

(2004) 07 GUJ CK 0040

In the Gujarat High Court

Case No : Special Civil Application No. 1676 of 2004

Adani Exports Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 23-07-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 20(1), 226, 286
Contract Act, 1872 — Section 70
Customs Act, 1962 — Section 14, 157, 2(41), 25, 25(1)
Finance Act, 1936 — Section 18
Foreign Trade (Development and Regulation) Act, 1992 — Section 5, 5(3), 6
Shipping Bill and Bill of Export (Form) Rules — Rule 2

Citation : (2004) 07 GUJ CK 0040

Hon'ble Judges : M.S. Shah, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Dushyant Dave and Kamal Trivedi and Vikram Nankani, Rakesh Gupta, for Trivedi and Gupta for Petitioner Nos. 1-2, for the Appellant; Raju Ramchandran, Addl. Solicitor General and Asim J. Pandya, for Respondent Nos. 1-2, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Shah, J.—In this petition under Article 226 of the Constitution, the first petitioner-Company [hereinafter referred to as "the petitioner"] has challenged the amendments/corrections to paragraph 3.7.2.1 of the Export Import Policy [the Exim Policy] by the notifications dated 28.1.2004 (para 5) and 21.4.2004 read with the notification dated 23.4.2004 issued by the Government of India in exercise of the powers u/s 5 of the Foreign Trade (Development & Regulation) Act, 1992 read with para 1.1 of the Export & Import Policy 2002-07. The petitioner has also challenged paragraphs 1, 2 and 3 of the public notice dated 28.1.2004 issued by the Director General of Foreign Trade (DGFT) [the second respondent herein] amending paragraph 3.2.6 of the Hand Book of Procedure.

The amendments/corrections to the EXIM POLICY and the public notice pertain to

Duty Free Import Entitlement for Export Status Holders.

In particular, the petitioner has challenged the aforesaid notifications and the public notice in so far as the amendments/corrections are expressly made applicable to the exports made from 1.4.2003 i.e. prior to the date of the notifications and the public notice.

2. The relevant provisions falling for consideration are as under :-

2.1 Under the Exim Policy 2002-07 as introduced on 1.4.2002, the Central Government announced "Special Strategic Package for Status Holders" [hereinafter referred to as "the Special Scheme" or "the Incentive Scheme"]. The term "status holder" is defined by paragraph 9.53 of the Exim Policy as under :-

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

As per the "Special Scheme", the status holders are eligible for certain special facilities. For the purposes of the present petition, the other facilities are not relevant, but the Exim Policy as amended upto 31.3.2003 provided for the following new facility :-

"(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/suporting manufacturer/job worker. The entitlement/good shall not be transferable."

[This clause was initially numbered as (vi) in the EXIM POLICY amended upto 31.3.2003 and appears to have been subsequently renumbered as (vii)]

The Special Scheme as amended upto 31.3.2003 provided that on the basis of the exports made from 1.4.2003 to 31.3.2004, duty free import entitlement shall be provided from 1.4.2004.

2.2 By the impugned notification dated 28.1.2004 (Annexure "B"), facility No. (vii) is retained in the same terms, but the following notes are added to the same :-

"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 units operating under SEZ/EOU/EHTP/STPI Schemes or products manufactured by them and exported through DTA units.

(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 2003-04) to a status holder if the applicant as well as the non-status holder have less than 25 percent 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 percent 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 reserves 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 1.4.2003.

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

2.3 By the impugned public notice dated 28.1.2004 (Annexure "C"), amendments have been made to the Hand Book of Procedure, particularly to paragraphs 3.2.5 and 3.2.6 of the Special Scheme for duty free import entitlement for the status holders. While most of those amendments are procedural, the following amendment is significant for the purposes of the present petition:-

"2. In terms of para 3.2.5 of Handbook of Procedures (Volume I), 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. Food 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 I) the following

items would not be allowed for imports under Duty Free Credit Entitlement Certificate for Status Holders :-

a. Agricultural products which fall under Chapters 1024 of ITC (HS) Classification of Export and Import items."

Para 3.2.5 of the Handbook is in the same terms as para 3.2.7.1. of the Exim Policy (as amended upto 31.3.2003) plus the presumption of the jurisdictional authority, application form for duty free credit entitlement certificate, form of statement of imports to be made within one month from expiry of the validity of duty free entitlement certificate.

2.4 When the petition was being heard on 15.4.2004, the learned Addl. Solicitor General indicated that exclusion of exports of the aforesaid four items from the benefits of the Special Scheme and also exclusion of imports of agricultural products as provided in the DGFT's public notice dated 28.1.2004 were as contemplated by the Government under Note 3 and, therefore, the Hon'ble Minister for Commerce has rejected the petitioner's representation dated 11.2.2004 and that to obviate any doubt whether exclusion of the four categories of exports and exclusion of import of the agricultural products was the decision only of the DGFT or whether it was of the Central Government, the Central Government would issue necessary notification in this behalf. Thereafter, the Government issued notification dated 21.4.2004 stating as under :-

GOVERNMENT OF INDIA

MINISTRY OF COMMERCE & INDUSTRY DEPARTMENT OF COMMERCE NEW DELHI

NOTIFICATION NO.38(RE-2003)/2002-2007

DATED : 21ST April 2004

S.O.(E) - In exercise of powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992 read with paragraph 1.1 of the Export and Import Policy, 2002-2007 as amended from time to time, the Central Government hereby makes the following correction in Exim Policy, 2002-07 (as amended upto 31.3.2003)

1. In terms of para 2 and 3 of the Public Notice No.40 dated 28.01.2004, exports of certain products for calculation of entitlement as well as imports of certain products were excluded from the purview of the Duty Free Entitlement Certificate for Status Holders. The said provision is hereby inserted in the Exim Policy by correcting Notification No.28 dated 28.01.2004 as under :

In Chapter-3, in paragraph 3.7.2.1, after sub-paragraph (vii), the following note is inserted after No.5 namely :-

"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

- a. Rough, uncut and semi polished diamonds
- b. Gold, Silver in any form including plain jewellery thereof
- c. Food grains sourced from Central pool maintained by FCI
- d. Items exported under free shipping bills

Note 7 -The following items would not be allowed for imports under Duty Free Credit Entitlement Certificate for Status Holders :

Agricultural products, which fall under Chapters 1-24 of ITC (HS) Classification of Export and Import items".

This issues in Public interest.

(L MANSIGH), Director General of Foreign Trade Another correction notification dated 24.4.2004 was issued with the same contents, but with the description of the author of the notification as Director of Foreign Trade & Ex-Officio Secretary to the Central Government. Both the notifications dated 21st and 24th April 2004 have also been challenged by amending the petition which resulted into another hearing given to both the parties.

3. The basic facts averred in the memo of the petition and challenges to the notification and the public notice as raised in the petition are as under :-

3.1 It is the case of the petitioner that from 1.4.2003, having regard to the provisions of the Special Scheme, the petitioner exported wide range of products to various countries. The exports made by the petitioner are either (a) direct exports or (b) third party exports, all of which are recognized and are reckoned for the purposes of ascertained export performance levels for status holders. The petitioner has also realized the sale proceeds of exports in all cases (except the two categories of cases referred to in para 12 of the petition). This fact is evidenced by the Bank Realization Certificates (BRC) which are either in the name of the petitioner or in the joint names of the petitioner as well as the supporting manufacturer or the nominated agencies such as Public Sector Undertaking like the State Trading Corporation of India Ltd. who on behalf of and/or jointly alongwith the petitioner exported the goods as "third party exports". All the goods exported by the petitioner-Company are permissible for export and have been exported in accordance with the relevant provisions. In case of all the exports, whether direct or third party exports, shipping bills are filed indicating the name of the petitioner (singly or jointly) as an exporter.

3.2 Relying on the provisions of the aforesaid scheme and based on the promises and assurances contained in the said scheme (as amended on 31.3.2003), between 1.4.2003 and 27.1.2004 the petitioner has exported goods of an aggregate value of Rs.3,429.78 Crores, thus achieved an incremental growth of more than 25% over the exports during the year ended 31.3.2003 as prescribed in the Scheme.

3.3 The impugned notifications and the public notice are also challenged on the ground that they are contrary to the avowed purpose of the Exim Policy to boost exports and also to render exports competitive in the international market. Since the provisions totally negate the object and purpose to promote exports, the same are arbitrary and unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution conferring the fundamental right to carry on the business of exporting.

3.4 While challenges levelled against notes 1 to 3 and 6 to 7 will be enumerated while discussing them, it is necessary to set out the most important challenge which is to Note 4 of the notification. Note 4 providing that "these guidelines will be applicable to the exports made on or after 1.4.2003" is challenged on the ground that the same gives retrospective effect to the impugned notification. Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 does not confer any power on the Central Government to make amendments to the Exim Policy with retroactive and retrospective effect. The Central Government is a mere delegate of the legislature and in absence of any power conferred by the legislature, the power to amend the Exim Policy cannot be exercised retroactively or retrospectively. Notes 1 to 3 and 6 to 7 added by the impugned notifications are not mere guidelines. They are substantive changes which amount to inserting fresh and new conditions under the garb of amendment. Note 4 is also violative of the petitioner's fundamental rights under Articles 14 and 19(1)(g) of the Constitution.

3.5 The petitioner-Company has also invoked the doctrine of promissory estoppel in the following terms :-

"The Company exported goods during the period from 1.4.2003 to 27.1.2004 based on the promises and assurances and representations contained in sub-para (vi) of paragraphs 3.7.2.1. While calculating the cost of exports and the price the Company took into account the 10% duty free entitlement. The Company satisfies all the conditions contained in sub-para (vii) of para 3.7.2.1. The Company altered its position accordingly. The respondents are, therefore, estopped from going back on the promises and assurances contained in para 3.7.2.1 in the said Exim Policy as amended upto 31.3.2003. Applying the principles of promissory estoppel as laid down by the Hon'ble Supreme Court and this Hon'ble Court, the respondents are estopped from changing the said Exim Policy to the detriment and prejudice of the petitioners."

Paragraphs 2 and 3 of the impugned public notice dated 28.1.2004 excluding certain export goods from the purview of the special scheme are challenged on the ground that the Director General of Foreign Trade (respondent No.2 herein) cannot usurp the power of the Central Government and restrict import or export items by or through the Handbook. The said paragraphs are, therefore, ab initio void. Exclusion of rough, uncut and semi-finished diamonds and the goods exported under free shipping bills are challenged as going beyond the Exim Policy.

4. At the first hearing of the petition on 10.2.2004, while issuing notice for final disposal, this Court had passed an order permitting the petitioner to make a representation to the respondents against the impugned amendments, particularly with reference to Note 4 stating that the amended guidelines will be applicable to the exports made on or after 1.4.2003, without prejudice to the petitioner's right to make a separate representation against the change in policy even with prospective effect. This Court had clarified that pendency of this petition did not preclude the respondents from considering and deciding such a representation. The petitioner accordingly made the representation which came to be rejected by the order dated 19.3.2004.

5. On behalf of the respondents, affidavit in reply dated 22.3.2004 is filed by the Joint Director General of Foreign Trade. Written submissions are also filed. The major defences are -

5.1 The impugned notifications and the public notice are in the nature of clarification of the Duty Free Credit Entitlement Scheme notified by the Central Government under the Exim Policy as amended upto 31.3.2003. When the clarification is made in the Scheme, it always relates back to the date of issuance of the original scheme and, therefore, it cannot be said that any retrospective effect has been given by amending the policy. The scheme was announced on 31.3.2003. The benefit of the scheme is made available with effect from 1.4.2004. The export entitlements are to be calculated for the current financial year i.e. the whole of the financial year 2003-04 and the clarification has been made on 28.1.2004 prior to the year coming to an end. In the past also, the export and import policy had been amended making amendments therein relating to the current financial year. The amendments to the taxation and fiscal laws are usually made during the current financial year. The duty free import entitlement to be given on and after 1.4.2004 is to be calculated only on the basis of exports made during the current financial year 2003-04 and hence, no retrospective amendment has been made. The Government has clarified the term "incremental growth in exports" and the exports of particular nature have been excluded from the purview of the scheme.

5.2 After giving the background of the scheme, the respondents have given justification for clarifications. Since the above mentioned scheme was a new initiative, a large number of representations were received from Trade Associations/Export Promotion Councils as well as individual exporters seeking clarifications on various points relating to the implementation of the scheme. At the same time, the Government received reports that some status holders were trying to increase their export turnover by taking credits for the export of others without putting any significant effort in increasing exports. Such diversion/enhancement of exports merely to increase benefits under the scheme in that manner would not lead to the intended objective of the incremental growth in exports. Such transactions amounted to misuse of the scheme. Considering this aspect in mind, certain clarifications were introduced by way of impugned

notifications and public notice. During the period of about 6 to 7 months from the date of announcement of the scheme, it was reported by the Department of Revenue to the DGFT on the basis of intelligence gathered that the scheme was being misused by status holders by entering into contracts with various exporters for arrangements showing themselves as third party exporters. Such contracts were executed on stamp papers. 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. These "contracts" were found to have been entered into between the parties as merely a paper arrangement with a view to claim the benefit of Duty Free Credit Entitlement on the export of others. 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. To contain this kind of misuse, one of the major recommendations of the Department of Revenue was to put necessary restriction in the scheme by way of clarification by not allowing third party exports from being counted for the purpose of calculating the incremental growth in exports subject to certain conditions. The impugned notifications and public notice have been issued with a view to clarify the aspect as to how incremental growth in export should be reckoned. From Note 1 which was inserted after sub-paragraph (vii) of paragraph 3.7.2.1 in Chapter 3, it is clear beyond doubt that third party exports are not totally excluded from the scheme. The third party exports are to be excluded for reckoning the incremental growth in exports, if the supplies made or export performance effected by a non-status holder (merchant exporter/ manufacturer exports with any export performance in 2003-2004) to a status holder, if the applicant as well as the non-status holder are having less than 25% incremental growth for their respective previous years direct export turnover. This clearly indicates that by clarification certain types of exports which are merely paper exports and which do not lead to genuine export growth have been kept outside the purview of the scheme. This has been done in public interest and in exercise of powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992, and Export-Import Policy.

5.3 The petitioner's export performance was going down steadily -

Years	Rs.(in Crores)
1997-98	1634.91
1998-99	1109.24
1999-2000	1171.06
2000-01	987.98
2001-02	869.98
2002-03	377.43

In the year 2002-03, India's exports increased by 22%. As compared to the earlier performance, in the year 2003-2004, the petitioner's exports suddenly catapulted to Rs.3,400 crores and that too within the first 9 months. During the period i.e. April-January 2003-04, India's export grew by only 7.11% in rupee terms.

5.4 The basic objective of the scheme stands defeated unless appropriate safeguards are built in. Such safeguards can be incorporated only by amendment of the scheme, as would be evident from the reports received from the Revenue

Intelligence Agency of DOR and other field formations. The matter was deliberated upon and after detailed discussion with all concerned, it was decided to impose conditions so that the misuse of the scheme and undue out go of the Government revenue could be prevented. So unlike other notifications and public notices, in this case the said notification and the public notice categorically stipulate the reasons for imposition of all such essential conditions so that the doubts in the mind of the exporters can be clarified and the misuse of the provisions of the policy can be minimized or stopped altogether. This has been done solely in the public interest.

5.5 As regards the representation made by the petitioner against retrospective effect being given to the notification, the respondents have stated as under :-

"The petitioners made a representation to the Hon'ble Union Minister for Commerce with a copy to the Director General of Foreign Trade, New Delhi on 11th February 2004. The representation of the petitioners was considered dispassionately. However, the request of the petitioners made in the representation was rejected on the grounds set out in the speaking order dated 19.3.2004."

5.6 As regards promissory estoppel and legitimate expectation, the respondents have stated as under in the reply affidavit :-

"The Import and Export Policy can be amended or rescinded by the Central Government at any time and by issuance of Exim Policy, no promise is held out by the Central Government. The petitioners, therefore, cannot invoke the doctrine of promissory estoppel against the respondents. Without prejudice to the contention that in this case the doctrine of promissory estoppel does not apply, it is submitted that to invoke the doctrine of promissory estoppel, the petitioners are required to satisfy certain requirements and they have to specifically prove that on the basis of the promise held out by the Government, they have altered their position. In the present case, the petitioners are in the business of exports and are holding Golden Superstar Trading House Certificate. The export business is the routine business of the petitioners. The petitioners have not given any details in respect of the so-called export growth achieved by the petitioners and what extra efforts the petitioners have made to achieve the said growth. Unless the petitioners establish that on the basis of some promise the petitioners have altered their position in such a way that equity requires the other side to be bound by the doctrine of promissory estoppel, the petitioners cannot be allowed any relief on the basis of that principle. In this case, in absence of such details and proper pleading to that effect, the Court cannot examine the grievance of the petitioners on the basis of vague assertion of violation of doctrine of promissory estoppel and legitimate expectation. Even otherwise as said above, this principle has no application in the present case."

6. The petitioner has filed rejoinder affidavit dated 9.4.2004 of its General Manager (Legal) placing on record the details of the direct exports, third party

exports and total exports made by the petitioner from 1994-95 to 2002-03 and has further given the details of item-wise exports, both third party as well as direct exports, made during the period from 1.4.2003 to 27.1.2004 and the exports made during the entire year 2003-04. Besides at the hearing of the petition, the learned counsel has submitted a note to highlight the petitioner's grievances and also written rejoinder to the written submissions on behalf of the respondents. Reference to this material will be made during discussion.

7. At the hearing of the petition, Mr Dushyant Dave and Mr KB Trivedi, learned counsel for the petitioner have raised the following contentions :-

7.1 What the impugned notifications and the public notice have done is not merely to give clarifications or make corrections but they have made substantive amendments.

7.2 The amendments made by the impugned notifications are illegal as they go beyond the avowed object of the Exim Policy to boost exports. The incentives were given to the exporters to give a fillip to the exports by giving incentives to status holders like the petitioner who has admittedly shown the incremental growth of more than 25% with an export of more than Rs.25 crores. The very idea of including third party exports in the said scheme introduced from 1.4.2003 was to help the small units which on their own would never be able to tap the international market. By excluding such third party exports, the impugned notifications defeat the very object of the Act and the Exim Policy. Hence, the amendments are violative of Article 14 of the Constitution.

7.3 Exclusion of various items through the trade notice issued by the DGFT is illegal and without authority of law as the DGFT cannot amend the policy for which the Central Government is the only competent authority. The Central Government not having issued any notification in this behalf till 31.3.2004, the DGFT had no authority to exclude any items from the special scheme. The public notice is, therefore, contrary to and in violation of Section 5(3) of the Foreign Trade (Development & Regulation) Act, 1992.

7.4 The Government notifications dated 21/24.4.2004 seek to give further retrospective effect to Notes 6 and 7 added in para 3.7.2.1 to the exports made between 1.4.2003 and 31.3.2004. Such a retrospective effect cannot be given even by delegated legislation.

7.5 In any view of the matter, relying on the provisions of the special scheme which was applicable to the exports made from 1.4.2003 to 31.3.2004, the petitioner had put in extra efforts for the growth of exports both direct exports as well as third party exports for various categories of export goods and vested rights had accrued in favour of the petitioner on the basis of the special scheme. The impugned notifications in so far as they apply the amendments to the special scheme even to exports made during the period between 1.4.2003 to 27.1.2004 take away the vested rights of the petitioner.

7.6 The petitioner can challenge the retrospective effect given to the amendments which take away the petitioner's vested rights, even without invoking the principle of promissory estoppel or the doctrine of legitimate expectation. Reliance is placed on a large number of authorities to which reference will be made at an appropriate stage.

8. On the other hand, Mr Raju Ramchandran, learned Additional Solicitor General instructed by Mr Asim Pandya, learned Additional Standing counsel for the Central Government for the respondents has opposed the petition and has made the following submissions :-

8.1 Public interest demands that duties leviable under the relevant taxing statutes like the Customs Act must be levied. However, in order to give boost to exports, when the Government introduced a special incentive scheme for giving duty free entitlements to exporters who achieve incremental growth in exports, the intention was to have real growth in exports and, therefore, when the Government found that the scheme was being misused to show paper growth in exports by certain parties solely for the purpose of claiming incentives under the special scheme, without there being actual growth in real exports, the Government has not only the power, but it is duty bound to prevent abuse or misuse of the scheme and for that purpose to make necessary clarifications in the scheme or even to rescind or withdraw the entire scheme. Since such clarifications have been made midstream in January, 2004 [before expiry of the period (2003-04) during which the exports are to be made] and before commencement of the period for which duty free import entitlements are to be given i.e. from 1.4.2004, the impugned notification and the public notice are mere clarifications and are not amendments.

8.2 Even if they are treated as amendments to the scheme, they are not retrospective because the incentives were never to be given before 1.4.2004 and issuing guidelines to prevent misuse of the scheme before the grant of incentives from 1.4.2004 does not amount to the amendments being given retrospective effect. It is submitted that the amendments made in January, 2004 for the purpose of giving incentives from 1.4.2004 may be in relation to the exports made between April 2003 and March 2004. That does not amount to giving retrospective effect, but means only retroactive operation of the clarifications or the amendments.

8.3 Section 5 of the Foreign Trade (Development & Regulation) Act and para 1.1 of the EXIM POLICY preserve the right of the Government to amend the policy in public interest. A statutory power to amend the policy, after noticing the misuse of the policy for purposes for which it was never intended, can never 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 will not take any action whatsoever. That apart, the doctrine of legitimate expectation can never curtail a statutory provision, far less can it be pressed into service to assail an

action taken entirely to sub-serve the public interest.

8.4 As per the settled legal position, 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". The writ Court would not interfere with the Government's decision in an economic policy matter merely because another policy decision may have been fairer or wiser or more logical. The Court would not interfere unless the decision is patently arbitrary, discriminatory or mala fide. Reliance has been placed on a large number of decisions to which reference will be made hereafter.

8.5 Any economic decision as contained in the notifications granting monetary benefits can be withdrawn even before expiry of the period for which such benefit was originally given if the Government's decision is based on relevant material justifying the clarification/change of the policy and it is not for the Court to go into the question of sufficiency or otherwise of the material, once there is some relevant material to justify such decision. Strong reliance is placed on the decision in *Kasinka Trading and another, etc. etc. Vs. Union of India and another, .*

8.6 Neither in the petition nor in the representation made by the petitioner pursuant to the liberty given by this Court while issuing notice, the petitioner had placed any material to show that it has suffered any detriment by acting upon the policy which was in force prior to 28.1.2004 or that it would suffer any prejudice after the effect is given to the impugned notifications and public notice dated 28.1.2004. It is, therefore, submitted that the petitioner not having availed of the opportunity to produce such material either in the representation made before the Government or in the memo of the petition, it is not open to the petitioner to rely upon the material produced alongwith the affidavit in rejoinder.

9. Before examining the contentions urged on behalf of the petitioners for challenging the impugned notification and the public notice, it is necessary to bear in mind the following caveat sounded by the Apex Court in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, (Page 605) as to how the Court would deal with the challenge to a policy decision of the Government in economic matters, (which principle has again been reiterated by the Apex Court in *BALCO Employees Union (Regd.) Vs. Union of India and Others*, :-

"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 and Others Vs. Union of India (UOI) and Others*, . 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 given by Frankfurter, J. in *Morey v. Doud* 343 US 457 : (1957) 1 L Ed.2d 1485 :-

"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 pedestal 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 strait-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 problems of Government" as pointed out by the Supreme Court of the United States in *Metropolis Theater Co. vs. State of Chicago* 57 L Ed 730 : 228 US 61 (1912)

"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 : 390 US 747 (1968), 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."

In *Zippers Karamchari Union Vs. Union of India and Others*, , the Apex Court has reiterated the above principle that in matters of trade and commerce or economic policy, the wisdom of the Government must be respected and courts cannot lightly interfere with the same unless such policy is contrary to the provisions of the Constitution or any law or if such policy is wholly arbitrary.

10. In exercise of the powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992, the Central Government has notified the Export and Import Policy for the period 2002-2007. Para 1.1 of the Policy states that the Central government reserves the right in public interest to make any amendments to the Policy in exercise of the powers conferred by Section 5 of the Act. Such amendment shall be made by means of a notification published in the Gazette of India. Para 1.4 of the Policy lays down the principal objectives of the policy as under :-

"1.4 The principal objectives of this Policy are :

[i] To facilitate sustained growth in exports to attain a share of atleast 1% of global merchandise trade.

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

[iii] & [iv]

Para 2.4 of the Policy 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 for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and the Policy. Such procedures shall be included in the Handbooks and published by means of a public notice. Such procedures may, in like manner, be amended from time to time. The Handbook (Vol.I) is a supplement to the Exim Policy.

Para 2.5 of the Policy provides that any request for relaxation of the provisions of the Policy or of any procedure, on the ground that there is genuine hardship to the applicant or that a strict application of the Policy or the procedure is likely to have an adverse impact on trade, may be made to the DGFT for such relief as may be necessary and the DGFT may pass orders or grant such relaxation or relief, as he may deem fit and proper. The discretion is also conferred on the DGFT to exempt in public interest any person or class or category of persons from any provision of the Policy or any procedure, subject to such conditions as he may impose.

11. Chapter 3 of the Exim Policy 2002-07 as amended upto 31.3.2003 provided for various promotional measures for encouraging exports. The basic objects of introducing the Special Scheme in the Exim Policy on 31.3.2003 were stated in the Commerce & Industry Minister's speech in the following words :-

"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 endeavour 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 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 manufacturers."

12. Paragraph 3.7.2.1 (the relevant portion of which is already quoted in para 2.1 of this judgment) enumerates the special facilities for which the status holders are eligible, which are again quoted hereinbelow for the sake of convenience :-

"3.7.2.1 The status holders shall be eligible for the following new/special facilities :-

[i] to [v]

[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."

[This clause was initially numbered as (vi) in the EXIM POLICY amended upto 31.3.2003 and appears to have been subsequently renumbered as (vii)]

The emphasis is not just on increase in exports, but on incremental growth in exports.

13. Taking up the challenges for consideration - Notes 1 and 2

13.0 Petitioner's case

13.1 In the memo of the petition, it is stated that "Notes 1 and 2" to paragraphs 3.7.2.1 inserted by the impugned notification exclude the following exports effected by the petitioner-Company :-

(a) Export of goods which have been purchased by the Company from the manufacturers who may also be exporters in their own rights but not status holders.

(b) Export of goods procured by the Company from the manufacturers thereof who may also be the status holders in their own rights.

(c) The export of goods procured by the Company from EOUs.

13.2 However, in its note submitted at the hearing, the petitioner has stated as under :-

Note 1 (to para 3.7.2.1) added by the notification dated 28.1.2004, excludes 7 categories of exports. The petitioner has no exports which fall under clauses (i), (iii), (iv) and (vii) of Note 1. The petitioner is, however, adversely affected by the remaining three exclusions which read as under :-

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

(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.

13.3 The thrust of the petitioner's contention is that Notes 1 and 2 are illegal and directly hit "the third party exports" which are permissible under the Exim Policy in terms of para 2.34 read with para 9.55 and are also recognized for the purposes of calculating export performance for issue of status certificate. The amendment also runs counter to the basic policy of facilitating sustained growth in exports which is one of the principal objects of the Exim Policy.

Discussion on Notes 1, 2 and 4

14.1 It is true, as contended on behalf of the petitioner, that the export policy itself recognizes third party exports in paras 2.34 and 9.55 of the scheme.

9.55 "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).

General Provisions Regarding Imports and Exports

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

14.2 Para 5 of the impugned notification dated 28.1.2004 sets out the reasons for making clarifications:-

"The Scheme was announced as part of the initiatives taken in the Exim Policy announced on 31st March 2003 with the specific objective of accelerating the incremental growth in exports and to facilitate India emerging as a major base for sourcing different products and services for the rest of the world. It was recognized that status holders would continue playing a significant and increasing role for boosting exports particularly from the small-scale sector, as most of the small scale units would not be in a position to directly access the international market. In view of this, duty free import entitlement @ 10% of the incremental growth in value of exports was allowed, subject to the condition of eligibility on actual user condition, which could be passed on to supporting/associate manufacturers/job worker for ultimate production. Since the Scheme was

intended to be a specific incentive for fast growing status holders, the benefits would be available w.e.f 1st April 2004.

Being a new initiative, a large number of representations have been received from Trade Associations/ Export Promotion councils as well as the individual exporters seeking clarifications on various points relating to the implementation of the Scheme. At the same time, Government has received reports that some Status Holders are trying to increase their export turnover by taking credits for the export of others without putting any significant efforts in increasing exports. Such diversion/enhancement of exports merely to increase benefits under the Scheme in this manner would not lead to the intended objectives of incremental growth in exports. Such transactions amount to misuse of the Scheme. In view of this, on both these counts it has become essential to lay down specific norms for the implementation of the Scheme."

14.3 What the impugned notification dated 28.1.2004 does is not to make "third party exports" illegal or entirely ineligible for getting incentives under the special incentive scheme for status holders, but the basic intention of the scheme was to encourage the exports of products manufactured by Small Scale Industry sector who do not have access to the international market because of lack of required international marketing expertise and the optimum resources to have presence in the international marketing arena. Hence, 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 are having the required marketing skill and have been exporting in previous years as well) to another status holder does not advance the purpose of the scheme. So also, 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 28.1.2004 that the condition of 25% incremental growth of exports will apply both to the applicant-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 in so far 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 terms and not merely to encourage the existing exporters to pool their exports for the purpose of merely giving appearance of the incremental growth of exports.

14.4 At this stage, we may record the clarification made by Mr Raju Ramchandran, learned Addl. Solicitor General that the manufacturers like small scale industries which had not made any exports before the current year (i.e.

2003-04) and who have made such exports for the first time in 2003-04 through a status holder like the petitioner are not required to fulfill the condition of 25% incremental growth in exports for the simple reason that such manufacturers had never made any exports earlier. Of course, the condition of 25% incremental growth of exports would apply to status holders through whom such manufacturers (not having made any exports prior to 2003-04) had exported their goods in the year 2003-04.

14.5 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, the incremental export growth of the group as a whole has been made the basic criterion for availing the scheme. This is also an obvious clarification which does not need any further elucidation.

14.6 Reliance placed by the petitioners on the Circular No. 16 dated 24.12.2002 is of no avail, as the said circular (clarifying that third party exports are applicable for all the export promotion schemes) was issued long before the Special Incentive Scheme was announced on 31.3.2003.

Similarly, reliance placed by the learned counsel for the petitioners on the decision of the Apex Court in *K. Gopinathan Nair and etc. Vs. State of Kerala*, does not carry the petitioners' case any further as the said decision was rendered in the context of the controversy under sales-tax law in the background of the provisions of Article 286 of the Constitution which provide that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place in the course of the import of the goods into, or export of the goods out of, the territory of India. To what of kind of exports, to what extent and in what manner the incentives should be given for exports is a matter altogether different from sales tax liability on a transaction between a manufacturer-exporter and an export house.

14.7 On the issue of exports by Domestic Tariff Area units as merchant exporters on behalf of units operating under SEZ/EOU/EHTP/STPI schemes and exports directly effected by these units (these units are set up for manufacturing goods for exports only), the Government took a decision not to take into consideration such exports for the Special Incentive Scheme because these units have the flexibility to import any item duty free ab initio and as such they do not require the benefits of duty free import under the Special Scheme under consideration.

15. Obviously, these provisions in the impugned notification dated 28.1.2004 are clarifications and cannot be treated as amendments to the scheme. We, therefore, hold that Notes 1 and 2 inserted by the notification dated 28.1.2004 merely amplify what was implicit in the original scheme.

As per the settled legal principle as enunciated in the aforesaid decisions in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, , it is not for this Court to sit in appeal over the wisdom of the Government in such economic matters and such clarificatory amendments cannot, therefore, be treated as arbitrary or

unreasonable restrictions on the petitioner's right to carry on business. In fact, the amendments are to the incentive scheme and they do not impose any restrictions on the petitioner's right to carry on the business of exporting goods.

16. But, as already indicated earlier, the thrust of the petitioner's challenge to application of the clarifications/amendments 1.4.2003 and 28.1.2004 is on the ground that the impugned notification and public notice take away the vested rights of the petitioner. The petitioner has given the charts in Annexure 1 and 3 to their rejoinder affidavit which give the following picture :-

-----								Sr.	Financial
Direct	Third	Total	No.	Year	Exports	Party	Exports		
-----								1	1994-95
125.16		341.00				466.16			
-----								2	1995-96
320.39		455.30				775.69			
-----								3	1996-97
304.55	784.79	1089.34		1996-97	304.55	784.79	1089.34		
1996-97	304.55	784.79	1089.34		1996-97	304.55	784.79	1089.34	
	1996-97	304.55	784.79	1089.34		1996-97	304.55	784.79	
1089.34		1996-97	304.55	784.79	1089.34		1996-97	304.55	
784.79	1089.34		1996-97	304.55	784.79	1089.34		1996-97	
304.55	784.79	1089.34		1996-97	304.55	784.79	1089.34		
1996-97	304.55	784.79	1089.34		1996-97	304.55	784.79	1089.34	
	1996-97	304.55	784.79	1089.34		1996-97	304.55	784.79	
1089.34		1996-97	304.55	784.79	1089.34		1996-97	304.55	
784.79									
-----								4	1997-98
364.99		1269.95				1634.94			
-----								5	1989-99
241.36		867.51				1108.87			
-----								6	
1999-2000		328.50		840.28		1168.78			
-----								7	2000-01
498.63		489.35				987.98			
-----								8	2001-02
409.94		460.04				869.98			
-----								9	2002-03
213.74		163.69				377.43			
-----								10	2003-04
2803.14	1854.24	4656.88		-0	2803.14	1854.24	4656.88		-04
2803.14	1854.24	4656.88		-04	2803.14	1854.24	4656.88		-04
2803.14	1854.24	4656.88		-04	2803.14	1854.24	4656.88		-04
2803.14	1854.24	4656.88		-04	2803.14	1854.24	4656.88		-04
2803.14	1854.24	4656.88		-04	2803.14	1854.24	4656.88		-04
2803.14	1854.24	4656.88		-04	2803.14	1854.24	4656.88		-04

2803.14		1854.24		4656.88			-04		2803.14		1854.24		4656.88			-04	
2803.14		1854.24		4656.88			-04		2803.14		1854.24		4656.88			-04	
2803.14		1854.24		4656.88			-04		2803.14		1854.24		4656.88			-04	
2803.14		1854.24		4656.88			-04		2803.14		1854.24		4656.88			-04	

It is submitted on the basis of the above figures that it is not for the first time in the year 2003-04 that the petitioner has made third party exports. Earlier also, the petitioner was making such exports, but this year the petitioner put in extra efforts to boost third party exports as well as direct exports.

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 exporter/status holder recognized under this Policy or any other EOU/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 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 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

Notes 1 and 2 read with Note 4.

Notes 3 and 6 read with Note 4

19. However, Notes 3 and 6 added by notifications dated 21.4.2004 and 23.4.2004 read with public notice dated 28.1.2004 in so far as they exclude certain export products from the Incentive Scheme cannot be said to be mere clarifications. It may be that the Government may have good reasons to justify exclusion of such export products (the justification to be examined hereafter), but nonetheless exclusion of those products is in the nature of amendment of the Incentive Scheme. The question, therefore, is whether even after taking out exports covered by Notes 1 and 2, the petitioner had acquired any vested rights in duty free import entitlement on the exports between 1.4.2003 and 27.1.2004 of the category of goods covered by Notes 3 and 6.

20. Looking to the language of the Special Scheme as contained in the Exim Policy amended upto 31.3.2003, it does appear that 10% duty free credit entitlement was to follow exports covered by the incremental growth of 25% (as explained above). Under that scheme, it was not a matter of discretion for the DGFT to exclude exports of any of those goods merely by stating that rough diamonds or food items were to be excluded. The business community at large was entitled to proceed on the basis that all categories of goods were covered by the Incentive Scheme. On that basis, contracts might have been entered into, exports might have been made, goods have physically moved out of the country, prices might have been determined on that basis and payments have been made by the buyers to the sellers. The sellers or the export houses would ordinarily and naturally take into consideration special incentive of duty free imports to the extent of 10% of exports while determining prices for export of goods. It would, therefore, not be possible to say that the status holders and exporters having achieved 25% incremental growth in exports over previous years (Rs.25 crores and above) as explained earlier - did not get any right at the time of exports made between 1.4.2003 and 27.1.2004.

21. But Mr Ramchandran, learned Addl. Solicitor General submits that when the Government steps in to prevent any abuse or misuse of a scheme, it can not only make amendments but can even rescind a scheme or withdraw it altogether. If this can be done, the Government can also withdraw the scheme for some of the goods. In any case, amendments to the Scheme are not having retrospective effect, as the Duty Free Imports were to begin from 1.4.2004 and, therefore, at the most they are retroactive. Hence, none of the principles against retrospectivity will apply in the instant case.

Mr Dave, on the other hand, would emphatically submit that such exclusion of goods cannot be made without being stigmatized as arbitrary retrospective action taking away vested rights and, therefore, violative of all canons of constitutional and administrative law. Strong reliance has been placed by Mr Dave on Bennion's Interpretation of Statutes and various authorities.

It is also vehemently submitted on behalf of the petitioner that the delegated legislation taking away vested rights, without any such authority conferred by the parent legislation, must fall to the ground as arbitrary and illegal, without any further debate.

Notes 3 and 6 read with Note 4 - Retroactive or Retrospective ?

22. One way of dealing with the controversy is to note the distinction between vested rights and existing rights and to hold that even if the petitioner had any existing right to get Duty Free Import Entitlement with effect from 1.4.2004 on the basis of the exports already made between 1.4.2003 and 27.1.2004, the petitioner had no vested right, because the Duty Free Import Entitlement was not yet actually granted when the amendments were made on 28.1.2004 nor had it been completely and definitely settled in the petitioner. Reference is to be made to the definition of "Vested Rights" in Black's Law Dictionary.

In *Trimbak Damodhar Raipurkar Vs. Assaram Hiranman Patil and Others*, (para 9), the Apex Court had held as under :-

"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."

23. Since it is contended on behalf of the respondents that a retroactive delegated legislation does not have to face any challenge that a retrospective delegated legislation has to encounter, it is necessary to look at the three categories of cases where such controversies are raised -

(i) Where legislation or delegated legislation seeks to take away vested rights - benefits which are already obtained by a party are sought to be taken away because of legislation/delegated legislation being given effect from the date prior to its enactment. For the reasons to be discussed hereinafter, the Rules of interpretation of statute raise a presumption against such retrospective effect being given to a legislation and Courts may strike down such offending measure as arbitrary on the touchstone of Article 14.

(ii) While in the first category, retrospective delegated legislation takes away rights which are already vested, in the second category - the principle of promissory estoppel and doctrine of legitimate expectation are to be invoked when the legislation/ delegated legislation/ executive instructions take away the future benefits which would have otherwise become available to the petitioner if existing law/scheme had continued without any amendment. This principle/ doctrine are to be invoked in case where a person's future rights are to be adversely affected when he had planned his present on the basis of past promises or conduct of the authorities.

(iii) When the legislation/delegated legislation has retroactive operation - the third is the intermediate category where a statute creates powers exercisable in future by reference to a continuous period of time antecedent to their exercise

and which comes into force while that period is running [L'Office Cherifien vs. Yamashita Ltd., (1994) 1 All ER 20].

The first celebrated case in the intermediate category is *R vs. Inhabitants of St Mary, Whitechapel* (1848) 12 QB 120 wherein Lord Denman CJ made the following oft quoted observations :-

"It was said that the operation of the statute was confined to persons who had become widows after the Act was passed, and that the presumption against a retrospective statute being intended supported this construction: but we have before shewn that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

While the Indian cases in this category are catalogued in the "Principles of Statutory Interpretation" by Justice GP Singh [9th Ed. (2004) Chapter 6 440], it should suffice to refer to the decision of the Apex Court in *Dilip Vs. Mohd. Azizul Haq and Another*, laying down that the problem retrospectivity concerning enactments depends on events occurring over a period. If the enactment comes into force during a period, it only operates on those events occurring then. We must bear in mind that the presumption against retrospective legislation does not necessarily apply to an enactment merely because a part of the requisites for its action is drawn from time antecedent to its passing. The fact that as from a future date tax is charged on a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed as held in *Commissioners of Customs and Excise v. Thorn Electrical Industries Ltd.* (1975) 1 WLR 1661.

Principles enunciated by House of Lords

24. The principles of far reaching importance enunciated by the House of Lords through Lord Mustill in *L'Office Cherifien* (Supra) now need to be quoted in their entirety, because these weighty principles deserve fullest consideration by the Courts in India. After referring to the principles enunciated in *Maxwell on The Interpretation of Statutes* (12th edn.) and *Craies on Statute Law* (7th edn.) raising a presumption against retrospective operation of a statute, Lord Mustill made the following pertinent observations :-

"My Lords, it would be impossible now to doubt that the Court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterization as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent natural, civil or familial status of individuals. Nevertheless, I must own to reservations about the reliability of generalized presumptions and a

particular form of words, for they too readily confine the Court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is none more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after an event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself.

Lord Mustill then made reference to the following statement by Staughton LJ in *Secretary of State for Social Security vs. Tunncliffe* (1991) 2 All ER 712) :-

"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

Thereafter the House of Lords went on to enunciate the following principles in *L'Office Cherifien* (Supra) :-

"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity is so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

After referring to the above quoted observations of Lord Denman CJ in *R vs Inhabitants of St. Mary, Whitechapel* (Supra), Lord Mustil in *L'Office Cherifien* went on to make the following pertinent observations :-

"These cases do not point directly to a conclusion, but they do demonstrate that

where an intermediate type of retrospectivity is in issue the purpose of the legislation and the hardship of the result contended for are of particular importance."

The House of Lords also referred to the orthodox distinction between accrued substantive rights and procedural rights and held that sometimes it is not possible to assign rights under consideration unequivocally to one category rather than another and that the Court would prefer to look to the practical value and nature of the rights under consideration as a step towards an assessment of the unfairness of taking them away after the event.

Principles regarding retrospectivity based on public policy

25. Though the above principles may at first blush appear to be a radical departure from the traditional legal principles, they are quite in conformity with the settled principles as analyzed in the leading text-books on the subject.

25.1 Maxwell on the Interpretation of Statutes states the legal principle in the following emphatic terms:-

"It is a fundamental rule of English law that no statute is 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."

The principle is founded on the maxim, "lex prospicit non respicit" (law looks forward not back). As stated by Willes J. in *Phillips vs. Eyre* (1870) LR 6 QB (23)

"Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

Article 20(1) of the Constitution also provides against making of a ex-post facto law making an act an offence which was not so when committed or imposing more severe punishment than was imposed at the time of commission of the offence, otherwise the fundamental principle of the legal system will be violated.

The Courts have, however, applied the principle against retrospectivity more strongly against penal statutes than statutes in the realm of trade and commerce.

25.2 Since the entire debate turns on two questions whether any vested rights had accrued in favour of the petitioner and whether such vested rights can be taken away, it is necessary to examine the expression "vested rights". In Black's Law Dictionary, the expression "vested rights" is defined as under :-

"Vested rights. In constitutional law, rights- which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful

in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.

Such interests as cannot be interfered with by retrospective laws; interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice. *American States Water Service Co. of California v. Johnson* 31 WB.App.2d 606, 88 P.2d 770. Immediate or fixed right to present or future enjoyment and one that does not depend on an event that is uncertain. A right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy. *State ex rel. Milligan v. Ritter*;s Estate Ind.App. 46 N.E.2d 736, 743."

25.3 Francis Bennion's Statutory Interpretation (Part VIII pg.445) recognizes the principle of "public good construction" in the following terms:-

"Public good construction : One of the principles governing statutory interpretation is that the construction adopted should promote the public good. This criterion, like many others, can affect the question of whether an enactment should be given a retrospective construction."

The learned Author then refers to the following two cases:-

In *Remon vs. City of London Real Property Co. Ltd.* (1921) 1 KB 49, the Court was required to consider the provisions of Rent and Mortgage Interest (Restrictions) Act, 1920 giving from 2nd July 1920 security of tenure to tenants of council houses. The question whether "tenant" would include person whose tenancy had expired and who had received a notice to quit before the date of coming into force of the Act - was answered in the affirmative on the ground that the Act was passed to deal with the critical housing shortage which followed the demobilization of immense numbers of the armed forces after the end of the first world war. The Court took the view that the legislation was enacted to remedy the crisis and that such a remedial legislation could be given retrospective effect.

Again, in *Lord Howad de Walden vs. IRC*, (1942) 1 KB 389 (398), Lord Greene MR had no hesitation in giving retroactive effect to the tax avoidance provisions of Section 18 of the Finance Act, 1936 in the following terms:-

"The fact that the section has to some extent a retroactive effect appears to us of no importance when it is realised that the legislation is a move in a long and fiercely contested battle with individuals who well understand the vigour of the contest."

25.4 As stated in Bennion's, Interpretation of Statutes - "Retrospective operation; delegated powers" (page 450) -

"Since the principles regarding retrospectivity are based on public policy, it

follows that they apply equally to delegated legislation. However, the legislative intention needs to be gathered by considering both the enabling Act and the delegated instrument. If retrospectivity is beyond the power conferred by the Act, the doctrine of ultra-vires comes into play."

25.5 It is, thus, clear both in principle and on authority that the PRINCIPLES REGARDING RETROSPECTIVITY ARE BASED ON PUBLIC POLICY and, therefore, the tests laid down by the House of Lords in *L'Office Cherifien* (1994) 1 All ER 20 speaking through Lord Mustill are very much in consonance with the settled legal principles and are applicable to all three categories of cases as enumerated in para 23 hereinabove.

Classification and consequences - Analysis of Principles

26. From the fundamental principles flowing from various decisions that public interest is a superior equity and, therefore, where the overwhelming public interest so demands, the legislation/subordinate legislation may have to be allowed to take away future benefits promised in the past *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, and having regard to the principles enunciated in the leading text-books as explained in para 25 hereinabove and the principles laid down in *L'Office Cherifien* as quoted in para 24 hereinabove, the following principles emerge :-

I when challenge to delegated legislation or executive order bringing about a change in Government's policy with PROSPECTIVE effect is examined by the Court on merits, the Court does not sit in appeal over the Government decision. The Court not only presumes the delegated legislation/executive order to be constitutional, but even when the petitioner succeeds in shifting the onus to the Government, after the Government produces some material to defend the decision on merits, the Court does not go into sufficiency or otherwise of such material. The Court will not interfere unless the change in policy is malafide or arbitrary.

II It is only when the change has RETROACTIVE effect (the intermediate type of retrospectivity - third category as enumerated in para 23) or the case falls in the second category (promissory estoppel) that -

(a) the Government has to justify the change in policy by showing overwhelming public interest which, IN THE OPINION OF THE COURT, will override the general public interest in seeing that the Government does not commit breach of its promises or that the Government does not deny benefits which would have flowed to the promisee but for the change in policy.

(b) When the Government is able to satisfy the Court that there is overriding public interest to justify the change in policy which will have future effect (second category in para 23) or retroactive effect (third category) that the Government is free to change the policy and the Court would not hold the Government to be bound by its promise.

(c) It is only when the Government is not able to show such overriding public interest that the further question is required to be considered whether, after breach/ non-fulfilment of the promise by the Government, the promisee can resume his position. If answer is in the negative, the Court would grant appropriate relief in favour of the promisee.

(d) Court is more strict when the statute inflicts penalty or imposes new liabilities rather than when a remedial statute affects existing rights in order to protect the public interest *The State of Maharashtra Vs. Vishnu Ramchandra, and In Remon (1921) 1 KB 49*].

III It is in the case of delegated legislation giving RETROSPECTIVE effect i.e. TAKING AWAY VESTED RIGHTS and, therefore, falling in the first category (enumerated in para 23) that -

(i) the Government has firstly to satisfy the test that the parent legislation has expressly or by necessary intendment empowered or permitted the Government to make delegated legislation with retrospective effect;

(ii) secondly the Government has to satisfy the tests (a) and (b) as indicated above.

(iii) In absence of overwhelming and overriding public interest, the Court must strike down the delegated legislation as arbitrary and violative of Article 14 without applying test (c) as indicated above.

Application of Principles - Notes 3, 6 and 4

27. In light of the aforesaid discussion, while the Court is of the view that the present case is concerned with delegated legislation with retroactive operation and, therefore, belongs to the intermediate category of retrospectivity where the duty free import entitlement to be given to the export houses on and from 1.4.2004 will be affected by the notification dated 28.1.2004 read with public notice dated 28.1.2004 and further Government notifications dated 21/24.3.2004 covering the exports during the entire period from 1.4.2003 to 31.3.2004 and such notifications would have effect on the exports made from 1.4.2003 to 27.1.2004 also (besides affecting the future exports from 28.1.2004 to 31.3.2004). The next important question is whether it is unfair on the part of the Central Government to make an amendment to the Exim Policy by excluding from the benefits of the Incentive Scheme specified categories of goods exported before the date of notification.

28. In view of our finding that in so far as Notes 3 and 6 with Note 4 are concerned, the present case falls in the third category (i.e. retroactive operation of the amendment) and not in the first category of retrospectivity, it is not necessary to examine the question whether the parent Act authorizes the Government to give retrospective effect to delegated legislation. It is, therefore, not necessary to deal with the various decisions cited on behalf of the petitioner such as *Hukam Chand etc. Vs. Union of India (UOI) and Others*, .

29. At the first hearing (which took place in the second week of April 2004) much had been said on behalf of the petitioner against the public notice dated 28.1.2004 issued by the DGFT, particularly the provisions excluding certain categories of export and import goods from the benefits of the Special Scheme under consideration. It was contended that the DGFT had no power to amend the EXIM POLICY. With the issuance of the Government notifications dated 21/24th April 2004 correcting notification dated 28.1.2004 and adopting those very clauses of the DGFT's public notice dated 28.1.2004, the petitioner's arguments have obviously lost much of their steam. However, in the amended petition, it is contended that Government notifications dated 21/24th April 2004 are illegal and arbitrary because Notes 6 and 7 are given retrospective effect from 1st April 2003.

30. While it is usual for any Legislation to provide for appointment of a Director General or a Chief Executive Officer to carry out the provisions of the Act, Section 6 of the FTDR Act does not stop there, but proceeds to state that the Director General shall advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy. The Parliament, therefore, recognized the complex nature of the activity of developing and regulating foreign trade. The very nature of this activity of looking after development and regulation of foreign trade would require the Central Government and the Director General of Foreign Trade to deal with several unforeseen, unexpected situations and circumstances which neither the Parliament nor the Central Government nor even the Director General of Foreign Trade could have anticipated, contemplated or visualized while framing a particular policy. Hence, by adding Note 3 to para 3.7.2.1 of the Exim Policy on 28.1.2004, the Government made its intention very clear that exports and imports of certain goods were to be excluded from the benefits of the Special Scheme for status holders. In view of the said Note, Section 6 of the Act and para 3.2.5 of the Handbook of Procedures, the DGFT issued the public notice dated 28.1.2004 on which the exporters and status holders including the petitioner started acting (for instance the petitioner stopped export of rough diamonds as stated in the respondents' written submissions para 10). The then Commerce Minister also rejected the petitioner's representation dated 11.2.2004 and thereby granted the seal of approval on the DGFT's public notice dated 28.1.2004 excluding certain export goods from the Special Scheme w.e.f. 1.4.2003. In this background, once the RETROACTIVE operation of the Government notification dated 28.1.2004 (including Note 3 thereof) on exports made from 1.4.2003 is upheld as valid, the notifications dated 21/24th April 2004 flowing from the said Note 3 and adopting the contents of the public notice dated 28.1.2004 cannot be faulted on the ground of retrospectivity.

31. The decisions in Union of India (UOI) and Another Vs. Shree Ganesh Steel Rolling Mills Ltd. and Another, and in Narendra Udeshi Vs. Union of India (UOI) and Others, have been relied upon by the learned counsel for the petitioner in support of the contention that in the guise of clarification the Government cannot

amend the policy with retrospective effect.

31.1 In *Ganesh Steel (Supra)*, the Court held that the procedure to be followed in the matter of import and export can be specified and effected only by means of a public notice and the clarification issued by the DGFT in that case not having been issued by means of any public notice, it cannot be read as amendment to the procedure. In the instant case, the Government notifications and the DGFT's public trade notice are not shown to be vitiated by any vice of non-publication.

31.2 In *Narendra Udeshi Vs. Union of India (UOI) and Others*, , the Bombay High Court held that the DGFT cannot issue any public notice which would go beyond the scope and ambit of the powers vested in the DGFT and would run counter to the Policy of the Central Government as announced in the Exim Policy 2002-07.

This aspect has already been examined in para 30 hereinabove.

Case Law on Promissory Estoppel - After *Motilal Padampat*

32. Before proceeding to examine whether the amendments made by Notes 3, 6 and 7 with retroactive effect are unfair and if yes, are so UNFAIR that this Court should interfere with them, we would deal with some of the decisions cited by the learned counsel for the parties so that the tests to be applied for undertaking the above exercise as set out in Part II of para 26 become clear:-

32.1 The learned Addl. Solicitor General placed strong reliance on *Kasinka Trading and another, etc. etc. Vs. Union of India and another*, , wherein the doctrine of promissory estoppel was invoked in the following set of facts:-

Under Section 25(1) of the Customs Act, 1962, the Government of India issued notification dated 15.3.1979 in "public interest" granting exemption from whole of the customs duty on import of PVC resin. The notification itself provided that it shall remain in force upto 31.3.1981. But before expiry of the said stipulated period, another notification dated 16.10.1980 was issued in "public interest" withdrawing the exemption and confining the exemption from customs duty as is in excess of 40% ad valorem.

The appellant-petitioner before the Apex Court contended that relying on the exemption notification dated 15.3.1979, 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 representation contained in the notification dated 15.3.1979 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 15.3.1979 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.

The Apex 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 15.3.1979, 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 vs. Union of India* AIR 1976 J & K 41 :-

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."

32.2 The above decision was followed by the Apex Court in *Shrijee Sales Corporation and Another Vs. Union of India (UOI)*, , 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 persons took full advantage of the exemption. The Court held that the facts of the economic situation explained in the judgment of *Kasinka* were not controverted 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 15.3.1979 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 principle should be applicable even in cases where a period has been indicated".

32.3 However, in the subsequent decision in *Dai-Ichi Karkaria Ltd. Vs. Union of India and Others*, relied upon by Mr Dave for the petitioner, the Court was concerned with a controversy somewhat similar to the controversy in the above two cases, but on different facts. The Court held that the Government had failed to discharge the burden of justifying reduction of the extent of exemption. By notification dated 10.9.1982 (which stated that it would be in force till 10.9.1987), the Government of India exempted from payment of customs duty/ additional duty all raw material and components imported for the manufacture of goods to be supplied to various organizations such as International Development Association... .. ONGC, OIL or GAIL. By notification dated 30.12.1986, the Central Government exempted raw materials and components required for the manufacture of the goods to be supplied to ONGC or GAIL from payment of customs duty in excess of 25% ad valorem and the whole of the additional duty. By another notification dated 30.12.1986, it was notified that the notification dated 10.9.1982 stood amended by omitting the words "or Oil and Natural Gas Commission or Oil India Limited or Gas Authority of India Limited". As a result thereof, the appellant who was manufacturer and supplier of certain goods to ONGC became liable to pay duty to the extent of 25% for the period between 30.12.1986 and 10.9.1987. The Apex Court struck down the notification dated 30.12.1986 reducing the exemption on the ground that the policy of the Government of India was to indigenise production as is the policy of the ONGC also to indigenise. The appellant had secured orders for supply of goods against global tenders where foreign suppliers also participated and in the teeth of international competition, the appellant had been awarded the contracts by ONGC; that pursuant to the exemption that had been granted, the appellant had invested since 1983 a large amount of money in respect of its plant for manufacture of goods to be supplied to ONGC; that public interest which prompted the Government of India to issue exemption notification dated 10.9.1982 remained unaltered and no new supervening circumstances had justified reversal of the said policy and, in fact, such a reversal to encourage foreign manufacturers at the cost of Indian manufacturers is per se contrary to public interest and a drain on foreign exchange.

It was in the above set of circumstances that the Apex Court distinguished the decisions in *Kasinka Trading and Shrijee Sales Corporation* without differing from the principle laid down therein that public interest is a superior equity which can override the individual equity and, therefore, the principle would be applicable even in cases where a period has been indicated for which period the notification or the policy was to remain in force.

In *Dai-ichi Karkaria*, the Government failed to justify the rationality or reasonableness of impugned notification. The Apex Court did not lay down a different principle.

32.4 An analysis of the above cases, therefore, clearly indicates that if at all the fundamental principles regarding applicability of the principle of promissory

estoppel have undergone any change from those enunciated in Motilal Padampat Mills case in 1979, it is only to soften the rigour of burden of proof on the Government by requiring the petitioner to prove "manifest injustice or fraud" and not merely commercial loss. Accordingly, the Courts will interfere with change in policy with future effect or retroactive effect only to "prevent manifest injustice or fraud". At the cost of repetition, we would say that superior equity of public interest may override individual interest even if the promisee cannot resume his position. It is only when there is no such overriding public interest and the promisee cannot resume his position that the Government would not be allowed to resile from its promise (principle II in para 25 hereinabove). This fundamental principle of superior public equity is as much applicable to the principle of retroactive operation of delegated legislation in economic sphere as it is applicable to the principle of promissory estoppel.

Case Law on Retrospective Change in Policy and Vested Rights.

33. We must point out that the learned counsel for the petitioner cited the following decisions in support of his contention that any executive action or delegated legislation or even a legislative enactment has to be stuck down by the Court if it takes away vested rights :-

(i) State of Madhya Pradesh and another Vs. G.S. Dall and Flour Mills and Others, .

(ii) M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others, .

(iii) Collector of Customs, Bombay Vs. East Punjab Traders and Others, .

(iv) In Sonia Fisheries and Another Vs. Union of India and Others, .

(v) Sakuri vs. Tanaji AIR 1983 SC 1279

(vi) Bejgam Veeranna Venkata Narasimloo and Others Vs. State of A.P. and Others, .

(vii) Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, .

(viii) P. Mahendran and others Vs. State of Karnataka and others, .

(ix) Commissioner of Income Tax, U.P.-II, Lucknow Vs. Bazpur Co-operative Sugar Factory Ltd., Bazpur, Distt. Nainital,

(x) State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, .

(xi) Kazi Lhendup Dorji Vs. Central Bureau of Investigation and Others, .

(xii) Adani Exports Limited Vs. Union of India (UOI), The Additional Director General of Foreign Trade, The Joint Director of General of Foreign Trade and The Designated Authority,

(xiii) K. Kapen Chako Vs. The Provident Investment Company (P) Ltd., .

(xiv) S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others,

It is not necessary to deal with all these cases as in the first place they dealt with notifications which were issued after the concerned petitioners had already obtained the benefits. The length of period after which those benefits were sought to be taken away was also a crucial factor which weighed with the Courts in striking down the offending executive action or the legislation and rightly so, because vested rights, as defined in Black's Law Dictionary are those which have so completely and definitely settled in a person that he could not be arbitrarily deprived of them without injustice. Impugned amendments to the Incentive Scheme made midstream can never be compared to those cases. Moreover, in none of those cases, the Court was persuaded to take the view that the public interest outweighed individual interest. Just to fortify the above analysis, we would prefer to deal with five out of the aforesaid decisions cited on behalf of the petitioner.

33.1 In State of Madhya Pradesh and another Vs. G.S. Dall and Flour Mills and Others, , the State of MP framed an executive scheme for the grant of subsidy/ interest free loan to new industries set up in Madhya Pradesh. The scheme excluded "traditional industries" like dall mills from the benefit of the scheme. The Government thereafter issued notification dated 23.10.1981 in exercise of power under the MP Sales Tax Act granting concession in payment of sales tax by new industrial units which commenced production after 1.4.1981. The statutory scheme did not exclude "traditional industries" from the grant of sales-tax concession. However, by notification dated 3.7.1987, the State Government amended the 1981 notification with retrospective effect so as to exclude "traditional industries" from the grant of the sales-tax benefits. The Apex Court held that 1981 notification had not clearly envisaged exclusion of any industry, which fulfils the terms of the notification, from availing of the exemption granted under it, but the 1987 amendment had the effect of rescinding the exemption granted by 1981 notification in respect of the traditional industries. The Apex Court, therefore, held that while the notification granting the benefit can be prospective or retrospective, only prospective operation can be given to a notification rescinding an exemption granted earlier. The Court held that the 1987 notification cannot be treated as one merely clarifying an ambiguity in the earlier one and hence capable of being retrospective; it enacts the rescission of the earlier exemption and, hence, can operate only prospectively. It cannot take away the exemption conferred by the earlier notification. The assessee in that case had started production from January 1983 and the Court held that the assessee was covered by the terms of the 1981 notification and, therefore, he was entitled to the exemption till 1987 amendment took away the exemption.

In the above case, exemption granted in 1981 was sought to be taken away after 6 years and in the appellant's case after 4 years during which period the benefit of sale tax exemption was already obtained.

In the facts of the instant case, however, the amendments have been introduced midstream during the same financial year to which the exports relate.

33.2 In *Bejgam Veeranna Venkata Narasimloo and Others Vs. State of A.P. and Others*, , the appellant rice-millers supplied the FCI rice under the Andhra Pradesh Procurement and Price fixation orders. The FCI paid the price fixed by the 1975 Order on 3.11.1976. Subsequently, by Government notification dated 24.2.1977, the Government reduced the price of rice with effect from 7.9.1976. The Government sought to recover the excess price paid on 3.11.1976. The Apex Court held that the rice had been sold under a procurement order and if the petitioner supplied goods under that order and if a portion of the price paid by the FCI is taken away, the appellants will be prejudicially affected. The rice-millers had actually received payment for the rice sold. If the rice was delivered without any valid procurement order, the sellers were even otherwise entitled to be paid at the market rate in terms of Section 70 of the Contract Act. The retrospective notification dated 24.2.1977 reducing the price had tried to take a portion of the money the rice-millers had already lawfully obtained. Therefore, the Apex Court interfered.

In the instant case, the petitioner was not given any import entitlement on the date of the impugned notification i.e. on 28.1.2004. The incentive scheme is to come into force from 1.4.2004 on the basis of the exports made between 1.4.2003 and 31.3.2004. Hence, the facts in the instant case are entirely different.

33.3 In *State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others*, , the Court was concerned with the retrospective amendments to the Gujarat Panchayats Act, 1961. The employees of the erstwhile Municipalities converted into Panchayats were treated as Government servants under the unamended Act for 20 years. By the impugned amended Act their status as Government servants was sought to be taken away after passage of 20 years. It was in the context of these facts that the Court held that the law cannot say, 20 years ago the parties had no rights, therefore, the requirements of Constitution will be satisfied if the law is dated back by 20 years. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years.

This case has no relevance to the controversy at hand which is concerned with midstream clarification/amendment to Exim Policy in January 2004 about Duty Free Import Entitlement from April 2004 on the basis of exports made between April 2003 and January 2004.

33.4 In *Adani Exports Limited Vs. Union of India (UOI)*, The Additional Director General of Foreign Trade, The Joint Director of General of Foreign Trade and The Designated Authority, , the Madras High Court held that in the passbook scheme under the Exim Policy, credit should be calculated on the basis of the exports

made and, therefore, the credits have to be calculated on the basis of the norms as they were existing on the date of exports. The Court held that the credit is not to be calculated in light of the new norms particularly when in the new policy there is no scope or mention or reference to the passbook scheme at all.

It is thus clear that what weighed with the Court was that since the passbook scheme was conspicuously absent in the new policy, one fails to understand as to how the authorities could be allowed to calculate the credits payable to the exporter under a non-existent passbook scheme. Therefore, on the basis of the language of the scheme, the Court held that there was no scope to hold that the subsequent norms could govern the earlier exports. In the instant case, however, as pointed out by the respondents, the expression "incremental growth of 25%" was required to be clarified by the impugned notification dated 28.1.2004 and overwhelming public interest warranted exclusion of certain export items.

33.5 In *S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others*, , the Apex Court was concerned with an application for advance license for import granted in advance of export. The observations made therein in the context of a hypothetical argument do not refer to any vested right, but at the most an existing right as discussed in para 22 hereinabove.

33.6 Thus in all the above cases the Government had either not pleaded, or failed to discharge the burden of showing, overwhelming public interest which could justify the change in Government policy with retrospective effect.

Examining Challenge to retroactive operation of Notes 3, 6 and 7 on merits.

34. Applying the aforesaid tests, now we take up Notes 3, 6 and 7 in the notification dated 21/24th April 2004 and the public notice dated 28.1.2004 which read as under :-

Note 3 - Government reserves 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 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

- a. Rough, uncut and semi polished diamonds
- b. Gold, Silver in any form including plain jewellery thereof
- c. Food grains sourced from Central pool maintained by FCI
- d. Items exported under free shipping bills

Note 7 -The following items would not be allowed for imports under Duty Free Credit Entitlement Certificate for Status Holders :

Agricultural products, which fall under Chapters 1-24 of ITC (HS) Classification of Export and Import items.

35. EXCLUSION OF ROUGH, UNCUT AND SEMI-POLISHED DIAMONDS,

35.1 In their note submitted at the hearing, the petitioners stated as under :-

(i) Rough Diamonds export is Rs.751.96 crores and Rs.1719.49 crores is export of polished diamonds.

(ii) These exports have been made/effective by the petitioners under Para 2.36 and 2.39 of the Exim Policy.

(iii) The petitioners have not imported the rough diamonds but have exported after procuring the same from local suppliers.

(iv) Export of diamonds is covered by Thrust Section in para 3.10(d) of Exim Policy.

(v) The petitioners have also referred to paras 2.36 and 2.39 of the Exim Policy under which the diamonds were not restricted items for imports or exports.

35.2 In their written submissions, the respondents' case is -

"... .. rough diamonds constitute less than 5% of diamond exports and only the export of rough and semi-polished diamonds was restricted to be counted as growth turnover. Rest of the categories including polished diamonds which constitute the major percentage of exports were fully allowed under the Scheme. The petitioner has claimed to export diamonds worth Rs.2400 crores out of its turn over of Rs.4000 crores in the current financial year. Diamonds are low duty items and round tripping was reported in the National Press. Rough diamonds are not produced in India (except for a trickle from Panna). It's a low volume high value, zero customs duty item. The petitioner has indicated that it has purchased rough diamonds locally and exported it. It does not defy the logic that such items are exported from India. India is not a rough diamond exporting country and only those rough diamonds that are unsuitable for cutting in India are re-exported. According to Gems & Jewellery figures, petitioners M/s Adani Exports Limited have exported 143.13 million dollars worth of diamonds during January-December 2003. The fact that the petitioners were exporting rough diamonds merely to take the benefits of DEFC 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.

The major items of exports are such that the petitioners cannot use their entitlement under the scheme without violating the basic conditions leading to huge loss of revenue which would have otherwise come into the public exchequer."

35.3 Applying the test whether the respondents have shown overriding public

interest in excluding diamonds exported from 1.4.2003 to 27.1.2004 from the benefit of the special scheme, we are of the view that since rough diamonds could be imported without payment of duty and the material available to the Government in the form of intelligence report revealed that there was round tripping of diamonds (rough diamonds imported without any payment of duty and thereafter successive stages through which the diamonds were processed for enhancing the export turn over), the Government was justified in excluding the exports of rough, uncut and semi-polished diamonds from the special scheme. It is pertinent to note that the Government has not excluded exports of polished diamonds, but has excluded only rough, uncut and semi polished diamonds from the benefits under the special scheme. Paras 2.36 and 2.39 of the Exim Policy only provide for legality of exports of all categories of diamonds, but that does not necessarily mean that exports of all goods deserve to be rewarded with the benefits of the special scheme.

As regards exports of diamonds being in Thrust Section in para 3.10 (d) of the Exim Policy, it is pertinent to note that what is excluded is only rough diamonds and not polished diamonds. It is necessary to note that while issuing the remedial notifications and the public notice, the Government was dealing with the international trade at large and not merely with the petitioners and, therefore, the contention that the petitioners have not imported rough diamonds, but have exported after procuring the same from local suppliers cannot have any bearing on the justification for exclusion of rough, uncut and semi-polished diamonds from the special scheme. The Government cannot be expected to go to the local suppliers to find out how they got the rough diamonds.

Even otherwise, when the petitioners had exported polished diamonds of Rs.1719.49 crores, which are eligible for the benefits under the Special Scheme even after the amendment and the petitioners are not going to get the benefit of export on rough diamonds of Rs.751.96 Crores, it cannot be said that the impugned notifications are so UNFAIR to the petitioners or that the petitioners are subjected to such "manifest injustice or fraud" that this Court should interfere.

36.0 EXCLUSION OF GOLD, SILVER INCLUDING PLAIN JEWELLERY

36.1 The petitioners have stated in their note as under:-

"Exports of plain jewellery amounts to Rs.157.73 crores upto 31st March 2004. Export of jewellery is covered by Thrust Sector in para 3.10 (d) of Exim Policy."

36.2 The Government has dealt with the same in written submissions as under :-

"... ..the Exim Policy has special facilities as contained in para 4.4 of the Policy for promoting export of gem and jewellery. Similarly, special facilities have been provided for export of gold/silver and platinum jewellery in para 4.4.3 for the exporters to import their essential inputs as well as diamonds, precious and semi-precious stones in accordance with the procedure specified for the purpose. In

view of this, the petitioners will have no necessity to utilize their entitlement for import of rough or semi-polished diamonds for use either in their own units or in the units of associate manufacturers for the production of cut and polished diamonds or for studded jewellery. Obviously, they cannot import, synthetic yarn for utilization in these units because there is no way such units can manufacture anything other than polished diamonds or jewellery."

Paras 4.4 and 4.4.3 of the Exim Policy read as under :-

"4.4 Exporters of gem and jewellery are eligible to import their inputs by obtaining Replenishment (REP) Licences from the licensing authorities in accordance with the procedure specified in this behalf.

4.4.3 Exporters of gold/silver/platinum jewellery and articles thereof may import their essential inputs such as gold, silver, platinum, mountings, findings, rough gems, precious and semi-precious stones, synthetic stones and unprocessed pearls etc. in accordance with the procedure specified in this behalf."

36.3 In view of the justification given by the Government, it does not appear to be unfair to the petitioners if export of gold, silver including jewellery does not entitle them to import any inputs under the Special Scheme. However, clause (vi) in para 3.7.2.1 of the said Special Scheme provides as under :-

"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."

If, therefore, the exporter or the supporting manufacturer is desirous of using the duty free import entitlement for import of capital goods or office equipment, para 4.4.3 will not be of any avail to the exporter or to the associate/supporting manufacturer. Hence, it is for the petitioners to decide whether they would like to make any duty free import of capital goods or office equipment for the factory of their associate/supporting manufacturer/job worker. The exclusion of gold, silver, jewellery from the benefit under the Special Scheme will, therefore, have to be held to be unjustified to the limited extent that association/supporting manufacturer/job worker whose gold and silver, jewellery have been exported till 27.1.2004 through a status holder (provided both the existing exporter and the status holder have shown 25% incremental growth in exports) is excluded from the benefits of duty free import of capital goods and office equipment.

37.0 Exclusion of FOODGRAINS i.e. foodgrains sourced from central pool maintained by the Food Corporation of India - ,

37.1 The petitioner's case in the note with the rejoinder affidavit is as under:-

(i) Out of total agro exports of Rs.1,126.99 crores until 31st March, 2004, the petitioners have exported food grains worth Rs.239.08 crores upto 31st March, 2004.

(ii) These exports are third party exports where the export order from the foreign

buyer was received by the petitioner. The petitioner exports goods as third party exports through STC, PEC Ltd., which are public sector undertakings.

(iii) The contention in the counter affidavit (pg. 80) that exports of foodgrains is subsidized is not correct. The stock in the central pool reached a record level and maintaining such higher level of stock carried a very heavy price. Hence, FCI encouraged export of foodgrains by selling the goods for export at a prevalent international price.

37.2 The Government's reply in their written submissions is as under :-

"The other major exports claimed by the petitioner is in the agro sector amounting to Rs.1126.99 crores. Apart from the fact that the export of these products is subsidized and do not require any processing, it may be pointed out that this entitlement cannot be used for import of any agro or dairy products because of the restriction vide Customs notification No.53/2003 dated 1.4.2003 and circular No.25/2003 dated 1.4.2003. As such, there is no case for any retrospective application in the restrictions imposed on agro and dairy products. The DGFT's notification and public notice dated 28.1.2004 only reflect what had already been decided through the customs notifications at the time of introduction of the scheme. Even if this restriction was not there in the customs notification, the petitioners cannot use their entitlement in this sector as no processing is involved. The same argument holds well in the case of clinkers and iron ore also."

37.3 While the justification given by the Government that the export of the foodgrains is already subsidized may not by itself be a sufficient ground for excluding with retroactive effect foodgrains procured from the central pool of FCI, the said justification taken alongwith the other justification (that the entitlement on the basis of exports of foodgrains cannot be used for import of any agro or dairy products because of the restriction vide notification No.53/2003 dated 1.4.2003 and circular No. 25/2003 dated 1.4.2003 which were thus issued as far back as on 1.4.2003 when the special scheme was introduced) is sufficient to hold that it is not unfair on the part of the Government to exclude the export of foodgrains from the benefits of the Special Scheme. There is also considerable substance in the submission made on behalf of the Government that there is no retrospective or retroactive application in the restrictions imposed on agro and dairy products. The Customs Department notification No. 53/2003 dated 1.4.2003 is issued u/s 25(1) of the Customs Act, 1962 exempting the following "goods" when imported, inter alia, into India against the duty free entitlement credit certificate ("said certificate") issued under para 3.7.2.1 (vi) of the Exim Policy -

(a),(b) & (c) from the whole of the duty of customs, additional duty, special additional duty leviable thereon under the Customs Tariff Act, 1975.

Explanation :- In this notification,-

(i) "Capital Goods" has the same meaning as assigned to it in paragraph 9.10 of the Export and Import Policy,-

(ii) "goods" means,-

(a) capital Goods;

(b) office equipment (including Computer systems, Software, Fax/machine, Telephone); and

(c) raw materials, components, intermediates, consumables and parts other than agricultural and dairy products;

The notification does not exclude capital goods or office equipment from the benefit of duty free import of goods. However, only procedural safeguards are prescribed in respect of duty free import of capital goods.

Customs Circular No.25/2003 dated 1.4.2003 also provides for procedural safeguards for duty free import of goods under para 3.7.2.1 (vi) of the Exim Policy.

37.4 In view of the above notification and circular, it is clear that what is prohibited is only agricultural and dairy products as raw materials, components, intermediates, consumables and parts and such notification/circular do not prohibit duty free import of capital goods and office equipment under clause (vi) [now renumbered as (vii)] in para 3.7.2.1 of the Exim Policy. However, since the foodgrains are sourced from the central pool of FCI, it is for the FCI to take up the matter with the Central Government and the DGFT if they are desirous of claiming any duty free import of capital goods and office equipment for the FCI on the strength of the exports of foodgrains made between 1.4.2003 to 27.1.2004 from out of the central pool maintained by the FCI. Since it is a statutory Corporation under the FCI Act, it is open to the said Corporation to seek its remedies from the Central Government, if at all it is desirous of seeking any such benefits available to it under the Special Scheme.

38. Lastly, coming to exclusion of items exported under free shipping bills-,

38.1 The petitioners have stated as under :-

(a) There is nothing such as Free Shipping Bills. The Customs Act prescribes the following as Shipping Bills :-

(a) Shipping bill for duty free goods.

(b) Shipping bill for duty free goods ex-bond.

(c) Shipping bill for exports under drawback.

(d) Shipping bill for exports under DEPB.

(e) Shipping bill for exports under DEEC (Advance License)

(f) Shipping bill for dutiable goods.

(ii) All goods which are exported, other than those exported under clause (c) to (f) above, are exported under shipping bill which fall under clause (a) above. This includes exports under EPCG of para 2.39 mentioned above. The form of shipping bill does not and cannot be determinative of the substantive rights available to an exporter under a particular scheme. This is more so when there is no such restriction contained in the Exim policy.

(iii) No export incentives/benefits are availed in respect of goods exported under Shipping bill at (a) and (b) above, unlike in the case of drawback, DEPB, etc. There is, therefore, all the more no justification for excluding exports under these shipping bills from the benefit of the scheme.

38.2 The Government's reply in their written submissions is as under :-

"On the issue of the shipment effected under white shipping bills, it was decided not to allow exports effected against such shipping bills for entitlement under the scheme because for white shipping bill, the exports effected are generally without verification of the FOB value (so declared by the firm in the shipping bill) by the Customs authorities as per their Circular No.6/2002 dated 23.1.2002. Further, since the Exporters are entitled for duty exemption/remission against the exports effected, the exporter would be filing white shipping bill only in rare cases. Any sudden diversion from the pattern reflects that the exporter is looking for some undue advantage."

38.3 Section 50 of the Customs Act, 1962 provides that the exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel, a shipping bill, and that the exporter while presenting a shipping bill shall at the foot thereof make and subscribe to a declaration as to the truth of its contents. Section 51 provides that where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under the Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation. In exercise of the powers conferred by Section 157 read with Sections 50 and 60 of the Customs Act, the Central Government has framed Shipping Bill and Bill of Export (Form) Regulations, 1991 and Rule 2 thereof reads as under :-

"2. Shipping Bill.- A shipping bill to be presented by an exporter of goods shall be in the form specified in Annexure I, Annexure II, Annexure II or Annexure IV (See Forms 93, 94, 95, and 96 in Part 5), as the case may be, appended to these regulations."

Form 93 is a shipping bill for export of goods under claim for duty drawback. Form 94 is the form for shipping bill for export of dutiable goods and Form 95 is the form for shipping bill for export of duty free goods. Form 96 is the form for shipping bill for export of duty free goods ex-bond. Each of these Forms is to be

submitted in triplicate and one of the copies bears the title "Export Promotion Copy". Each of these Forms also contains a column "Value FOB" of the goods being exported and a declaration that the particulars given in the Form are true and correct.

The aforesaid Forms read in conjunction with the definition of "third party exports" make it clear that the procedural safeguard that the exports made by a status holder on behalf of any party like manufacturer will have to be supported by contemporaneous evidence like the shipping bill because the shipping bill has to indicate the names of both the exporter/manufacturer and exporter as will be clear from the definition of "third party exports" in para 9.55 of the Exim Policy.

9.55 "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).

Apart from the fact that Circular No. 6/2002 dated 23.1.2002 is not on record, such a circular issued prior to the announcement of the Special Incentive Scheme cannot negate the effect of substantive provisions of a Scheme in the Exim Policy. The learned Additional Solicitor General was not in a position to offer any justification for exclusion of free shipping bills other than reading out the above para from the reply affidavit.

38.4 We are not satisfied that the Government has shown any overwhelming public interest which would justify exclusion of the items exported under free shipping bills from the benefits of the Special Scheme. We have already held earlier that the Government was justified in giving clarification of the expression "the incremental growth in exports" so as to cover the incremental growth of more than 25% in FOB value of exports both of the status holder and of the existing exporters who had made exports in the year 2002-03 and we have already held that the Government was justified in excluding certain exports as provided in Notes 1 and 2 to the notification dated 28.1.2004. We have further held that the Government was justified in excluding export of rough, uncut and semi polished diamonds and exports of foodgrains sourced from the central pool maintained by the FCI from the benefits of the Special Scheme even if such exports were made between 1.4.2003 and 27.1.2004. Once these clarifications made and remedial measures inserted by the Government through notifications dated 28.1.2004 and 21/24.4.2004 and the DGFT's public notice dated 28.1.2004 have been upheld, we do not think that the other substantive rights available under the Special Scheme for status holders can be allowed to be whittled down by exclusion of items exported under free shipping bills.

38.5 In *Om Prakash Bhatia Vs. Commissioner of Customs, Delhi*, the Apex Court had an occasion to deal with the question of value of export goods as contained in Section 2(41) and Section 14 of the Customs Act, 1962. After referring to the aforesaid Sections, the Apex Court held that even though on export of goods no duty is payable under any Act, for determining the export

value of the goods, the provisions of Section 2(41) and Section 14 are very much applicable and, therefore, even if no duty is leviable, the mode for determining the true value of the goods sought to be exported provided u/s 14 is required to be followed. The Court further observed that for finding out whether the export value is truly stated in the shipping bill, it can be referred to for determining the true export value of the goods sought to be exported.

Even the duty free import entitlement under the Special Scheme is to be worked out at the rate of 10% of the incremental growth in exports (subject to minimum export turn over of Rs.25 Crores) and such incremental growth has to be at more than 25% in FOB value of exports. The Government has not placed any material to show that when any items are exported under what the Government calls "free shipping bills", the FOB value of exports is not indicated in such bills. Of course, the fact whether any exports have actually taken place and whether the shipping bills reflect the correct FOB value of exports could be a matter of scrutiny or verification, but in the guise of procedural safeguards, the Central Government or the DGFT cannot take away the substantive rights available to the exporters/status holder under a particular scheme. Only those procedural safeguards which are relevant for verification of genuineness of the exports and for determining FOB value of the goods and which are in conformity with the substantive provisions of the Special Scheme as amended by the impugned notifications dated 28.1.2004 and 21/24.4.2004 can be applied to the exports made during the period between 1.4.2003 and 31.3.2004, but items exported under "Free Shipping Bills" per se cannot be treated as ineligible exports for the purposes of the Incentive Scheme under consideration.

39. As far as challenge to Note 7 excluding import of agricultural products is concerned, the petitioners have challenged the same only on the ground of alleged retrospectivity. As already held earlier the impugned amendments are either clarificatory (Notes 1, 2 and 5) or having retroactive operation (Notes 3 and 6) because by virtue of Note 4 they all affect exports already made between 1.4.2003 and 27.1.2004. As far as restrictions on imports under the Special Scheme are concerned, they are yet to be made and, therefore, insertion of Note 7 is with prospective effect. Moreover, the Customs Notification dated 1.4.2003 discussed earlier in para 37.3 hereinabove had already prohibited imports of agricultural products. In this view of the matter also, the challenge to Note 7 must fail.

40. The public notice dated 28.1.2004 of the DGFT making the relevant procedural amendments to the Handbook of Procedures (Vol. I) shall also have to be read in light of the foregoing observations in paras 38.3 to 38.5 hereinabove.

41. In view of the above discussion, this petition is only partly allowed in so far as Note 6 to para 3.7.2.1 of the Exim Policy as inserted by the Government notifications dated 21/24th April 2004 and the DGFT's public notice dated 28.1.2004 exclude the following exports from the benefits of the duty free import entitlement for the export status holders as contained in para 3.7.2.1 of the Exim

Policy 2002-07 :-

(i) Items exported under free shipping bills. [paras 38.3 to 38.5]

(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. [para 36.3]

We also record the clarification that the exports effected by a non status holder (without any export performance in the year previous to 2003-04) through a status holder [with 25% incremental growth of exports] are eligible for the benefits under the Special Scheme irrespective of the fact that such exporters did not have any incremental growth in exports obviously because they had made no exports in the previous years in the first place. [para 14.4]. We also reiterate the clarifications made in paras 37.4 and 40 of this judgment.

42. Subject to the above findings and clarifications given in this judgement, the rest of the prayers made by the petitioners are hereby rejected.

43. Rule is made absolute only to the aforesaid limited extent as indicated above. For rest of the prayers, Rule is discharged.

There shall be no order as to costs.