Units (EOUs) and Units located in Special Economic Zones (SEZs), Agri Export Zone (AEZ's), Electronic Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio Technology Parks (BTPs) shall be eligible for applying for status as Star Export Houses.

3.5.2 Status Category
The applicant shall be categorized depending on his total FOB/FOR export performance during the current plus the previous three years:

Category	Performance (Rupees in Crores)
One Start Export House	15
Two Star Export House	100
Three Star Export House	500
Four Star Export House	1500
Five Star Export House	5000

Note: 1. Manufacturer exporters in Small Scale Industry/Tiny Sector/Cottage Sector, Units registered with KVICs/KVIBs, Units located in North Eastern States, Sikkim and J&K, Units exporting handloom/handicrafts/hand knotted or silk carpets, exporters exporting to countries in Latin America/CIS/sub-Saharan Africa as listed in Appendix-9, units having ISO 9000 (series)/ISO 14000(series)/WHOGMP/HACCP/SEI CMM level-II and above status granted by agencies listed in Appendix-6, exports of services and exports of agro products shall be entitled for double weightage of exports made for grant of Start Export House status.

2. Exports made on re-export basis shall not be counted for the purpose of recognition.

3. Exports made by a subsidiary of a limited company shall be counted towards export performance of the limited company for the purpose of recognition only if the limited company has a majority share holding in the subsidiary

company.

4. In case the recognition is claimed based upon the current year's export performance, same shall be considered only in case the exporter has export performance during any one of the preceding three years

as well.

3.5.2.1 Privileges
A Star Export House shall be eligible for the following facilities:

(i) Licence/certificate/permissions and Customs clearances for both imports and exports on self-declaration basis;

(ii) Fixation of Input-Output norms on priority within 60 days;

(iii) Exemption from compulsory negotiation of documents through banks. The remittance, however, would continue to be received through banking channels;

(iv) 100% retention of foreign exchange in EEFC account;

(v) Enhancement in normal repatriation period from 180 days to 360 days;

(vi) Entitlement for consideration under the Target Plus Scheme; and

(vii) Exemption from furnishing of Bank Guarantee in Schemes under this Policy."

121) Chapter 3 of the EXIM Policy mentions various 'promotional measures' and in para 3.2.5 thereof, it contained, inter alia, procedure for availing the benefit under TPS. Among other things, it was stipulated that the last date for filing of such applications shall be 31 st of December and that the duty credit certificate shall be valid for a period of twenty four months

from the date of issue, with a clear stipulation that revalidation of duty credit entitlement certificate shall not be allowed.

122) As is clear from the aforesaid provisions of TPS, the Central Government had announced an export incentive scheme under which star export houses were entitled to a duty free entitlement certificate at varying rates, depending on the quantum of incremental growth in exports achieved by them over their exports in the previous year. In terms of para 3.7.6, the Central Government issued Notification No. 32/2005 dated April 08, 2005 whereby it notified the duty credit of TPS which could be availed of in the course of import of any inputs, capital goods, including spares, office equipment, professional equipment and office furniture, provided the same is freely importable under the ITC (HS) classification of export and import items for their own use and that of supporting manufacturers, as declared in the application 17D. The

exporters in these cases claim that relying on the aforesaid Scheme, they ensured that they achieved incremental exports.

123) Thereafter, however, the Central Government, in exercise of powers conferred by Section 5 of the Act issued Notification bearing No. 48 (RE 2005)/2004-2009 dated February 20, 206. Vide this Notification, the Government amended the list of exports enumerated in para 3.7.5 of the FTP thereby excluding the exports of all types of forms of petroleum

products covered under ITC (HS) codes 2706-2715 for the purpose of calculation of TPS and computation of its entitlement. This amendment was made effective from April 01, 2005 in respect of exports effected during April 01, 2005 to March 31, 2006. The relevant portion of the said Notification, with which we are concerned, reads as under:

> "6. In para 3.7.5, the following shall be inserted after sub para 3.7.5(f)
>
> (g). Ores and Concentrates, of all types and in all forms.
>
> (h) Cereals, of all types.
>
> (i) Sugar, of all types and in all forms.
>
> (j) Crude/Petroleum Oil & Crude/Petroleum based Products covered under ITC HS codes 2709 to 2715, of all types and in all forms."

124) It may be recollected that in para 3.7.5, certain items are specified which are not to be taken into account for calculation of exports performance or for computation of entitlement under the TPS. The effect of the aforesaid amendment was to exclude the aforementioned four items as well insofar as calculation of export performance or computation of entitlement under the TPS is concerned.

125) Another amendment to the TPS was made vide Notification No. 8(RE 2006)/2004-2009 dated June 12, 2006. It also pertained to the exports effected during April 01, 2005 to March 31, 2006. By this Notification, para 3.7.3 was substituted by the following para:

> "The entitlement under this scheme would be contingent on the minimum percentage incremental growth of 20% in FOB value of exports in the current licensing year over the previous licensing year, and the rate of entitlement shall be 5% of the incremental growth."

126) Original para 3.7.3, which is in respect of 'entitlement' under the TPS mentioned that the said entitlement would be contingent on the minimum percentage incremental growth in FOB value of exports in the current licensing year over the previous licensing year. The percentage incremental growth was subsequently stipulated in the table provided under the said para. As per that, if the incremental growth was 20% and above to below 25%, duty credit entitlement provided was 5%. In case of incremental growth of 25% or above, but below 100%, the duty credit growth entitlement was to the tune of 10%. On incremental growth of 100% and above, duty credit entitlement stipulated was 15% (of 100%). However, by way of amendment, the minimum percentage incremental growth was specified as 20% in the FOB value of exports in the current year over the previous year and entitlement was made uniform @ 5% of the incremental growth.

127) These Notifications are challenged on the ground that these export houses had achieved the desired target by making necessary exports within the stipulated period, i.e. April 01, 2005 to March 31, 2006 and thus got vested right to avail the entitlement as contained in para 3.7.6, which could not be reduced to 5%. It was also submitted that the

various items exported included all types of forms of petroleum products covered under ITC (HS) codes 2706-2715 and these items could not be excluded by the aforesaid amendment. In nutshell, submission was that by giving retrospective effect to the amendment, which was in any case impermissible, even the vested right of these exporters was taken away. It can, thus, be seen that the arguments on vested right and retrospectivity are the same and the counsel who appeared in these matters advanced identical legal submissions.

128) We have already discussed these aspects in detail. To recapitulate, it is held by us that Section 5 of the Act does not empower the Government to make amendments with retrospective effect, thereby taking away the rights which have already accrued in favour of the exporters under the Scheme. No doubt, the Government has, otherwise, power to amend,

modify or withdraw a particular Scheme which gives benefits to a particular category of persons under the said Scheme. At the same time, if some vested right has accrued in favour of the beneficiaries who achieved the target stipulated in the Scheme and thereby became eligible for grant of duty credit entitlement, that cannot be snatched from such persons/exporters by making the amendment retrospectively. In the present case, we find that Section 5 of the Act does not give any specific power to the Central Government to make the Rules with retrospective effect. The Central Government is authorised to make

Rules/Schemes under the said provision as a delegatee, which means that the EXIM Policy/Scheme framed under the said provision is by way of delegated legislation. There has to be specific power to make the amendments with retrospective effect, which are lacking in the instant case. Moreover, even if there is such a power, it cannot take away vested rights which have accrued in favour of particular persons/exporters. We have already enlisted number of judgments of this Court taking such a view. A few such cases laying down the aforesaid principle are:

(i) Regional Transport Officer, Chittoor & Ors. v. Associated Transport Madras (P) Ltd. & Ors.[20]

(ii) Accountant General & Anr. v. S. Doraiswamy & Ors.[21]

(iii) A.A. Calton v. Director of Education & Anr.[22]

(iv) Chairman, Railway Board & Ors. v. C.R. Rangadhamaiah & Ors.[23]

129) Keeping in view the aforesaid legal position, we embark on the discussion relevant for the purposes of these cases, namely, pertaining to TPS.

130) TPS, which was introduced in EXIM Policy 2004-2009 on August 31, 2004, adopted some of the features of the earlier Schemes in the EXIM Policy 2002-2007 and introduced the concept of Multi-Entitlement Rates,

[20] (1980) 4 SCC 597

[21] (1981) 4 SCC 93

[22] (1983) 3 SCC 33

[23] (1997) 6 SCC 626

thus, allowing higher entitlement rates for higher growth. The Multi-Entitlement Rates depended upon the quantum of incremental growth achieved by particular exporters. As taken note of above, the TPS prescribed three rates of entitlement based on growth. It shows that TPS was in the nature of a reward Scheme and was somewhat different from the earlier Schemes which seek to neutralize the duty paid by the exporter. It intended to accelerate growth in export by rewarding star export houses who have achieved a quantum growth in exports.

131) Vide Notification No. 32/2005 dated April 08, 2005, the Central Government amended para 3.7.8 and instead of three rates of entitlement based on growth, it prescribed one single rate, i.e. 5% of the incremental growth. In replies given by the Government, no cogent or valid reason is given for this move. Interestingly, comments are made about the misuse of earlier Scheme in the EXIM Policy 2002-2007 and the evidence that surfaced during the said investigation, particularly with respect to the alleged dubious practices adopted by some exporters who had inflated their turnover in respect of gold and diamond exports and it is mentioned that under these circumstances, for 'anticipating misuse', the Government came out with the aforesaid Notification. The amendment Notification is justified on the ground that in the Scheme itself it had preserved the right to change the eligibility criteria and rate of entitlement effective from the beginning of the year, in public interest.

Thus, the action is justified on the ground that such a power was reserved in the TPS itself and that measure was taken to avoid misuse by unscrupulous exporters. Nowhere it is stated that there was misuse by any of these parties.

132) Pertinently, it is also not denied that these petitioners/exporters had achieved the quantum/incremental growth, as stipulated in the TPS, which made them eligible to get the rewards under the said Scheme. These exporters, therefore, had fulfilled the conditions contained in the TPS. The Scheme was floated to accelerate quantum growth in exports and when those star export houses achieved the quantum growth in exports, as stated in para 3.7.3, they would naturally become entitled to

a particular percentage of duty credit entitlement depending upon the quantum of growth achieved. These exporters, thus, got vested right to avail the duty credit entitlement and achieve higher rate, i.e. 10% or 15%, as the case may be. Reducing the same to 5% would clearly amount to taking away their vested right with the issuing of the Notification and making them effective retrospectively.

133) Likewise, no cogent explanation is coming forward for adding four items by amending para 3.7.5 vide Notification No. 48 (RE 2005)/ 2004-2009 dated February 20, 2006. The only argument advanced at the time of hearing was that the Government felt that benefit of TPS should not be

extended to the exporters of these items. That may be a policy decision and the Government is empowered to take such a decision. It may be noted that in para 3.7.5 of TPS, as was originally provided, certain items of exports were specifically mentioned, which were not to be taken into account for calculation of export performance or for computation of entitlement under the Scheme and the items now added vide Notification No. 48 (RE 2005)/2004-2009 dated February 20, 2006 were not mentioned therein. If the Government realised afterwards that export of these items should not have been given the benefit of TPS and extending the benefit to now excluded items was an ill-considered move, though the Central Government was free to withdraw it in respect of such items but it could do so only prospectively, but was not entitled to do so with effect from the back date, i.e. April 01, 2005, by taking away the vested right that had already accrued in favour of exporters of these items.

134) As a result, we hold that Notification No. 48/2005 dated February 20, 2006 and Notification No. 8/2006 dated June 12, 2006 cannot be applied retrospectively and they would be effective only from the dates they were issued.

135) Writ Petition (Civil) No. 27 of 2008, Transfer Case (Civil) Nos. 32 and 33 of 2007 (which were the writ petitions filed by exporters before the High

Court) are, thus, allowed in the aforesaid terms. The Transfer Case

arising out of Transfer Petition (Civil) No. 568 of 2014, which was the writ appeal filed by DGFT before the High Court is dismissed thereby confirming the order of the Gujarat High Court allowing the writ petition filed by the exporter, namely, M/s. Welspun India Limited.

.....J.
(A.K. SIKRI)

.....J.
(ROHINTON FALI NARIMAN)

NEW DELHI;
OCTOBER 27, 2015.

ITEM NO.1C COURT NO.13 SECTION III
(For judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 554/2006

DIRECTOR GENERAL OF FOREIGN TRADE & ANR Appellant(s)

VERSUS

M/S KANAK EXPORTS & ANR. Respondent(s)

WITH
C.A. No. 1587/2006

T.C.(C) No. 32/2007

T.C.(C) No. 33/2007

T.C.(C) No. 36/2007

T.C.(C) No. 1/2008

T.C.(C) No. 3/2008

W.P.(C) No. 27/2008

T.C.(C) No. 49/2009

W.P.(C) No. 343/2009

W.P.(C) No. 246/2010

C.A. No. 658/2006

C.A. No. 1589/2006

T.C.(C) No. 107/2015
@ TP(C) No. 568/2014

Date : 27/10/2015 These matters were called on for pronouncement of

judgment today.

For Parties Mr. Annam D. N. Rao,Adv.

Mr. Tarun Gulati, Adv.
Mr. Sparsh Bhargava, Adv.
Mr. Kishore Kunal, Adv.
Mr. Shashi Mathews, Adv.
Mr. Anupam Mishra, Adv.

Mr. Neilhiloreth, Adv.
Mr. Manish Rastogi, Adv.
Mr. Rony O.John, Adv.
Mr. Praveen Kumar,Adv.

Mr. S. S. Shroff,Adv.
Mr. Kamlendra Mishra,Adv.

Mr. K. R. Sasiprabhu,Adv.
Mr. Somiran Sharma, Adv.
Mr. Vishnu Sharma, Adv.
Mr. Biju P. Raman, Adv.
Mr. Rohan Shah, Adv.
Mr. Alok Yadav, Adv.
Mr. Raghav Shankar, Adv.
Mr. Aswin Dave, Adv.
Ms. Swati, Adv.

Mr. E.R. Kumar, Adv.
Mr. Nitin Thukral, Adv.
Mr. Galav Sharma, Adv.
Mr. Sameer Parekh, Adv.
For M/s. Parekh & Co.

Ms. Bina Gupta,Adv.
Ms. Sushma Suri,Adv.

M/s. Parekh & Co.,Adv.

Mr. V. K. Verma,Adv.

Hon’ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon’ble Mr. Justice Rohinton Fali Nariman.

The matters are dismissed/disposed of/allowed in terms of the signed reportable Judgment.

Pending Interlocutory Application(s), if any, shall stand disposed of accordingly.

(Ashwani Thakur) (Renu Diwan)
COURT MASTER COURT MASTER
(Signed reportable judgment is placed on the file)