

(2014) 02 GUJ CK 0127

In the Gujarat High Court

Case No : Special Civil Application No. 11031 of 2013

Alstom India Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37, 37B
Constitution of India, 1950 — Article 136, 14, 19(1)(g), 226, 246
Customs Act, 1962 — Section 11, 151A, 28, 3(4), 75
Finance Act, 1994 — Section 73, 93A, 94
Foreign Trade (Development and Regulation) Act, 1992 — Section 10, 11, 13, 15, 15(1)
Foreign Trade (Development And Regulation) Amendment Act, 2010 — Section 13, 2(a), 2(d), 2(e), 2(h)
Income Tax Act, 1961 — Section 115P, 115S, 115WD, 115WE, 115WF
Land Acquisition Act, 1894 — Section 4
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22(2) (g)
Securities and Exchange Board of India Act, 1992 — Section 11AA

Citation : (2014) 301 ELT 446 : (2014) 26 GSTR 449

Hon'ble Judges : Bhaskar Bhattacharya, C.J.;J.B. Pardiwala, J

Bench : Division Bench

Advocate : Sujit Ghosh and Maulik G. Nanavati, Ms. Kanupriya Bhargava and Ms. Nikita Mehta, Advocate for the Appellant; Haren Raval, Sr. Advocate and Harsh N. Parekh and Nishant Lalakiya, Advocate for the Respondent

Judgement

Bhaskar Bhattacharya, C.J.—By this Special Civil Application, the writ-petitioner, which is a company incorporated under the Companies Act, 1956 and engaged in setting up power plants including project engineering, procurement, construction and commissioning for its customers, has prayed for the following reliefs:- (a) Be pleased to hold that Para 2.3 of the FTP is unconstitutional and ultra vires the FTDR Act or the FTP;

(b) Be pleased to declare and hold that Para 8.3.6 of the HOP is ultra vires the FTDR Act as well as FTP and declare it as null, void ab initio and non est. law.

(c) Be pleased to hold that Para 7 of the declaration attached with ANF-8 form read with the provisions of HOP does not grant power to the Respondent No. 2 or its subordinates to re-verify or re-determine the duty drawback benefits once such benefits are approved to the claimant.

(d) Such further and other relief, order or direction which may be just, fit, proper and equitable in the facts and circumstances of the petition.

The case made out by the petitioner may be summed up thus:-- 1.1 The petitioner has been claiming "deemed export benefits" on various power projects and, therefore, has an interest in the legality and propriety of various powers exercised by the respondent No. 2, the Director General of Foreign Trade (D.G.F.T.) and its subordinates in connection with the processing and grant of the deemed export benefit. The respondent No. 1 is the Union of India, responsible for the formulation of the Foreign Trade Policy (FTP) under which the deemed export benefits are available to the petitioner.

1.2 Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 ("FTDR Act") empowers the Central Government to make provision for the development and regulation of foreign trade.

1.3 Section 5 of the FTDR Act empowers the Central Government to formulate and announce by way of notification in the Official Gazette, the export and import policy and it may also amend that policy from time to time. Pursuant to the powers under this Section, the FTP is issued by the Central Government. The policy is generally formulated for 5 years and the same is revised/amended by means of an Annual Supplement each year. The policy presently in force is the FTP 2009-14.

1.4 Section 6 empowers the Respondent No. 2 to advise the Central Government in the formulation of export and import policy and shall be responsible for carrying out that Policy. Section 6(3) provides that the Central Government, by Order published in the Official Gazette, can direct that any power exercisable by it under the FTDR Act should be exercised by the Respondent No. 2 or the officer subordinate to the Respondent No. 2 except the powers under Sections 3, 5, 15, 16 and 19 of the FTDR Act that reads as under:

Section 3 grants power to make provision relating to imports and exports;

Section 5 refers to the power to amend the policy;

Section 15 refers to the quasi-judicial powers i.e. power to hear appellate proceedings.

Section 16 refers to the revision powers granted to the Central Government and DGFT to revise the decision or orders passed by the Respondent No. 2 and the subordinates of the Respondent No. 2 respectively.

Section 19 refers to the power of the Central Government to make rules.

1.5 Pursuant to the aforesaid Section 6 of the FTDR Act, under Para 2.3 of the FTP, the Respondent No. 2 has been empowered to interpret the FTP Policy. As per Para 2.3, if any doubt or question arises in respect of interpretation of any provision in the FTP or in the matter of classification of any item in the ITC (HS) or in the HOP, the said question or doubt shall be referred to the D.G.F.T., whose decision thereon shall be final and binding.

1.6 The Central Government vide Para 2.4 of the FTP grants power to the Respondent No. 2 to specify procedure to be followed for the purpose of implementing provisions of FTDR Act, the Rules and the Order. Such procedures or amendments, if any, shall be published by means of public notice.

1.7 In exercise of powers conferred under Para 2.4 of the FTP, the Respondent No. 2 specifies HOP through Public Notice No. 1 (RE-2012)/2009-2014 New Delhi dated 5th June, 2012 which is in the form of an administrative guideline.

1.8 Para 8.3.1 of the HOP provides that to claim duty drawback benefits, a claimant has to fill an ANF-8 form. Para 7 of the declaration of ANF-8 form requires an undertaking from the claimant that in case of re-determination and re-verification, the claimant shall refund the amount paid in excess.

1.9 Para 8.3.6 of the HOP provides that subject to the procedures laid down in the HOP, Customs and Central Excise Duty Drawback Rules, 1995 shall apply mutatis mutandis to deemed exports.

2. In the aforesaid background, according to the petitioner, the aforesaid provisions i.e. Para 2.3 of the FTP, Para 8.3.6 of the HOP and Para 7 of the ANF-8 form are in gross violation of Article 14 and 19(1)(g) read with Articles 246 and 265 of the Constitution of India and the provisions of FTDR Act and the FTP on the following grounds:

2.1 The Respondent No. 2 through Para 8.3.6 of the HOP has incorporated by reference the provisions of Duty Drawback Rules mutatis mutandis to the FTP and HOP. The HOP is nothing but an administrative guideline as can be discerned from the reading of Para 2.4 of the FTP read with Section 6 of the FTDR Act. Section 3 of the FTDR Act grants power to the Respondent No. 1 to make provisions relating to imports and exports and the Respondent No. 1 u/s 5 of the FTDR Act can formulate and announce the foreign trade policy. Section 6 of the FTDR Act specifically provides that the powers granted to the Respondent No. 1 under Sections 3 and 5 of the FTDR Act cannot be sub-delegated to the Respondent No. 2. Therefore, in terms of Section 6 of the FTDR Act, the provisions related to FTP or import and export can only be legislated by the Parliament or by the Respondent No. 1 in its capacity as a delegate. The Respondent No. 2 through Para 8.3.6 of the HOP has sought to incorporate provisions of Duty Drawback Rules to deemed exports mutatis mutandis which is impermissible in view of the fact that no power has been granted to Respondent No. 2 either under the FTDR Act or the FTP to legislate either directly or by way of incorporation by reference. It is trite that the separation of power between the

legislature and executive forms part of the basic structure of the Constitution of India and any attempt by the executives to legislate without appropriate authority under the law would tantamount to violation of the basic structure of the Constitution of India. That power to legislate is enshrined under Article 246 of the Constitution of India and has been conferred on the Parliament and the State Legislature. Any attempt by the executives to legislate without the authority of law would thus be a colourable device and therefore, in violation of Article 246 of the Constitution of India. That the duty drawback Rules if permitted to be adopted by Respondent No. 2 by way of incorporation by reference, it would amount to permitting the Respondent No. 2 to deal with the matters relating to duty and tax refunds as provided u/s 75 of the Customs Act, Section 37 of the Central Excise Act and Section 93A read with Section 94 of the Finance Act, 1994. Such permission to the Respondent No. 2 to adopt the Duty Drawback Rules without any power to legislate either expressly or otherwise would tantamount to levying or collecting tax without authority of law and would, thus, be in violation of Article 265 of the Constitution of India. Therefore, Para 8.3.6 of the FTP is ultra vires the FTDR Act and is in violation of Articles 246 and 265 of the Constitution of India.

2.2 The power granted to the Respondent No. 2 under Para 2.4 of the FTP is to lay down the procedure and therefore, the same cannot be used to introduce substantive law i.e. Duty Drawback Rules. Therefore, Para 8.3.6 of the HOP is liable to be set aside.

2.3 The FTDR Act or FTP does not grant power to the Respondent No. 2 and its subordinates to re-determine or re-verify the deemed export benefits once such benefits have been approved or granted as per the provisions of the FTP. In the absence of power under FTDR Act or FTP, the Respondent No. 2 and its subordinates cannot assume quasi-judicial power such as power to redetermine or re-verify under administrative guidelines i.e. Para 7 of the ANF-8 Form. Therefore, Para 7 of the ANF-8 is usurpation of quasi-judicial power by the Respondent No. 2 and its subordinates and thus, travels beyond the provisions of the FTDR Act as well as FTP and hence, liable to be struck down.

2.4 Merely because such declaration is required to be signed by the claimant cannot confer power to re-determine and re-verify on the Respondent No. 2 and its subordinates where such power is otherwise not available in law. It is a settled principle of law that acquiescence cannot validate propriety and jurisdiction of an authority where no such power inherently exists with such authorities. Therefore, Para 7 of the ANF-8 is in violation of FTDR Act as well as the FTP and hence, is liable to be struck down.

2.5 The Para 2.3 of the FTP provides that the decision of Respondent No. 2 on matters relating to interpretation of FTP, HOP, etc., is final and binding. The various subordinate authorities of the Respondent No. 2 perform quasi-judicial functions under Sections 7, 8, 9, 10, 11, 13, etc. of the FTDR Act. Therefore, the unfettered power granted under Para 2.3 of the FTP to the Respondent No. 2 to

interpret FTP and HOP [which is final and binding] interferes with the independence of the quasi-judicial functions of its subordinates and also binds them and interferes with their independent application of mind. Such an unfettered power and all advisories issued thereunder such as circulars, minutes of the meetings and other instructions by whatever name called that has its effect of binding the quasi-judicial and judicial authorities is bad in law. The provisions of Para 2.3 is contrary to the Constitution of India and ultra vires the FTDR Act. The Para 2.3 of the FTP is liable to be struck down. Every taxing statute like Central Excise Act, Customs Act, Finance Act, and Income Tax Act grants administrative powers to the C.B.E. & C./CBDT to issue orders, instructions and directions. However, it has been provided in all such statutes that such instruction or direction or order shall not be binding on authorities performing quasi-judicial functions. Therefore, Para 2.3 of the FTP is unlike the scheme of other fiscal legislations insofar as it pertains to power to issue orders, instructions and directions by the administrator which has the possibility of influencing the quasi-judicial authorities.

3. The aforesaid application is opposed by the Respondent No. 2 by filing affidavit-in-reply and the defence of the Respondent No. 2 may be summed up thus:

Preliminary Submissions

3.1 Under British regime the import of goods from Great Britain was encouraged and the export of goods from India and the import of goods from other developed countries was discouraged by imposition of higher customs duties. The statutory mechanism for controlling foreign trade was the Sea Customs Act, 1878. Regarding imports and exports, the Government of India Act, 1935 granted an exclusive power to the Centre to legislate on the subject. But no specific enactment was passed by the Central Legislature. During the Second World War, under the compulsive necessity created by the scarce foreign exchange resources and the acute shortage of shipping space in the Indian ports, a notification under the Defence of India Rules was issued in 1939, bringing under control the import of 68 commodities. Steadily other notifications were issued bringing more items under control. In July, 1943 a consolidated notification was issued covering a wide range of controlled items. With the end of the Second World War, the Defence of India Rules lapsed but the provisions regarding import control instructions were continued by virtue of the Emergency Provisions (Continuance) Ordinance, 1946 which was replaced, insofar as the imports and exports control is concerned, by the Imports and Exports (Control) Act, 1947. It came into force for a period of three years but was extended from time to time. In 1971, it became a permanent statute. By the Imports and Exports (Control) (Amendment) Ordinance, 1975, changes of far-reaching character were made in the Imports and Exports (Control) Act, 1947. The Ordinance was replaced by the Imports and Exports (Control) (Amendment) Act, 1976. In spite of changes made by the Act of 1976 the Imports and Exports

(Control) Act, 1947 continued to suffer from deficiencies. The legal regime set up under the Act, 1947 became outdated and hindered the growth and development of India's foreign trade. Consequently, on 19th June, 1992, the President of India promulgated the Foreign Trade (Development and Regulation) Ordinance repealing the Imports and Exports (Control) Act, 1947. To replace the Foreign Trade (Development and Regulation) Ordinance, 1992, the Foreign Trade (Development and Regulation) Bill was introduced in the Parliament with the following statement of objectives and reasons:

Statement of Objectives & Reasons:

3.2 It is now generally acknowledged that foreign trade is the driving force of economic activity. Technology, investment and production are becoming increasingly interdependent upon each other and foreign trade brings these elements together and spurs economic growth.

3.3 The Imports and Exports (Control) Act, 1947 was made under the then prevailing circumstances. Since the Act did not provide an adequate legal framework for the development and promotion of India's foreign trade, it was amended from time to time. Besides, in July, 1991 and August, 1991, major changes in trade policy were made by the Government of India. The goals of the new trade policy are to increase productivity and competitiveness and to achieve a strong export performance. The Exports and Import Policy is a vital part of trade policy. The basic law governing foreign trade must serve as an instrument to create an environment that will provide a strong impetus to exports, facilitate imports and render export activity more profitable.

3.4 Preamble of the Foreign Trade (Development and Regulation) Act, 1992 recites that it is an Act to provide for development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto. Thus, the said Act was enacted in light of the above stated statement of objects and reasons and the preamble above referred to. It has come into force on 19th June, 1992 and has been amended by Act 25 of 2010, being called Foreign Trade (Development & Regulation) Amendment Act, 2010 which is brought into effect by virtue of Notification S.O. 2099(E), dated 27th August, 2010.

Some important provisions of the Statutes which have bearing on the contentions urged in the petition.

3.5 Section 2(a) of the said Act defines "adjudicating authority" to mean the authority specified in, or u/s 13. Section 2(d) defines "Director General" to mean the Director General of Foreign Trade appointed u/s 6.

3.6 Section 2(e) defines "import" and "export" respectively as "bringing into, or taking out of, India any goods by land, sea or air".

3.7 Section 2(h) defines "Order" as "any order made by the Central Government u/s 3".

3.8 Section 3 enables the Central Government to make provisions for the development and regulation of foreign trade by facilitating imports and increasing exports. It is therefore trite to submit that any policy framed by virtue of exercise of power u/s 3(1) must be so interpreted to further the statutory intention as manifest by virtue of Section 3(1). Similarly, u/s 3(2) Central Government is empowered to make provision for prohibiting, restricting or otherwise regulating in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology. Proviso to Section 3(2) provides that the provisions of the said sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies. Section 3(3) of the said Act provides that all goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited u/s 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly. Section 3(4) provides that without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or license shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under the Act, or rules or orders made thereunder.

3.9 Section 5 of the Act provides that the Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy. It goes without saying that power to frame, announce and amend the foreign trade policy vests only in the Central Government and not in any other authority.

3.10 D.G.F.T. is appointed u/s 6(1) of the said Act, who, in view of the provisions contained in sub-section (2) of Section 6 has to advise the Central Government in the formulation of the foreign trade policy and shall be responsible for carrying out that policy. It is therefore, clear that on bare reading of Section 6(2), the said sub-section clothes D.G.F.T. with all powers to enable him to decide statutory responsibilities of carrying out the Policy. Such powers expressly flow from Section 6(2), including powers to interpret the Policy and are also implicit in statutory provisions, to fulfil the purposes of the Act and to interpret the Policy so as to carry out in accordance with law.

3.11 Section 6(3) of the Act provides that the Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under the said Act (other than the powers under Sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order. However, this very provision makes it clear that powers under Sections 3, 5, 15, 16 and 19 conferred on the Central Government cannot be delegated. That u/s 13 of the Act "adjudicating authority" is empowered to

impose any penalty or adjudge any confiscation. This power can be exercised by the Director General as adjudicating authority or subject to such limits as may be specified, by such officer as the Central Government may, by notification in the Official Gazette, authorize in this behalf.

3.12 Only powers which are exercised by the adjudicating authority u/s 13 either by the Director General or subordinate officer empowered by the Central Government are made subject matter of appeal u/s 15(1) of the Act. Provision of sub-section (1) of Section 15 is clear since appeal can be preferred by any person aggrieved by any decision or order made by the adjudicating authority under the said Act. Orders that adjudicating authority can pass are those which are mentioned in Section 13, namely, imposing penalty or adjudging confiscation. Such appeal lies to the Central Government when an order is made by the Director General as adjudicating authority and to the Director General in case where it has been made by an officer subordinate to the Director General or to any officer superior to the adjudicating authority authorized by the Director General.

3.13 Section 16 was existing in original unamended Act (prior to Act 25 of 2010) which was titled as "revision". It provides that the Central Government, in the case of any decision or order made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, may on its or his own motion or otherwise, call for and examine the records of any proceeding, for the purpose of satisfying itself or himself as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit. Such power was subject to limitation prescribed in clauses (a) and (b) of proviso to Section 16, i.e., it has to be exercised within a period of two years from the date of such decision or order, notice to show cause why such decision or order shall not be varied after giving reasonable opportunity of making representation and if he so desires be heard in its defence.

3.14 Chapter 2 of the said FTP contains general provisions regarding imports and exports. Para 2.1 thereof provides that exports and imports shall be free, except where regulated by FTP or any other law in force. The power to specify itemwise export and import policy, as specified in ITC (HS) is conferred upon the Director General of Foreign Trade and to notify and to amend from time to time. Para 2.3 provides that if any question of doubt arises in respect of interpretation of any provision contained in FTP, or Handbook of Procedure Volume I or Handbook of Procedure Volume II or classification of any item in ITC (HS) or Schedule of DEPB Rates (including content scope or issue of an authorization thereunder) said question or doubt shall be referred to D.G.F.T. whose decision thereon shall be final and binding.

3.15 in light of the aforesaid provisions, it is, therefore, apparent that in every case where question of doubt arises as regards interpretation of the provisions contained in FTP or classification of any item in ITC (HS) or HOP, Vol. I or II or

Schedule of DEPB rates including content, scope or issue of an authorization thereunder, the said question or doubt shall be referred to the D.G.F.T. whose decision thereon shall be final and binding. The above power is wide and untrammelled to interpret any provision of the FTP. It is, therefore, within the jurisdiction, power and authority of the D.G.F.T. to interpret the provisions of FTP. In other words, maintaining the provision of the Policy as it is, power conferred on the D.G.F.T. under para 2.3 in regard to interpretation is wide enough to determine the eligibility of any person claiming hereunder.

3.16 Para 2.4 of the FTP provides that D.G.F.T. may specify procedure to be followed for an exporter or importer or by any licensing or any other competent authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and FTP. Such procedures shall be published by means of a Public Notice, and may, in like manner, be amended from time to time. Bare perusal of the above provision makes it clear that the Director General has the power to specify the procedure to be followed by an exporter for the purposes of implementation of the provisions of the Act and the Rules. Such power is implicit power of the D.G.F.T. to determine any procedure followed by an exporter for the purpose of claiming any benefit under the FTP.

Preliminary Objection against the Special Civil Application

3.17 That the petition is neither maintainable nor tenable at law and deserves to be dismissed in limine as it is misconceived in law as well as in facts.

3.18 That the petitioner has not approached this Court with clean hands. The petition is lacking in bona fides which will be apparent from the fact hereinafter mentioned. The petitioner is guilty of suppressing true and correct facts from this Court and has attempted to mislead this Court by mischievous averments as well as by suppressing true and correct facts. The petitioner is guilty of not disclosing the order rendered by this Court in an earlier petition filed by the petitioner being Special Civil Application No. 2569 of 2013 disposed of by order dated 26th June, 2013 by the Division Bench of this Court (Coram : M.R. Shah and Ms. Sonia Gokani, JJ.). The petitioner is also guilty of suppressing the fact that pursuant to the above order rendered by this Court, the issues sought to be raised in the present petition are directed to be considered by the Director General of Foreign Trade. The present petition is a complete abuse of the process of law, which has disintitiled the petitioner from invocation of jurisdiction of this Court as well as the consideration and grant of any relief, whether final or interim. The petitioner, by such a conduct, which will be apparent from the facts narrated hereinafter and which have been suppressed, deserves to be saddled with exemplary costs while dismissing the petition in limine. Those facts are:

3.19 As stated in the Petition, it challenges the provision of para 8.3.6 of the Handbook of Procedures, 2009-14, as well as para 2.4 of the Foreign Trade Policy, 2009-14 as well as para 7 of the declaration of ANF Form also purports to challenge legality and validity of provisions of para 2.3 of the Foreign Trade Policy

by averring in paragraph 2 that the petitioner claimed deemed export benefit under the Foreign Trade Policy. The petitioner then mischievously avers in paragraph 5 that the petitioner has been claiming deemed export benefits and, therefore, has an interest in the legality and validity of various powers exercised by the Director General of Foreign Trade (respondent No. 2) and its subordinate officers that are processing the applications for grant of deemed export benefit and by saying so the petitioner has explained the filing of the present petition, challenging the vires of para 8.3.6 and para 2.3 of the Foreign Trade Policy, on the apprehended alleged correctness and soundness of the proposed action of the respondents pursuant thereof. Thereafter, the petitioner has further averred in paragraph 11 that it is likely to be affected by the assumption of jurisdiction by the respondent No. 2 and its subordinates within territorial limits of this Court. All these averments apart from being wholly mischievous suffer from suppression of material facts that the petitioner had instituted Special Civil Application No. 2569 of 2013, inter alia, praying for the following relief:--

(a) To issue a writ of order/direction, setting aside impugned order dated March 21, 2011 passed by the respondent No. 3 and order dated April 13, 2012 passed by the respondent No. 4 in appeal and instructions contained in the minutes dated March 15, 2011 and September 9, 2011 of PIC as illegal, arbitrary, contrary to FTDR Act and violative of Articles 14, 19(1)(g) and 300A of the Constitution;

(b) To pass an order, directing the respondent authority to disburse the amount claimed by the petitioner towards the duty drawback along with interest.

3.20 The factum of filing of the said petition, the factum of the same being disposed of by order dated 26th June, 2013 and the factum of an order having been passed on 21st March, 2011 by the Joint Director General of Foreign Trade, rejecting the claim for grant of deemed export benefit which led to filing of earlier petition being Special Civil Application No. 2569 of 2013 as well as the factum of a departmental appeal having been preferred and the same having been dismissed by order dated 13th April, 2012, have been suppressed from this Court. All these are material facts, suppression of which alone is sufficient to seek a dismissal of the present petition with exemplary costs.

3.21 The petitioner has compounded its suppression of material facts by not even disclosing before this Court that pursuant to an order dated 26th June, 2013 rendered in Special Civil Application No. 2569 of 2013, the petitioner has been directed to submit fresh detailed representation again for reconsideration of the decision dated 21st March, 2011 of the Joint Director General of Foreign Trade as well as in support of their case that they are eligible to duty drawback with respect to the goods in question under the relevant Export-Import Policy/ Foreign Trade Policy and rest of other grounds which may be available to it within a period of 15 days from the date of dismissal of the said petition i.e. 26th June, 2013. The petitioner has suppressed that by the said order of the Division Bench the answering respondent No. 2 i.e. Director General of Foreign Trade was

directed to inform the petitioner with respect to the date of personal hearing, and take a decision thereon, hold personal hearing which shall be within a period of four weeks from the date of the said order dated 26th June, 2013. The petitioner has suppressed the fact that the Director General of Foreign Trade has been directed to pass afresh order on such representation in accordance with law and on merits with an open mind and without in any way being influenced by the earlier order and pass speaking order thereafter within a period of two weeks from the actual date of personal hearing and communicate such decision forthwith thereafter. This Court has observed in para 6.0(iv) that all contentions and defence which would be available to the respective parties, more particularly the petitioner, are kept open to be dealt with and considered by the Director General of Foreign Trade in accordance with law and on merits for which this Court has not expressed anything in favour of either of the party. This Court has also observed in para 6.0(v) that in case of any adverse decision it will be open for the petitioner to challenge the same before appropriate Court/forum which shall be considered in accordance with law and on merits. This order has also been suppressed from this Court. The Petitioner has- suppressed the vital facts that in compliance of the above directions, it has submitted its fresh representation and hearing thereof is underway.

3.22 While disposing of the abovesaid Special Civil Application No. 2569 of 2013, this Court has in paragraph 2 of the decision dated 26th June, 2013 observed that number of submissions have been urged by the learned Counsel appearing on behalf of respective parties with respect to the power of the Joint Director General of Foreign Trade in reviewing and/or recalling their earlier decision of approving the duty drawback and even with respect to eligibility of duty drawback by the petitioner under the relevant Export and Import Policy/Foreign Trade Policy. The Court has further observed in para 4 and recorded the submissions of the learned Counsel appearing on behalf of this very petitioner that it would submit fresh detailed representation to the Director General of Foreign Trade in support of their claim that they are entitled to and eligible to duty drawback with respect to the goods in question under relevant Export and Import Policy/Foreign Trade Policy and has further recorded that the request to make suitable observation that Director General of Foreign Trade may take a fresh decision on such representation to be made by the petitioner against the decision of the Joint Director General of Foreign Trade dated 21st March, 2011 and also with respect to eligibility of duty drawback with respect to the goods in question by the petitioner, independently with open mind and without in any way being influenced by their earlier decision inclusive of the decision of the Policy Interpretation Committee (PIC). A prayer was also made to release some amount provisionally while directing Director General of Foreign Trade to take afresh decision as the amount of duty drawback involved is huge amount.

3.23 All the above-mentioned facts are suppressed by the petitioner with mala fide intention and ulterior motive of delaying the proceedings before the Director General of Foreign Trade which have been directed to be concluded as per the

direction of this Court dated 26th June, 2013. It may be mentioned that pursuant to the said direction within one week from 26th June, 2013 i.e. on 9th July, 2013 a notice, fixing the date of hearing on 23rd July, 2013, has been issued. That on 23rd July, 2013 the matter was heard and the petitioner had submitted additional documents. Next date of hearing is fixed on 30th July, 2013. On one hand, the petitioner is participating in those proceedings without disclosing the fact that the petitioner has filed present petition and on the other hand, the petitioner has invoked the equitable extraordinary and highly prerogative writ jurisdiction of this Court by suppressing all these relevant material facts and circumstances. Such a conduct of the petitioner by itself is sufficient to decline the exercise of discretionary and equitable jurisdiction of this Court.

3.24 There is yet another mala fide intention of the petitioner in preferring present petition. The petitioner-Alstom India had been appointed as an independent contractor in respect to the erection and commission of a Non-Mega Power Project of Gujarat State Electricity Corporation Limited (GSECL). That a dispute about eligibility of GSECL, who had by itself is an importer, having itself imported several goods and paid customs duty at a concessional rate of duty is pending before this Court as regards eligibility to claim Deemed Export Benefits in regard to the said transaction. The said amount is sought to be claimed as a duty drawback on the ground that such import of goods by said GSECL in view of a contract being given through international competitive bidding (ICB) to Alstom is eligible for consideration and grant of deemed export benefit under Chapter VIII of the present Foreign Trade Policy. The Union of India and the Director General of Foreign Trade, which have passed order denying such claim, are resisting such a prayer of GSECL. This issue is, however, subject matter of a writ petition being Special Civil Application No. 15706 of 2011, which is pending before Division Bench of this Court. The petitioner-Alstom India Ltd. is substantially and vitally interested in those proceedings, inasmuch as if such amount is ordered to be refunded to GSECL being the amount of import duty paid by it on such imports, it is reasonable and bona fide believed, in view of the terms and conditions of the contract entered into between the petitioner and Alstom and said GSECL, that it would claim the reimbursement of such amount from GSECL. The said action of the Union of India and Director General of Foreign Trade is challenged on various grounds including the applicability of the Foreign Trade Policy and the very provisions, namely para 8.3.6 and para 2.3. Apart from suppressing the above mentioned facts, the present petition, which is lacking in bona fides, is filed with the mala fide intention of causing an impediment to the smooth hearing and decision of the said petition which is pending and is in session of another Bench which has the requisite jurisdiction to deal with it according to the present roster. That said matter is fixed in the presence of the present petitioner (petitioner of Special Civil Application No. 2569 of 2013) on 30th July, 2013 when the said petition was heard and decided on 26th June, 2013. The present petition has been instituted with a view to derail and delay the hearing of the said petition before another Division Bench of

coordinate jurisdiction and with a view to make a prayer that both the said petitions being Special Civil Application No. 15706 of 2011 and the present petition be heard together. Thus, the attempt is to take out pending petition which was earlier heard on two occasions from jurisdiction of another Division Bench, which is seized of the said matter and on this ground alone, the present petition deserves to be dismissed with exemplary costs as it is nothing short of a gross abuse of process of law.

3.25 At present no cause of action has arisen to the petitioner to institute the present petition. Institution of the present petition by suppressing of relevant facts and circumstances, including the filing of earlier petition being Special Civil Application No. 2569/2013 and the order of this Court dated 26th June, 2013 clearly reflects the intention of the petitioner and the lack of bona fides. The cause of action for the petitioner to challenge the Foreign Trade Policy would arise only and only if there is a decision which is adverse to the petitioner if decided by the Director General of Foreign Trade, in compliance of the directions contained in the order dated 26th June, 2013 rendered in Special Civil Application No. 2569 of 2013. At present, the Director General of Foreign Trade is hearing the proceedings and is cognizant of the proceedings and, therefore, there is no cause of action for the petitioner to institute present petition.

3.26 If the submissions made in Para 11 are perused, then the petitioner has merely stated very vaguely that the petitioner is likely to be affected by the assumption of jurisdiction by respondent No. 2 and its subordinate authorities, by patently illegal reading of provisions of the FTP, within the territorial limits of this Court. On that basis the petitioner asserts that this Court has jurisdiction to entertain the petition. There is no specific cause of action pleaded by the petitioner. No cause of action has at present arisen within the jurisdiction of this Court. From the cause title of the present petition, it is clear on reading the cause title at page 1 that Alstom India Ltd.-petitioner has registered office at Bombay which is beyond the territorial jurisdiction of this Court. If the cause title is perused, both the respondents are not within the territorial jurisdiction of this Court. By mentioning District Vadodara in the cause title, the petitioner has instituted the present petition.

3.29 In light of the above-mentioned submissions, it is clear that the filing of the present petition at this stage when the proceedings are pending before the respondent No. 2, is clearly an action which is per se lacking in bona fides.

3.30 The filing of the present petition is mala fide and it is evident from the comparison of page 1 of the petition which contains cause title and the Index page of the compilation submitted during the course of hearing of SCA No. 2569 of 2013 by the very petitioner which appears to be a cut and paste job from the earlier petition since earlier petition was instituted in the name of Alstom India Ltd., Baroda.

3.31 in light of these preliminary submissions, the petition deserves to be

dismissed in limine without entertaining into any of the questions, whether apparently posed on an assumption that there are likely to be orders which may be passed and which may prejudice the interest of the petitioner.

3.32 By suppressing the fact that the Director General of Foreign Trade is hearing the matter as regards eligibility of alleged deemed export, the petitioner who has submitted a representation to the jurisdiction of the Director General of Foreign Trade in taking a decision and that pursuant to the direction of this Court dated 26th June, 2013 rendered in Special Civil Application No. 2569 of 2013, the petitioner has in fact attempted to file an appeal against the order dated 26th June, 2013 rendered by a coordinate Division Bench of this Hon"ble Court in a surreptitious manner. The present petition deserves to be dismissed on this ground alone.

4. Parawise reply

4.1 Para 1: As the title itself suggests, the Handbook of Procedures Volume I is a consolidated compilation on the methodology which needs to be followed by the importers/exporters/different agencies/concerned Government authorities, etc., involved in order to execute and implement the Foreign Trade Policy formulated by the Government of India. Section 6 of the Act has entrusted and empowered the D.G.F.T. to be responsible for carrying out the FTP. Being an executive body does not super impose the restriction that it cannot frame guidelines or procedures in order to shoulder its responsibilities. Rather, in terms of Section 6 of the Act, the executive body becomes bound to devise a suitable mechanism to fulfil the enshrined responsibility.

4.1.1 The D.G.F.T. has not legislated the stipulation at para 8.3.6 of the HOP Vol. I by incorporating the reference ".....Customs and Central Excise Duty Drawback Rules, 1995 shall apply mutatis mutandis to deemed exports." It is not only the Para 8.3.6 of the HOP Vol. I that has been devised, rather for each and every aspect of the scheme which is a part of the FTP, the D.G.F.T. has devised suitable documents and procedures. Para 8.3.6 of the HOP Vol. I contains the stipulation in the existing form, as, in the opinion of the D.G.F.T., there is no need of any other innovative stipulation/provision/procedure, since the provisions contained in the Customs and Central Excise Duty Drawback Rules, 1995 are sufficiently in consonance with the intended purpose of the D.G.F.T. No additional purpose would be served even if the existing stipulation is substituted with entries containing voluminous contents.

4.1.2 The form ANF 8 has been devised, as have been other numerous documents and ANFs in the HOP Vol. I, for the purpose of documentation which is made use of by the exporters for filing the claims. The declaration at Para 7 thereof is a safeguard mechanism adopted by the D.G.F.T. to counter such unforeseen circumstances which may arise due to erroneous/excess payment made to an exporter which may occur due to a human error or otherwise. This document has been devised by the D.G.F.T. in exercise of the powers granted to

him under para 2.4 of the FTP.

4.1.3 The FTP formulated by the Government of India provides that the decision of D.G.F.T. shall be final and binding on all matters relating to interpretation of Policy, or provision in HOP Vol. I, HOP Vol. II or classification of any item for import/export policy in the ITC (HS).

4.2 Para 2; It is a matter of records, hence no comments.

4.3 Paras 3 & 4; The various benefits which are provided in relation to the goods supplied to various categories of "Deemed Exports" specified in the FTP are extended only upon fulfilment of the corresponding conditions attached against such respective category. In other words, such a supply must qualify under one of these specified categories in order to be treated as "Deemed Exports", which would lead to availability of deemed export benefits. The exercise to scrutinise such supply as well as making available the consequential benefits is not directly done by the Respondent No. 2 himself, rather it is done by the officers subordinate to him, on behalf of Respondent No. 2.

4.3.1 Para 2.3 of the FTP provides that if any question of doubt arises in respect of interpretation of any provision contained in FTP, or classification of any item in ITC (HS) or HOP Vol. I or Vol. II, or Schedule of DEPB Rates (including content, scope or issue of an authorization thereunder) said question or doubt shall be referred to D.G.F.T. whose decision thereon shall be final and binding.

4.3.2 The interpretation of the existing FTP so made or clarification offered on the existing provisions of the FTP by the Respondent No. 2 under Para 2.3 of the FTP is communicated to the officers subordinate to him, both at the Headquarters and the Regional Offices spread across the country, who are directed to review the cases which may lie in the category for which clarification/interpretation has been offered by the D.G.F.T. Regional Authorities of the Directorate General of Foreign Trade, with whom the applicants had submitted the Declarations as per the para 7 of ANF 8, and based upon which the Regional Authorities had provided the deemed export reimbursement, thus, reviewed these cases, as per the clarification given by the D.G.F.T. through exercise of power by the D.G.F.T. under para 2.3 of the FTP.

4.4 Para 5: Para 2.3 of the FTP in itself is abundantly absolute and unambiguous. The utility, validity and sanctity of para 8.3.6 of the HBP Vol. I has already been contended at para 1 above.

4.5 Paras 6 to 8: These paras are a matter of records, hence no comments.

4.6 Para 9: The petitioner has contended that provisions contained in Para 2.3 of the FTP, Para 8.3.6 of the HOP Vol. I and para 7 of the ANF 8 are in gross violation of Article 14 and 19(1)(g) read with Articles 246 and 265 of the Constitution of India and the provisions of FTDR Act and the FTP. The petitioner has not explained as to on what grounds the gross violation has been contended.

4.7 Para 10: In view of the facts as submitted in the foregoing paras, this Court should dismiss the present petition.

5. The petitioner gave rejoinder to the aforesaid affidavit and the said rejoinder may be summed up as follows:

5.1 The legality and validity of Para 2.3 of the Foreign Trade Policy by which the Respondent No. 2 has been granted the unfettered powers to interpret the policy is one of the subject-matter of challenge. Such challenge is made on the ground that the interpretation adopted by the Respondent No. 2 is binding on its subordinate officers and it thereby influences their decision and thus, interferes in independent discharge of their quasi-judicial function.

5.2 The legality of provisions of Para 8.3.6 of the Handbook of Procedures 2009-14 by which the Respondent No. 2 has sought to incorporate the provisions of Customs and Central Excise Duty Drawback Rules, 1995 mutatis mutandis to deemed exports is also the subject-matter. Such challenge is premised on a legal submission that Respondent No. 2 being an executive body does not possess the power to legislate by resorting to "incorporation by reference" while exercising its executive powers arising under Para 2.4 of the Foreign Trade Policy, 2009-14; and

5.3 The petitioner has also disputed the validity of Para 7 of the declaration of ANF-8 form through which the subordinates of Respondent No. 2 including the Respondent No. 2 itself has assumed power to re-determine and re-verify the duty drawback benefit once the same is approved and requiring the claimant to return the same, although such power to recover is otherwise not available as such under the Foreign Trade (Development and Regulation) Act, 1992. The challenge is based on the submission that such jurisdiction and power are being assumed purely on the basis of Paragraph 8.3.6 of the Handbook of Procedures 2009-14 which is in the nature of administrative guidelines, without there being an express conferment of such power by either the Foreign Trade (Development and Regulation) Act, 1992 or the Foreign Trade Policy 2009-2014. Power to recover erroneous refund of taxes/benefits from an assessee/person, is a substantive power and cannot be assumed by way of administrative guidelines.

5.4 No challenge has been made in the present petition to any particular action or order passed by the Respondent No. 2 or any of its subordinate officers concerning any transaction related to the business of the present petitioner. All orders passed by the Respondent No. 2 or its subordinate officers to the extent they are adverse to the interest of the petitioner have been challenged separately before the appropriate forum. The adjudication of the legal issues raised in the present petition have no bearing on the judicial determination of such challenges pertaining to merits of individual transactions.

5.5 Preliminary objection

The affidavit has not been filed by the Respondent No. 2. Instead, the affidavit has been filed by an officer subordinate to the Respondent No. 2 holding the

designation of Jt. D.G.F.T. In the affidavit, no averments have been made, which remotely indicate that the deponent has been specifically authorized by the Respondent No. 2 on his behalf to submit the said affidavit nor has any appropriate authorization letter been annexed thereto. The Jt. D.G.F.T. is neither a party impleaded nor a proper party or necessary party for the purpose of the present petition, and in that sense is a stranger to the present legal proceedings. Therefore the affidavit filed by a person alien to the proceedings should not be considered by this Court and the affidavit should be directed to be taken off the record of the present petition.

Parawise rejoinder

6. Paras 1A and IB do not require any comments.

6.1 Para 1C(i) to (iii) do not require any comments.

6.2 The contents of Para 1C(iv) of the affidavit are denied to the extent that it states that the Respondent No. 2 ("D.G.F.T.") u/s 6(2) of the Foreign Trade (Development & Regulation) Act, 1992 ("FTDR Act") has power to enable him to decide statutory responsibilities to carry out the policy. On the contrary, appropriately put u/s 6(2) of the FTDR Act, the Respondent No. 2 (i.e. D.G.F.T.) has power to advise the Central Government in formulation of the Foreign Trade Policy ("FTP") and is responsible for carrying out that policy. However, the Respondent No. 2 draws its specific power to interpret the FTP from Para 2.3 of the FTP, which is a delegated legislation. The petitioner does not question the fact that a power to interpret the FTP has been bestowed on Respondent No. 2, however, it challenges the legality of such sweeping power granted to the Respondent No. 2 (i.e. D.G.F.T.) on the basis that such power is unbridled and unfettered. Further exercise of such power by the Respondent No. 2 conclusively binds the subordinate authorities and has the effect of directly influencing the subordinate officers envisaged under FTDR Act in the discharge of their quasi-judicial functions.

6.3 Para 1C(v) of the affidavit does not require any comment. Instead, by his own admission, the Jt. D.G.F.T. on behalf of the Respondent No. 2 has admitted that u/s 13 of the FTDR Act, various subordinate officers of the D.G.F.T. may be authorized by the Central Government to discharge the adjudicating functions envisaged u/s 13. The possibility of these subordinate officers being unduly influenced and bound by interpretation of the FTC accorded by the Respondent No. 2 in its capacity as an administrator of the FTP, forms the very substratum of the present petition. Such influence has the effect of vitiating fair play and an independent dispensation of quasi-judicial function by the officers subordinate to the Respondent No. 2 and therefore, is bad in law and cannot be sustained.

6.4 The petitioner admits the contents of Para 1C(vi) of the affidavit. In fact, by his own admission, the Respondent No. 2 has accepted that u/s 15(1) of the FTDR Act, where an adjudication order has been passed by the officer subordinate to the D.G.F.T., an appeal lies before the D.G.F.T. This is, therefore,

an illustration of an illusory and almost futile adjudicatory exercise that is likely to take place under the scheme of the FTP breaching all the established principles of judicial process in view of the following:

6.4.1 The subordinate authorities, while exercising their power to adjudicate u/s 13 of the FTDR Act are bound by the interpretation of the provision of the FTP by the Respondent No. 2 under Para 2.3 of the FTP and therefore, have no choice but to follow the interpretation so adopted by the superior officer (i.e. D.G.F.T.) in discharging their quasi-judicial function thereby militating the requirement of independent application of mind.

6.4.2 The adjudication order so passed by the subordinate officer on appeal shall lie before the Respondent No. 2 u/s 15 of the FTDR Act who having interpreted the FTP in a certain manner would certainly not take a view contrary to such interpretation adopted by him, thereby making the entire appellate procedure a sham one. It is also a classic case of violation of the trite principle of judicial process i.e. *nemo iudex in causa sua*.

6.4.3 Therefore, unless the power of the D.G.F.T. to interpret the policy is not made subject to reasonable restriction (such as these interpretations not binding quasi-judicial and appellate process), fair and independent dispensation of justice cannot be expected either at the subordinate officer level or at the appellate level, thereby making the entire adjudication process illusory.

6.5 Para 1C(vii) of the affidavit does not require any comment except that the Respondent No. 2 has stated that there are indeed officers subordinate to him who are empowered to take decisions and pass orders that become a subject matter of review before the Respondent No. 2. Through this petition, the petitioner is challenging the unbridled power vested with the Respondent No. 2 to interpret the FTP which binds such subordinate officers, thereby having the effect of derailing and vitiating a fair judicial process at the subordinate officer's level.

6.6 Para 1C(viii) of the affidavit does not require any comment.

6.7 It has been stated in Para 1C(ix) of the affidavit that the power to interpret any provision of the FTP granted to Respondent No. 2 under Para 2.3 of the FTP is wide and untrammelled. In other words, it has been admitted (in agreement with the petitioner's submission) that indeed the power of the Respondent No. 2 under Para 2.3 of the FTP has a very wide amplitude and it therefore, supports the petitioner's submission that such power is without any restrictive covenant which debars the Respondent No. 2 from influencing subordinate authorities in discharge of their quasi-judicial/adjudicating functions.

6.8 Para 1C(ix) of the affidavit does not require any comment. However, the Respondent No. 2 as the representative of the delegated authority (i.e. Central Government) cannot be said to have the power to legislate in the garb of laying down the procedures merely by virtue of powers bestowed on him under Para 2.4 of the FTP. It is trite in law that a delegated authority cannot sub-delegate unless

delegate has been specifically permitted to do so under the mother legislation (the principle of delegates non-protest delegate). While the scheme of the FTDR Act specifically confers power onto the delegate (i.e. Central Government) to make rules (as per Section 19 of the FTDR Act) there is no other provision that permits the Central Government to further delegate the rule making power or power to legislate to any third party including the Respondent No. 2. On analysis of the scheme of the FTDR Act and the principles of the administrative law stated above, it would be appropriate to state that the mother legislation (i.e. FTDR Act) has bestowed the power on the Central Government to formulate the delegated legislation (i.e. FTP) and further subordinate legislations by way of rules pursuant to Section 19 of the FTDR Act. However, no power can be seen to have been granted to the Respondent No. 2 to legislate and therefore, the power conferred on the Respondent No. 2 under Para 2.4 of the FTP, to specify procedures has to be interpreted strict sensu to mean "only administrative guidelines? and none other. If in discharge of such power and, in the garb of laying down the procedures, the Respondent No. 2 incorporates by reference any substantive law, [as has been done in Para 8.3.6 of the HOP by incorporating the Customs and Central Excise Duty Drawbacks Rules, 1995 ("duty drawback rules") it would be an action fraught with impropriety for reasons of having travelled beyond the power conferred on it and breaching the fundamental principle of administrative law and violating the basic structure of the Constitution which provides for separation of power between the executive and the legislature.

6.9 The contents of opening paragraph of Para 2 are incorrect, misconceived and smacks of autocratic approach of the Jt. D.G.F.T. on behalf of Respondent No. 2 inasmuch as the right to challenge the vires of any statutory provision cannot be a case which can be subjected to imposition of exemplary costs, should the petitioner fail, else fear of such costs would derail the very concept of right to seek judicial intervention in interpretative and complex matters thereby limiting the ambit and operation of Article 226 of the Constitution, under which the petitioner has approached this Hon"ble Court.

6.10 The allegation made in Para 2A of the affidavit is denied.

6.11 The malicious and baseless allegations sought to be cast upon the petitioner by the Jt. D.G.F.T. on behalf of the Respondent No. 2 through his submission at Para 2(B) of the affidavit are denied. It is an unfair and almost malicious attempt on the part of the Jt. D.G.F.T. on behalf of the Respondent No. 2 to prejudice this Court by distorting the facts and events for reasons that:

6.11.1 The petitioner had filed Special Civil Application No. 2569 of 2013 which was disposed of by an order dated 26th June, 2013 by a Division Bench of this Court (Coram : Hon"ble Mr. Justice M.R. Shah and Hon"ble Ms. Justice Sonia Gokani, JJ). The issue in the aforesaid writ petition was whether the Jt. D.G.F.T. has the power to withdraw the approval letter allowing the benefit of duty drawback once approved by him. The petitioner had also challenged in the said petition the existence of the Policy Interpretation Committee headed by the

Respondent No. 2 prior to 2012 and its minutes dated 15th March, 2011 on the basis of which such benefits were denied to the petitioner before the D.G.F.T.

6.11.2 The relief prayed in the said petition did not pertain to seeking the High Court's intervention to rule on the vires of the provisions of the FTP or HOP unlike what has been prayed for and pleaded in the present petition.

6.11.3 The subject-matter of the aforesaid petition was solely challenging the propriety of certain orders passed and actions of the Jt. D.G.F.T. and the Respondent No. 2 within the framework of the legislative provision on a bona fide assumption that exercise of power by the authority was legal and proper in view of legality of the source of power.

6.11.4 The challenge in the said petition of orders adverse to the interest of the petitioner was premised essentially on the principles of estoppel and violation of the principles of natural justice. It was the action of the officers of reopening assessments which have already been completed that was challenged on the ground that they do not possess any power under the FTDR Act read with the FTP for such reopening. One of the key points that the petitioner had highlighted before the Division Bench was that it is an established principle of law that once assessment is complete, such assessment cannot be reopened. Instead, a proper procedure is to file an appeal against such an assessment order and an authority having passed an order becomes functus officio and cannot recall his order.

6.11.5 While as part of one of its alternate arguments, legitimacy of the power of the Respondent No. 2 to interpret the FTP was raised (as merely an alternative argument) however, no relief whatsoever was prayed for by the petitioner with respect to challenging the vires of the said provision.

6.11.6 A bare perusal of the order passed by the Division Bench of this Court would vindicate the contentions and submissions of the petitioner.

6.11.7 In the present petition, apart from challenging the vires of Para 2.3 of the FTP, validity of Para 8.3.6 of the HOP and Para 7 of the declaration of the ANF-8 are also challenged. Legitimacy of these Paras was neither prayed nor argued in the aforesaid Special Civil Application No. 2569 of 2013.

6.11.8 In this petition, at Para 12, the petitioner has declared "that the petitioner has not filed any other petition before this Hon'ble Court or any other High Court or Supreme Court of India praying for the specific relief prayed herein below." Such is a true and honest declaration in view of the reliefs prayed for in the aforesaid writ petition, and the petitioner cannot be said to have suppressed any material fact concerning the ultimate relief prayed for before the Hon'ble Court in the present petition.

6.11.9 Under these facts and circumstances, it appears that the submission of the Jt. D.G.F.T. on behalf of the Respondent No. 2 that the petitioner lacks bona fides, that the petitioner is guilty of suppression and has attempted to mislead this Court - is clearly baseless and appears to be more of a deliberate distortion

of real facts, particularly when the Jt. D.G.F.T. was a party respondent in the earlier writ petition and fully aware of the pleadings of the said writ petition.

6.12 The petitioner also denies the allegation of Respondent No. 2 that the petitioner is guilty of suppressing the fact that pursuant to the above order of the Division Bench, the issues sought to be raised in the present case are directed to be considered by the D.G.F.T. Such an allegation shows the utter lack of understanding by the Respondent No. 2 of the provision of law and powers conferred on the D.G.F.T., inasmuch as.

6.12.1 It is not permissible for an executive authority discharging quasi-judicial function to ever decide on the vires of the Statute of which it is a creature.

6.12.2 Consequently, it was never possible for the petitioner to ever seek relief from the D.G.F.T. on propriety/legality/vires of such provision of law.

6.12.3 Therefore, the contention of the respondent that the petitioner could have and ought to have agitated the issues raised in the present petition can be agitated before and ought to have been argued before the D.G.F.T. is ex facie perverse, bereft of basic understanding of competencies and jurisdiction of the D.G.F.T. and is entirely motivated to deny substantive justice to the petitioner.

6.13 Consequently, the pleadings of the Respondent No. 2 that the petitioner deserves to be saddled with exemplary costs while dismissing the petition in limine is a reflection of their mala fide intention to deny the petitioner's legitimate right to challenge the vires/legality or otherwise of any piece of legislation before this Hon"ble Court.

6.14 The contents of Para 2(B)(i) of the affidavit are incorrect as the petitioner never challenged the vires of Para 2.4 of the FTP in the other writ petition. The subsequent averments by the Jt. D.G.F.T. on behalf of the Respondent No. 2 of the said paragraph do not in any manner establish that the action of the petitioner in filing this petition was ever mischievous and/or suffers from the vice of suppression of material facts. Except bald allegations, which as demonstrated herein above are bereft of any substance and are absolutely reckless, the Respondent No. 2 has not been able to show the manner in which the petitioner has committed any legal mischief or how the petitioner has suppressed relevant and material facts which would have a bearing on adjudication of legal issues raised in the present petition.

6.15 While the petitioner agrees to the factual events that have taken place earlier as elaborated under Para 2(B)(ii) of the affidavit in the case of the petitioner, however, the petitioner denies that these are material facts nondisclosure of which would expose the petitioner to charges of suppression of material and vital facts aimed at misleading the Court in deciding issues raised in the petition and thereby disentitle the petitioner from being heard on merits of the challenge raised in the present petition. In the present petition, none of those actions that had taken place in the past have been challenged,

consequently, none of the factual events leading up to such impugned actions were ever relevant. For challenging the vires of a given legislation, the legislation has to be tested through the prism of the rigorous drill prescribed under the Constitution and not through the fabric of any factual matrix. The factual events would be relevant for a petition only where a petitioner claims that it is covered or excluded from the provisions of a given legislative arrangement, through which either rights are granted or restrictions are imposed, as is often noticed in tax appeals, however where vires of legislative provision is examined, factual events have a little or no role to play.

6.16 The contents of Para 2(B)(iii) of the affidavit have no relevance whatsoever to the present petition in view of Para 16 of the present rejoinder. That apart, by its own admission, the Respondent No. 2 has clearly stated that as per the ambit of the D.G.F.T. hearing pursuant to the order of this Court in Special Civil Application No. 2569 of 2013, the D.G.F.T. was to hear the petitioner on merits of the case in so far as their eligibility to duty drawback under the FTP is concerned. This clearly demonstrates that the contents of the present petition has no bearing with the earlier matter, given that in the present petition, no argument or prayer has been advanced by the petitioner, qua its eligibility to duty drawback. The present petition is only restricted to challenging the vires of certain provisions which have been assailed in the petition. In addition and contrary to the averment made by the Respondent No. 2 in its affidavit that there has been suppression of facts, it has been rightly indicated in the affidavit "that the Hon'ble High Court at Para 6(iv) and (v) have rightly directed that all contentions and defences available to the parties more particularly to the petitioner have been kept open for consideration afresh by the D.G.F.T. and that the Division Bench is not expressing anything in favour of either parties and that should adverse decision be passed by the D.G.F.T. it is open for the petitioner to challenge the same before the appropriate Court forum". The said directive of the High Court cannot be interpreted to mean that the High Court has directed the D.G.F.T. to rule on the vires of the various provisions of the FTP - for the reason that the D.G.F.T. does not possess such power. Instead, the true and correct interpretation of the above directive can only be that the D.G.F.T. has been directed to examine the petitioner's eligibility to claim duty drawback on merits and all other aspects that the D.G.F.T. has jurisdiction to rule on. Therefore, these vital aspects clearly demonstrate that the substratum of both the petition is different.

6.17 The contents of Para 2(B)(iv) of the affidavit does not require any comment as it is a matter of fact and instead supports the plea of the petitioner that the substratum of the other petition was with respect to the power of Jt. D.G.F.T. in reviewing or recalling the earlier decision and approving the duty drawback and with respect to the eligibility to duty drawback and not vires of the provisions of the FTP and HOP.

6.18 The allegations made in Para 2(B)(v) of the affidavit that the above facts

have been blissfully suppressed by the petitioner with a mala fide intention of delaying the proceeding before the D.G.F.T., is false and denied. It is a matter of record that the petitioner has appeared before the D.G.F.T. on the appointed dates for hearing and has advanced arguments on the merits of their case. Neither in oral arguments nor in the written representation submitted before the D.G.F.T. has it been requested by or on behalf of the petitioner that the hearing be stayed in view of filing of the present petition. Such accusation by the respondent is a figment of wild imagination on the part of the Jt. D.G.F.T. The dishonesty in making such accusation is apparent from the fact that the affidavit has been affirmed by the Jt. D.G.F.T. on 31st July, 2013 whereas the petitioners had submitted their written representation before the D.G.F.T. in terms of the court order on 15th July, 2013 and again on 23rd July, 2013 and had appeared before the D.G.F.T. for personal hearing on 23rd July, 2013 and again on 30th July, 2013. It seems that the deponent of the affidavit has not bothered to verify the record available in the office of the D.G.F.T. and has hastily proceeded to file the present affidavit making allegations which are fanciful and contrary to the record, or has deliberately chosen to make a false and irresponsible statement on oath in the affidavit. The allegation of the Respondent No. 2 that the petitioner has not disclosed to the D.G.F.T. about filing of the present petition is factually incorrect. The Jt. D.G.F.T. seems to have made it a habit of making statements which are factually incorrect and/or contrary to the record. The additional submissions filed by the petitioner before the D.G.F.T. on 23rd July, 2013, the petitioner had specifically mentioned about filing of the present petition. Therefore, it is the respondent who is guilty of making false statements and thereby misguiding the Court.

6.19 The allegations made in Para 2(B)(vi) of the affidavit are vehemently denied as they are grossly erroneous and have shades of qualifying as being insinuating in nature without appreciating the relevant facts and circumstances pertaining to the dispute in the case of GSECL and the petitioner, for the reasons more fully described below:

6.19.1 To the best of the petitioner's knowledge, GSECL's claim for duty drawback (which was denied by Respondent No. 2 and is thus subject matter of Civil Application No. 15706 of 2011) pertains to the equipment purchased and imported by them. Alstom India Limited, i.e., the petitioner has no role or interest into the duty drawback claim of GSECL with respect to such imports.

6.19.2 Consequently, the allegation that - Alstom India Limited, i.e. the present petitioner is substantially and vitally interested in those proceedings, inasmuch as, if duty drawback is ordered to be granted to GSECL by the High Court, then Alstom India Limited would claim the reimbursement of such amount from GSECL demonstrates lack of knowledge of facts and the law on the part of the deponent. The conduct of the deponent in filing affidavits without verifying the facts is deplorable.

6.19.3 On the contrary, Alstom India Limited is an Indian company engaged in

the manufacture of equipment necessary for Hydel and Thermal power projects making domestic/indigenous supply to the power project owners who are not restricted only to GSECL but supply equipments to other public and private sector companies as well as overseas companies/projects.

6.19.4 In substance, the petitioner vehemently denies all the allegations and submits that no attempt has been made by the petitioner to derail the hearing of the proceedings in the case of Civil Application No. 15706 of 2011. Neither was it ever the intention of the petitioner, nor does it desire that the present petition be clubbed with the Special Civil Application No. 15706 of 2011 and such bald allegations made in the affidavit based on assumptions and presumptions may be viewed with scorn by this Court and appropriate strictures may be passed by this Bench against the deponent for having made such a false allegation through a sworn affidavit as such actions are nothing short of being perjury.

6.20 Neither in the pleadings nor in the oral submissions has a request been made by the petitioner or his lawyer to transfer the present petition to the Court hearing Special Civil Application No. 15706 of 2011 or have the said writ petition transferred to this Court. To the best of information available with the petitioner neither the petitioner in Special Civil Application No. 15706 of 2011 nor the lawyer for the said petitioner made any request before the Court hearing the said petition for either postponing the hearing of that petition in view of filing of the present petition or clubbing that petition with the present petition. The allegations made in the affidavit are fanciful and unbecoming of a Government servant.

6.21 The contention of the Respondent No. 2 that no cause of action has arisen for challenging the legality of a provision of law smacks of ignorance of law. The framing of a piece of legislation which is contrary to the provisions of the Constitution of India itself offers a cause of action to any party to challenge the said piece of legislation if he is likely to be directly or indirectly affected by such legislation. The contention of the Respondent No. 2 that a person needs to wait for being affected by exercise of power under such faulty legislation to challenge the legality of the said legislation is to say the least laughable and deserves to be rejected. The contention of the Respondent No. 2 that "the cause of action for the petitioner to challenge the Foreign Trade Policy would arise only and only if there is a decision which is adverse to the petitioner if decided by the Director General of Foreign Trade, in compliance of the directions contained in the order dated 26th June, 2013 rendered in Special Civil Application No. 2569/2013" betrays possession of rudimentary knowledge of law and highlights absolute non-application of mind on the part of the deponent.

6.21.1 The contention raised by the petitioner about lack of territorial jurisdiction of this Court in entertaining the present petition is devoid of any merit and hence, denied. Even though the registered office of the petitioner company is in State of Maharashtra, the petitioner-company has a significant investment in the form of full-fledged manufacturing plant in the State of Gujarat. It is from the

said plant that the petitioner supplies equipments to various power projects. In respect of such supplies, the petitioner files claims for duty drawback with the office of the D.G.F.T. at Vadodara. The above fact clearly demonstrates the territorial nexus the petitioner has with the State of Gujarat.

6.21.2 The petitioner-company would be directly affected within the territorial limits of jurisdiction of this Court if the authority were to exercise powers which the petitioner contends are violative of the Constitution of India. The cause of action would arise in its entirety within the territorial jurisdiction of this Court if the Jt. D.G.F.T. at Vadodara passes an order exercising powers under the provisions challenged by the petitioner in the present petition. The contention of the respondent that since the seat of respondent is at New Delhi, this Court does not have jurisdictional competency to entertain and adjudicate the present petition is fallacious and legally untenable as it ignores the doctrine of dominus litis and the principle of forum conveniens. This Court has jurisdiction to hear and decide the issues involved in the present petition on merits.

6.22 The allegations made in Para 2(B)(ix) of the affidavit are denied and the petitioner reiterates that the present petition has been filed bona fide.

6.23 The allegations made in Para 2(B)(x) of the affidavit are denied and the petitioner takes strong objection to such insinuating, mala fide, erroneous, perverse and misleading averments of the Respondent No. 2 alleging that the index of the present petition is identical and cut and paste of Special Civil Application No. 2569 of 2013 for the reasons mentioned herein below:

6.23.1 The present petition index page comprises of 1 page whereas in Special Civil Application No. 2569 of 2013 the index page runs into 2 pages.

6.23.2 The present petition has index reference to 4 serial numbers whereas there were 13 serial numbers in Special Civil Application No. 2569 of 2013.

6.23.3 The present petition makes reference to only 2 Annexures, viz. Annexure P1 and P2 whereas in Special Civil Application No. 2569 of 2013, there were 11 Annexures viz. P1 to P11.

6.23.4 None of the 2 Annexures that finds mention in the index of the present petition was included as any of the Annexure (P1 to P11) in Special Civil Application No. 2569 of 2013.

6.25 From the consistent misleading line of averments made by the Respondent No. 2 including the present one which are utterly baseless, presumptive, glaring misrepresentation of facts with a view to surreptitiously prejudice this Bench, goes to show the complete lack of desire for fair play by the Respondent No. 2 and instead, reflects badly of what governmental institutions should stand for. Exemplary costs and strictures, if any, should be deserved by the deponent of the affidavit for repeatedly making false allegations and attempting to misguide this Bench to intentionally cause harm to the interest of the petitioner and scuttle its legitimate right to approach this Court and seek relief subject to the Court's

discretion.

6.26 The contents of Para 2C of the affidavit are denied. The preliminary objections raised by the respondent are frivolous and without any substance. There is no suppression of any material fact which would have a bearing on the adjudication of legality of the provisions questioned in the present petition.

6.27 The allegations of Para 3 of the affidavit are denied which state that the petitioner has apparently sought to surreptitiously file an appeal before this Bench against the order of the Division Bench of this High Court rendered in the Special Civil Application No. 2569 of 2013 are denied on the following grounds:

6.27.1 A petition can be considered as an Appeal against an earlier order only if such other order has been impugned in the subject petition. In the present petition, it can be very clearly noticed that no order of any Court or Authority has been challenged, much less the order of co-ordinate Bench of this Court.

6.27.2 A petition by way of an appeal is filed only where the findings in relation to the subject-matter of any earlier order is being challenged before a higher authority. In the present case, it can be clearly ascertained from reading the contents of the present petition that neither the findings nor the orders and direction impugned in the earlier order have been agitated before this Bench, instead the substance and substratum of the current petition is solely restricted to challenging the vires of certain provision of the FTP or HOP.

6.27.3 It is the rudimentary and basic understanding of the law that an appeal can be filed only if the provision of law so permit and can never lie before another co-ordinate Bench. To even allege so, demonstrates complete lack of application of mind on basic principles of law.

6.28 The contents of paragraph 4 of the reply are not admitted and the respondent is put to strict proof thereof. The justification offered by the deponent for D.G.F.T. not filing an affidavit is wholly unacceptable and legally untenable. The non-rebuttal of the legal contentions raised by the petitioner as regards constitutionality of the provisions challenged in the present petition by a party respondent may be viewed as admission on the part of the Government and the Court may accordingly adjudicate the issues raised in the petition. As stated herein above, there is nothing surfacing on record from the averments made in the affidavit in reply that the deponent of the said affidavit has been authorized by the Respondent No. 2 to reply on merits for and on behalf of the Respondent No. 2. This is without prejudice to the contention as to whether the Respondent No. 2 could have authorized a subordinate officer to file an affidavit in response to a petition questioning the power of Respondent No. 2. The deponent, therefore, requests the Court to hear the petition ignoring the affidavit in reply filed on behalf of a stranger to the proceeding and one who is otherwise incompetent in law to put forth the case of the Respondent No. 2.

6.29 The contents of Para 5 are denied and Para 6 does not require any comment.

6.30 The averment of the Jt. D.G.F.T. on behalf of the Respondent No. 2 in Para 6(1) of the affidavit to the extent it states that the HOP Vol. I is a consolidated compilation of the methodology necessary for execution and implementing the FTP and also the averment that the Respondent No. 2 being an executive body is entrusted to carry out the FTP and can frame guidelines or procedures for this purpose is admitted. However, the subsequent averments made therein with respect to the specific comments made qua the nature and characteristics of the provisions contained in Para 8.3.6 of the HOP Vol. I in relation to which it has been stated in the affidavit that the D.G.F.T. has merely provided these as procedural guidelines as these duty drawback rules are sufficiently in consonance with the intended purpose of D.G.F.T. are denied for the reasons more fully described below:

6.30.1 The Duty Drawback Rules have been formulated by the Central Government by way of a delegated legislation pursuant to Section 75 of the Customs Act, Section 37 of the Central Excise Act, Section 93A read with Section 94 of the Finance Act and therefore, it is not merely an administrative guideline but partakes the character of law/legislation.

6.30.2 Section 75(2) of the Customs Act provides that the Central Government may make rules for the purpose of carrying out the provisions of Section 75 and in particular may make such rules that provide not only for procedural aspect [viz. Section 75(2)(b), (c) and (d)] but also substantive aspects such as,

(i) rules for payment of drawback equal to amount of duty actually paid on imported materials used in the manufacturing [75(2)(a)],

(ii) rules for specifying the goods in respect of which drawback shall not be allowed [75(2)(aa)],

(iii) rules for adjustment, etc., of duty drawback [75 (2)(ab)], and

(iv) rules to grant power to give drawback with retrospective effect in certain cases [75(3)].

6.30.3 Pursuant to the said rule making power, the Central Government has enacted the duty drawback rules which cover the following aspects:

6.30.4 From a bare perusal of scheme of Duty Drawback Rules it can be clearly noticed that the same deals largely with substantive aspects (i.e. 13 Rules) and only few provisions deal with procedural matters (i.e. 5 Rules).

6.30.5 Under these circumstances, when an executive incorporates the duty drawback rules by reference, such incorporation by reference as has been done in Para 8.3.6 of the HOP is clearly a colourable device aimed at incorporating substantive law in the garb of mere procedural guidelines.

6.30.6 Such an action by the executive which amounts to nothing but legislation, goes against the very grain of separation of power between the executive and the legislature, particularly where the executive (i.e. the D.G.F.T.) has not been

delegated any power to legislate by the mother legislation.

6.31 The averment of the Respondent No. 2 in Para 6(1) of the affidavit to the extent that it states that the ANF-8 has been devised for the purpose of documentation which is used by the exporters for filing the duty drawback claims is admitted. However, the subsequent averments made qua declaration at Para 7 of the ANF-8 are denied for the reasons more fully described below:

6.31.1 Power to recover erroneous/excess payment made by any governmental agencies is a substantive power which should be provided in a statutory framework and cannot be introduced through administrative guidelines as has been done. Similar power to recover excess payment of refund is incorporated u/s HA of the Central Excise Act, Section 28 of the Customs Act and Section 73 of the Finance Act as also Rule 16 and 16A of the Duty Drawback Rules, all of which are legislations or delegated legislations as opposed to mere administrative guidelines.

6.32 The averment of the Respondent No. 2 in Para 6(1) of the affidavit to the extent that the FTP grants the D.G.F.T. the power to interpret is admitted.

6.33 Para 6(2) of the affidavit requires no comments.

6.34 The averments in Para 6(3 & 4) of the affidavit and in fact the Respondent No. 2 by the aforesaid Para himself has supported the contention put forth by the petitioner that the interpretation of the D.G.F.T. is used by the subordinate authorities in discharge of their various quasi-judicial functions are admitted. Such a scheme goes against the basic principle which requires that the adjudicating and quasi-judicial body cannot be influenced by administrative directive from superior officer. Safeguards as provided under the Central Excise Act, Customs Act Finance Act and Income Tax Act in this regard ought to have been adopted under the FTP as well.

6.35 The averment of Respondent No. 2 in Para 6(5) that under Para 2.3 Respondent No. 2 has abundant absolute power which aspect forms the very edifice of the petitioner's pleadings is admitted. The said absolute powers without reasonable restrictions are being challenged in the present petition.

6.36 Para 6(6 to 8) of the affidavit requires no comments.

6.37 The contents of Para 6(9) of the affidavit and rely upon Para 1 of the writ petition are denied.

6.38 The contents of Para 10 are denied.

6.39 The averments of Para 6(A to D) are denied in view of the above submissions.

6.40 The contents of Para 6(E & F) of the affidavit are denied by relying upon the submission made in Para E of the writ petition.

6.41 In regard to para 6(11) of the affidavit, the petitioner requests this Court to

allow the writ petition filed by the petitioner.

6.42 The contents of Para 6(12) requires no comments.

6.43 In regard to Para 6(13) of the affidavit, the petitioner requests this Court to allow the writ petition filed by the petitioner.

7. Mr. Harin Raval, the learned Senior Advocate appearing on behalf of the Union of India, has, at the outset, taken a preliminary objection as to the maintainability of the present Special Civil Application on the ground of suppression of material facts. According to Mr. Raval, the petitioner has attempted to mislead this Court by mischievous averments as well as suppression of true and correct facts. According to Mr. Raval, the petitioner is guilty of not disclosing the order passed by this Court in an earlier petition filed by the petitioner being Special Civil Application No. 2569 of 2013 disposed of by order dated 26th June, 2013 by the Division Bench of this Court (Coram : M.R. Shah and Ms. Sonia Gokani, JJ.). Mr. Raval further submits that the petitioner is also guilty of suppressing the fact that pursuant to the above order rendered by this Court, the issues sought to be raised in the present petition are directed to be considered by the Director General of Foreign Trade, and thus, the present petition is a complete abuse of the process of law, which has disentitled the petitioner from invocation of jurisdiction of this Court.

7.1 Mr. Raval points out that in the present petition, the petitioner challenges the provision of para 8.3.6 of the Handbook of Procedures, 2009-14 as well as para 2.4 of the Foreign Trade Policy, 2009-14 as well as para 7 of the declaration of ANF Form and also purports to challenge legality and validity of provisions of para 2.3 of the Foreign Trade Policy by averring in paragraph 2 of the writ application that the petitioner claimed deemed export benefit under the Foreign Trade Policy. Mr. Raval further submits that the petitioner then averred in paragraph 5 that the petitioner has been claiming deemed export benefits and, therefore, has an interest in the legality and validity of various powers exercised by the respondent No. 2, the Director General of Foreign Trade, and its subordinate officers that are processing the applications for grant of deemed export benefit and by saying so the petitioner has explained the filing of the present petition, challenging the vires of para 8.3.6 and para 2.3 of the Foreign Trade Policy, on the apprehended alleged correctness and soundness of the proposed action of the respondents pursuant to the direction given by the earlier Division Bench. Mr. Raval further submits that the petitioner has further averred in paragraph 11 that it is likely to be affected by the assumption of jurisdiction by the respondent No. 2 and its subordinates within territorial limits of this Court. According to Mr. Raval, all those averments, apart from being wholly mischievous, suffer from suppression of material facts that the petitioner had instituted Special Civil Application No. 2569 of 2013, inter alia, praying for the following relief:--

(a) To issue a writ of order/direction, setting aside impugned order dated March

21, 2011 passed by the respondent No. 3 and order dated April 13, 2012 passed by the respondent No. 4 in appeal and instructions contained in the minutes dated March 15, 2011 and September 9, 2011 of PIC as illegal, arbitrary, contrary to FTDR Act and violative of Articles 14, 19(1)(g) and 300A of the Constitution;

(b) To pass an order, directing the respondent authority to disburse the amount claimed by the petitioner towards the duty drawback along with interest.

7.2 According to Mr. Raval, the factum of filing of the said petition, that the same being disposed of by order dated 26th June, 2013 and the further fact that an order having been passed on 21st March, 2011 by the Joint Director General of Foreign Trade, rejecting the claim for grant of deemed export benefit which led to filing of earlier petition being Special Civil Application No. 2569 of 2013 and filing of a departmental appeal and the same having been dismissed by order dated 13th April, 2012, have been suppressed from this Court. According to Mr. Raval, suppression of above material facts alone is sufficient to dismiss the present writ-petition.

7.3 Mr. Raval has further contended that the petitioner has even not disclosed before this Court that pursuant to the order dated 26th June, 2013 passed in Special Civil Application No. 2569 of 2013, the petitioner has been directed to submit fresh detailed representation for reconsideration of the decision dated 21st March, 2011 of the Joint Director General of Foreign Trade as well as in support of their case that they are eligible to duty drawback with respect to the goods in question under the relevant Export-Import Policy/Foreign Trade Policy and rest of other grounds which may be available to it within a period of 15 days from the date of dismissal of the said petition. According to Mr. Raval, the petitioner has suppressed that by the said order of the Division Bench, the respondent No. 2 i.e. Director General of Foreign Trade, has been directed to inform the petitioner with respect to the date of personal hearing, and take a decision thereon, hold personal hearing which shall be within a period of four weeks from the date of the said order dated 26th June, 2013. Mr. Raval further submits that the petitioner has suppressed the fact that the Director General of Foreign Trade has been directed to pass a fresh order on such representation in accordance with law and on merits with an open mind and without in any way being influenced by the earlier order and to pass a speaking order thereafter within a period of two weeks from the actual date of personal hearing and communicate such decision thereafter. Mr. Raval further points out that the Division Bench in the earlier occasion had observed in para 6.0(iv) that all contentions and defence which would be available to the respective parties, more particularly the petitioner, were kept open to be dealt with and considered by the Director General of Foreign Trade in accordance with law and on merits for which the Court has not expressed anything in favour of either of the party. Mr. Raval further submits that the Division Bench also observed in para 6.0(v) that in case of any adverse decision it will be open for the petitioner to challenge the same

before appropriate Court/forum which shall be considered in accordance with law and on merits.

7.4 Mr. Raval further submits that while disposing of the above said Special Civil Application No. 2569 of 2013, the Division Bench has in paragraph 2 of the decision observed that number of submissions had been urged by the learned Counsel appearing on behalf of respective parties with respect to the power of the Joint Director General of Foreign Trade in reviewing and/or recalling the earlier decision of approving the duty drawback and even with respect to eligibility of duty drawback by the petitioner under the relevant Export and Import Policy/Foreign Trade Policy. Mr. Raval further points out that the Division Bench has further observed in paragraph 4 by recording the submissions of the learned Counsel appearing on behalf of this very petitioner that it would submit fresh detailed representation to the Director General of Foreign Trade in support of their claim that they are entitled to and eligible to duty drawback with respect to the goods in question under relevant Export and Import Policy/Foreign Trade Policy and has also recorded the request to make suitable observation that Director General of Foreign Trade may take a fresh decision on such representation to be made by the petitioner against the decision of the Joint Director General of Foreign Trade dated 21st March, 2011 and also with respect to eligibility of duty drawback with respect to the goods in question by the petitioner, independently with open mind and without in any way being influenced by their earlier decision inclusive of the decision of the Policy Interpretation Committee (PIC).

7.5 All the above-mentioned facts, according to Mr. Raval, are suppressed by the petitioner with mala fide intention and ulterior motive of delaying the proceedings before the Director General of Foreign Trade which have been directed to be concluded as per the direction of this Court contained in its order dated 26th June, 2013. Mr. Raval further submits that pursuant to the said direction, within one week from 26th June, 2013 i.e. on 9th July, 2013 a notice fixing the date of hearing on 23rd July, 2013, has been issued. On 23rd July, 2013, the matter was heard and the petitioner had submitted additional documents and the next date of hearing is fixed on 30th July, 2013. Thus, according to Mr. Raval, on one hand, the petitioner is participating in those proceedings without disclosing the fact that the petitioner has filed present petition, and, on the other hand, the petitioner has invoked the equitable extraordinary and highly prerogative writ jurisdiction of this Court by suppressing all these relevant material facts.

7.6 Mr. Raval has further drawn our attention to the fact that the petitioner had been appointed as an independent contractor in respect to the erection and commission of a Non-mega Power Project of Gujarat State Electricity Corporation Limited (GSECL). A dispute about eligibility of GSECL, who had by itself is an importer, having itself imported several goods and paid custom duty at a concessional rate of duty, is pending before this Court as regards eligibility to

claim Deemed Export Benefits in regard to the said transactions. The said amount is sought to be claimed as a duty drawback on the ground that such import of goods by said GSECL, in view of a contract being given through International Competitive Bidding (ICB) to the petitioner, is eligible for consideration and grant of deemed export benefit under Chapter VIII of the present Foreign Trade Policy. The Union of India and the Director General of Foreign Trade, which have passed order denying such claim, are resisting such a prayer of GSECL. Such issue, according to Mr. Raval, is the subject matter of a writ petition being Special Civil Application No. 15706 of 2011, which is pending before Division Bench of this Court. According to Mr. Raval, the present petitioner is substantially and vitally interested in those proceedings, inasmuch as if such amount is ordered to be refunded to GSECL being the amount of import duty paid by it on such imports, it is reasonable and bona fide believed, in view of the terms and conditions of the contract entered into between GSECL and the petitioner, that it would claim the reimbursement of such amount from GSECL. Mr. Raval further submits that the said action of the Union of India and Director General of Foreign Trade is challenged on various grounds including the applicability of the Foreign Trade Policy and the very provisions, namely, para 8.3.6 and para 2.3. According to Mr. Raval, apart from suppressing the above-mentioned facts, the present petition, which is lacking in bona fides, is filed with the mala fide intention of causing an impediment to the smooth hearing and decision of the said petition which is pending and is in session of another Bench which has the requisite determination to deal with it according to the present roster. Mr. Raval further submits that the said matter was fixed in the presence of the present petitioner on 30th July, 2013. According to Mr. Raval, the present petition has been instituted with a view to derail and delay the hearing of the said petition before another Division Bench of coordinate jurisdiction and with a view to make a prayer that both the said petitions being Special Civil Application No. 15706 of 2011 and the present petition be heard together.

7.7 According to Mr. Raval, at present, no cause of action has arisen to the petitioner to institute the present petition and institution of the present petition by suppression of relevant facts and circumstances, including the filing of earlier petition being Special Civil Application No. 2569/2013 and the order of this Court dated 26th June, 2013 clearly reflects the intention of the petitioner and the lack of bona fides. Mr. Raval further points out that the cause of action for the petitioner to challenge the Foreign Trade Policy would arise only if there is a decision which is adverse to the petitioner if decided by the Director General of Foreign Trade, in compliance of the directions contained in the order dated 26th June, 2013 rendered in Special Civil Application No. 2569 of 2013.

7.8 Mr. Raval also pressed the question of want of territorial jurisdiction by submitting that in paragraph 11, the petitioner has merely stated that the petitioner is likely to be affected by the assumption of jurisdiction by respondent No. 2 and its subordinate authorities, by patently illegal reading of provisions of the FTP, within the territorial limits of this Court. According to Mr. Raval, there is

no specific cause of action pleaded by the petitioner and no cause of action has, at present, arisen within the jurisdiction of this Court. According to Mr. Raval, even from the cause title of the present petition, it would be clear that petitioner has its registered office at Bombay which is beyond the territorial jurisdiction of this Court, and thus, if the cause title is perused, both the respondents are not situated within the territorial jurisdiction of this Court. According to Mr. Raval, by simply mentioning District Vadodara in the cause title, the petitioner has instituted the present petition.

8. Mr. Ghosh, the learned advocate appearing on behalf of the petitioner, has, on the other hand, strongly opposed the aforesaid preliminary objection raised by Mr. Raval. Mr. Ghosh contends that his client had filed SCA No. 2569 of 2013 which was disposed of order dated 26th June, 2013 by another Division Bench and the issue in the aforesaid writ-application was whether the Joint Director General of Foreign Trade had the power to withdraw the approval letter allowing the benefit of duty drawback once approved by him. Mr. Ghosh contends that the petitioner had also challenged in the said petition the existence of the Policy Interpretation Committee headed by the Respondent No. 2 prior to 2012 and its Minutes dated 15th March, 2011 on the basis of which such benefits were denied to the petitioner by the D.G.F.T. According to Mr. Ghosh, the relief prayed in the said petition did not pertain to seeking the High Court's intervention to rule on the vires of the provisions of the FTP or HOP unlike what has been prayed for and pleaded in the present petition. Mr. Ghosh contends that the subject-matter of the aforesaid petition was solely the challenge of the propriety of certain orders passed and actions of the Jt. D.G.F.T. and the Respondent No. 2 within the framework of the legislative provision on a bona fide assumption of power by the authority was legal and proper in view of legality of the source of power. Mr. Ghosh contends that the challenge in the said petition of orders adverse to the interest of the petitioner was premised essentially on the principles of estoppel and violation of the principles of natural justice and it was the action of the officers of reopening assessments which have already been completed that was challenged on the ground that they do not possess any power under the FTDR Act read with the FTP for such reopening. According to Mr. Ghosh, one of the key points that the petitioner had highlighted before the Division Bench was that it is an established principle of law that once assessment is complete, such assessment cannot be reopened and instead, the proper procedure is to file an appeal against such an assessment order and an authority having passed an order becomes functus officio and cannot recall its order. Mr. Ghosh further contends that while as part of one of its alternate arguments, legitimacy of the power of the Respondent No. 2 to interpret the FTP was raised, no relief whatsoever was prayed for by the petitioner with respect to challenging the vires of the said provision whereas in the present petition, apart from challenging the vires of Para 2.3 of the FTP, validity of Para 8.3.6 of the HOP and Para 7 of the declaration of the ANF-8 are also challenged. Mr. Ghosh contends that legitimacy of these Paras was neither prayed nor argued in the aforesaid Special Civil

Application No. 2569 of 2013.

8.1 Mr. Ghosh further contends that in paragraph 12 of the present petition, the petitioner has declared "that the petitioner has not filed any other petition before this Hon"ble Court or any other High Court or Supreme Court of India praying for the specific relief prayed herein below." According to Mr. Ghosh, the same is a true and honest declaration in view of the reliefs prayed for in the aforesaid writ petition, and the petitioner cannot be said to have suppressed any material fact concerning the ultimate relief prayed for before the Hon"ble Court in the present petition.

8.2 Mr. Ghosh further contends that GSECL's claim for duty drawback was denied by Respondent No. 2 and the subject-matter of Special Civil Application No. 15706 of 2011 pertains to the equipment purchased and imported by them. According to Mr. Ghosh, the petitioner has no role or interest into the duty drawback claim of GSECL with respect to such imports and consequently, the allegation that that the present petitioner is substantially and vitally interested in those proceedings, inasmuch as, if duty drawback is ordered to be granted to GSECL by the High Court, then the present petitioner would claim the reimbursement of such amount from GSECL demonstrates lack of knowledge of facts and the law on the part of the deponent. Mr. Ghosh further contends that neither in the pleadings nor in the oral submissions has a request been made by the petitioner or his lawyer to transfer the present petition to the Court hearing Special Civil Application No. 15706 of 2011 nor has the said writ petition transferred to this Court.

8.3 Mr. Ghosh further contends that the contention of the Respondent No. 2 that cause of action for the petitioner to challenge the Foreign Trade Policy would arise only if there is a decision which is adverse to the petitioner if decided by the Director General of Foreign Trade, in compliance of the directions contained in the order dated 26th June, 2013 rendered in Special Civil Application No. 2569/2013 betrays possession of rudimentary knowledge of law and highlights absolute non-application of mind on the part of the respondent No. 2.

8.4 Mr. Ghosh lastly contends that the dispute raised as regards the territorial jurisdiction of this Court is equally devoid of any merit. Mr. Ghosh contends that even though the registered office of the petitioner company is in State of Maharashtra, the petitioner company has a significant investment in the form of a full-fledged manufacturing plant in the State of Gujarat. It is from the said plant that the petitioner supplies equipments to various power projects. In respect of such supplies, the petitioner files claims for duty drawback with the office of the D.G.F.T. at Vadodara. The above fact clearly demonstrates the territorial nexus the petitioner has with the State of Gujarat.

8.5 Mr. Ghosh, therefore, prays for overruling the aforesaid preliminary objection.

9. After hearing the learned counsel for the parties on the above preliminary objections, we are of the view that in order to reject a writ-application on the

ground of suppression of material fact, a writ Court must come to a specific conclusion that suppression of facts is material in the sense that if such facts were pleaded and brought to the notice of the Court, it would not have entertained the writ-application at all inasmuch as the writ-petition would have been dismissed for existence of a circumstance which would disentitle the petitioner from getting the relief claimed. Therefore, the question before us is whether we would have entertained the present writ-application had the petitioner pleaded the fact of filing of earlier writ-application and the directions given by the Division Bench by directing the D.G.F.T. to dispose of the representation afresh.

10. It is now well-settled law that a citizen, even after making payment of tax on demand by either misinterpretation of the statutory provision or under unconstitutional provision or under mistake of law, can subsequently challenge the inherent lack of jurisdiction on the part of the said State authority to demand tax, and if such a citizen succeeds, the Court can, in an appropriate case, direct refund of the amount which had been collected by the state authority having no jurisdiction. There are instances where after payment of tax by an assessee, on his prayer,, the provisions of imposition of tax has been held ultra vires the Constitution of India and in such a case, the subsequent proceedings for annulment of the proceedings under which the tax was collected cannot be dismissed on the sole ground of payment of tax by the petitioner inasmuch as there cannot be a waiver of constitutional rights of mandatory character or fundamental rights. The only exception to this principle is where the assessee has passed on the burden of tax to the third parties i.e. the consumers. [See *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*,]. Thus, if the Constitution does not permit an authority to collect tax by enactment of appropriate law vesting such power, merely because such authority has recovered the amount by virtue of ultra vires adjudication, cannot be a factor standing in the way of the assessee to challenge the provisions as ultra vires just as in a Civil Litigation after suffering a decree, the judgment debtor in the executing proceedings can pray for declaration that the decree sought to be executed is a nullity for want of inherent jurisdiction without preferring any appeal against the original decree [See *Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others*,].

11. Moreover, we find substance in the contention of Mr. Ghosh, the learned counsel appearing for the petitioner, that in the earlier proceedings before the Division Bench, pursuant to the directions given by the Division Bench, there was neither any adjudication on the question involved in this writ-application nor was there any scope of giving direction upon the respondent No. 2 to decide the question of vires of the provisions challenged in this writ-application. Therefore, the fact that in the past, the petitioner has filed another Special Civil Application on the question of merit of an order by assuming the provision to be valid, cannot stand in the way of the petitioner in maintaining the present writ-application because when a statutory authority acts in excess of its power or

jurisdiction under the statute which created it, its action cannot be upheld on the principle of estoppel or acquiescence. At this stage, we may profitably refer to the following observations of the Supreme Court in the case of Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, dealing with the case of excess of statutory power:

An excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The Court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. Lord Selborne in *Maddison v. Alderson*, (1883) 8 App Cas 467 said that courts of equity would not permit the statute to be made an instrument of fraud. The impeached resolution of the Municipality has no legal foundation. The High Court was wrong in not quashing the resolution on the surmise that money might have been spent. Illegality is incurable.

12. We now propose to deal with the two decisions on this question cited by Mr. Raval, namely, that of *Bhaskar Laxman Jadhav And Ors. v. Karamveer Kakasaheb Wagh Education Society And Ors.* reported in 2013 AIR SCW 34 and that of *P.G.F. Ltd. v. Union of India* reported in 2013 (0) GLHEL-SC 53925.

12.1 By relying upon the decision in the case of *Bhaskar Laxman Jadhav* (supra), particularly paragraph 46, Mr. Raval strenuously contended that it is not for a litigant to decide what fact is material for adjudicating a case and what is not material and it is an obligation of a litigant to disclose all the facts of a case and leave the decision making to the Court. In this case, according to Mr. Raval, the petitioner cannot contend that he thought that the existence of earlier litigation and directions contained therein are not material and, for that reason, he was entitled not to mention such fact. Mr. Raval contends it was the duty of the petitioner to give details of the earlier litigation and then it is for the Court to decide whether this Court will take into consideration such fact.

12.2 In the above case before the Supreme Court, the question was whether non-mentioning of an earlier order dated 2nd May, 2003 in the earlier application for extension of time filed by the Trustees and the finality attached to it was a relevant fact which has not been clearly disclosed before the Supreme Court by the petitioner and, according to the respondent, in view of the suppression, the Special Leave to Appeal should not be granted to the petitioner. The Supreme Court in paragraph 45 of the judgment made a categorical finding that the order dated 2nd May, 2003 was very much material and in that context in paragraph 46 made the following observations:--

46. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision making to the Court. True, there is a mention of the order dated 2nd May, 2003 in the order dated 24th July, 2006 passed by the JCC, but that is not enough disclosure. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2nd May, 2003 was passed

or that it has attained finality.

12.3 In the case before us, we have held that existence of the earlier proceeding and the order passed therein are not material for the disposal of the questions raised before us in this application and, therefore, the said fact cannot be a material fact. In our opinion, the above decision of the Supreme Court in the case of Bhaskar Laxman Jadhav (supra) should not be interpreted as if the Supreme Court has laid down a proposition of law that the petitioner is required to plead even a fact, which is not material and thereafter, this Court should decide whether such fact is material or not. The above observation was made in context where there was suppression of material fact as found by the court, but such principle cannot have any application to a case when the Court itself finds that the alleged suppression of a fact is not material. We, thus, find that the aforesaid decision is not applicable in a case where the Court itself finds that the fact the suppression of which has been alleged is not a material fact.

12.4 Similarly, in the case of PGF Ltd. (supra), the Supreme Court was considering whether Section 11AA of the SEBI Act was ultra vires the Constitution of India and, ultimately, came to the conclusion that the said provision is valid. In the above context, the Supreme Court in paragraphs 31 and 32 made the following observations upon which Mr. Raval has placed strong reliance:--

31. Before advertng to the various contentions raised in challenging the vires of Section 11AA of the SEBI Act, we feel that it is worthwhile to state and note certain precautions to be observed whenever a vires of any provision of law is raised before the Court by way of a writ-petition. It will be worthwhile to lay down certain guidelines in that respect, since we have noticed that on very many occasions a challenge to a provision of law, as to its constitutionality is raised with a view to thwart the applicability and rigour of those provisions and as an escape route from the applicability of those provisions of law and thereby create an impediment for the concerned authorities and the institutions who are to monitor those persons who seek such challenges by abusing the process of the Court. Such frivolous challenges always result in prolongation of the litigation, which enables such unscrupulous elements who always thrive on other peoples money to take advantage of the pendency of such litigation preferred by them and thereby gain, on the one side, unlawful advantage on the monitory aspect and to the disadvantage of innocent victims, and ultimately, gain unlawful enrichment of such ill-gotten money by defrauding others. In effect, such attempts made by invoking the extraordinary jurisdiction of the writ Courts of many such challenges, mostly result in rejection of such challenges. However, at the same time, while taking advantage of the long time gap involved in the pending proceedings, such unscrupulous litigants even while suffering the rejection of their stand at the end as to the vires of the provisions, always try to wriggle out of their liabilities by stating that the time lag had created a situation wherein those persons who were lured to part with huge sums of money are

either not available to get back their money or such unscrupulous petitioners themselves are not in a position to refund whatever money collected from those customers or investors. It is, therefore, imperative and worthwhile to examine at the threshold as to whether such challenges made are bona fide and do require a consideration at all by the writ courts by applying the principle of "lifting the veil" and as to whether there is any hidden agenda in perpetrating such litigation. With that view, we lay down some of the criteria to be kept in mind whenever a challenge to a provision of law is made before the Court.

32. The Court can, in the first instance, examine whether there is a prima facie strong ground made out in order to examine the vires of the provisions raised in the writ petition. The Court can also note whether such challenge is made at the earliest point of time when the statute came to be introduced or any provision was brought into the statute book or any long time gap exist as between the date of the enactment and the date when the challenge is made. It should also be noted as to whether the grounds of challenge based on the facts pleaded and the implication of provision really has any nexus apart from the grounds of challenge made. With reference to those relevant provisions, the Court should be conscious of the position as to the extent of public interest involved when the provision operates the field as against the prevention of such operation. The Court should also examine the extent of financial implications by virtue of the operation of the provision vis-à-vis the State and alleged extent of sufferance by the person who seeks to challenge based on the alleged invalidity of the provision with particular reference to the vires made. Even if the writ Court is of the view that the challenge raised requires to be considered, then again it will have to be examined, while entertaining the challenge raised for consideration, whether it calls for prevention of the operation of the provision in the larger interest of the public. We have only attempted to set out some of the basic considerations to be borne in mind by the writ Court and the same is not exhaustive. In other words, the Writ Court should examine such other grounds on the above lines for consideration while considering a challenge on the ground of vires to a Statute or provision of law made before it for the purpose of entertaining the same as well as for granting any interim relief during the pendency of such writ petitions. For the above stated reasons it is also imperative that when such writ petitions are entertained, the same should be disposed of as expeditiously as possible and on a time bound basis, so that the legal position is settled one way or the other.

12.5 After going through the aforesaid observations made in Paragraphs 31 and 32, we find that the Supreme Court was concerned with a case where frivolous pleas of vires of the provisions were taken in order to delay the proceeding or to obstruct the judicial proceeding and in that context, made the aforesaid observations. The said observations cannot have any application to a case where the Court, on consideration of the materials on record, holds that a particular provision really ultra vires the provision of the Constitution or the Act itself. We have already pointed out that there is no waiver of a constitutional provision

going to the root of the power of a statutory authority. The above observations, in our opinion, should be borne in mind while entertaining a writ application challenging the vires of the statutory provision and for the purpose of granting interim order. But by taking aid of that observation the State cannot legitimately contend that although the statutory provisions challenged is violative of the provisions of the Constitution and the statute itself resulting in abuse of the power by a statutory authority, the same should be dismissed on the ground of mere delay or waiver. We, thus, find that the aforesaid two decisions are of no avail to the Union of India.

12.6 We, thus, find that non-mentioning of the above facts cannot stand in the way of the petitioner in challenging the provisions as ultra vires in this Special Civil Application.

13. In the case of Sunil Poddar and Others Vs. Union Bank of India, , the Supreme Court, while considering the provisions of Section 22(2)(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 held that in the application filed by the appellant before the DRT, Jabalpur, there is no mention murmur that the applicants were the defendants in the suit instituted in the Civil Court, that they were served and they appeared through an Advocate and also filed a written statement and other applications requesting the Court to try certain issues as preliminary issues. The Supreme Court further held that it was expected of the appellants to disclose all those facts and apart from suppression of fact as to service of summons and appearance of the defendants before the Court, in the application wherein they requested the DRT to set aside ex parte order passed against them. According to the Supreme Court, the appellants deliberately and intentionally concealed those facts. In these circumstances, the Supreme Court held that the appellants had not come forward with clean hands and even in their application for setting aside the order, they have not candidly disclosed all the facts that they were aware of such proceedings and were represented by a counsel. In view of such non-disclosure, the Supreme Court held that the DRT rightly dismissed the application, and the High Court rightly refused to interfere with the DRT's order and since the defendants had not come before the Supreme Court with clean hands, interference in exercise of equitable jurisdiction under Article 136 is not called for. In the case before us, we have already found that there is no suppression of any material fact and thus, the said decision cannot have any application to the facts of the present case.

14. In the case of K.D. Sharma Vs. Steel Authority of India Ltd. and Others, , where the petitioner made false statement and concealed material facts and mislead the Court, the Apex Court held that in such a case, the Court may dismiss the petition at the threshold without considering the merits of the claim. In the said case, an impression was sought to be created as if no notice was ever given to the appellants nor was he informed about the consideration of cases of eligible and qualified bidders in pursuance of the order passed by the High Court

in review and confirmed by the Supreme Court. The true facts, however, were just contrary to what was sought to be placed before the Court. A notice was issued by SAIL to the appellant, he received the notice, intimated in writing to SAIL that he had authorized R to appear on his behalf, R duly appeared at the time of consideration of bids. The bid of the respondent No. 2 was found to be lower and was accepted and the contract was given to him. In the above facts, the Supreme Court observed that the appellant had not placed all the facts before the Court clearly, candidly and frankly and has not come forward with all the facts.

15. The ratio of the decisions in the cases of Sunil Poddar (supra) and K.D. Sharma (supra), thus, have no application to the present case, where the petitioner has raised a pure question of law as to the legality of a provision as ultra vires the Constitution of India and the Statute and at the same time, not suppressed any material fact. Therefore, the principle laid down in the said decisions cannot have any application to the facts of the present case.

16. In the case of Ramjas Foundation and Another Vs. Union of India (UOI) and Others, , one "R" started three schools between 1912 to 1916 in memory of his father. He purchased land measuring 1800 bighas therefor from his own resources and by collecting money in the form of donations from other philanthropists. In a public function held on 25th December, 1916 in Ramjas School, "R" was alleged to have made an announcement that he had created a wakf and dedicated and donated all his movable and immovable properties to the said school for charitable purposes, namely, advance and promotion of education to the public and poor students. In 1917, "R" formed Ramjas College Society. On 25th June, 1936, he transferred the entire land to the Society by executing a release deed. In 1967, the name of the Society was changed from Ramjas College Society to Ramjas Foundation and the same was registered as such. By notification dated 13th November 1959 issued u/s 4 of the Land Acquisition Act, 1894, land measuring 34,070 Acres including land of appellant foundation was sought to be acquired for planned development of Delhi which excluded certain categories of land. Clause (d) of the said notification excluded the land for graveyards, tombs, shrines and the land attached to religious institutions and wakf property. The objections by the appellant before the competent authority were rejected and the appellant thereafter filed several cases in the High Court and the Supreme Court. In the proceedings before the Supreme Court, the appellant failed to mention about the large number of cases filed by him challenging the acquisition, grounds on which the challenge was founded and the orders passed by the High Court and the Supreme Court. The appellant also suppressed the fact that after the dismissal of the first appeal by the Division Bench, possession of the land was taken by the Land Acquisition Collector on 13th July, 2001 and transferred to the Development Authority. In such circumstances, the Supreme Court held that a person who does not come to the Court with clean hands is not entitled to be heard on merits of his grievances, and is not entitled to any relief.

17. We, thus, find that suppression of the facts indicated in the above decision was very much material and in the above context, the Supreme Court made the aforesaid observations which is not the case before us.

18. In the case of Prestige Engineering (India) Ltd. and Others Vs. Collector of Central Excise, Meerut and Others, , the question was as regards interpretation of the Notification No. 119/75-C.E., dated 30th April, 1975 issued by the Central Government under Rule 8(1) of the Central Excise Rules, 1944. The said notification partly exempted goods falling under Item No. 68 manufactured in a factory as "job work" and included under the explanation, the articles returned after manufacturing process by the "job worker". In such circumstances, the Supreme Court, applying the statutory, and not the ordinary/normal meaning of the explanation "manufacture" and referring to the dictionary meaning of the expression "job work" held that the expression "manufacture" contemplated by the notification was not confined to those processes alone which were "incidental or ancillary to the completion of the manufactured product" but extended to the work where "job workers" contributed mainly their labour and skill as distinct from contributing their own material to the article supplied by the customer. It was further held that addition or application of minor items by the job workers would not detract from the nature and character of his work. The Supreme Court held that the intent of the notification should be taken into consideration for the purpose of interpretation.

18.1 We fail to appreciate how the said decision could be of any help to Mr. Raval's client in the present case.

19. We find that in none of the decisions cited by Mr. Raval, the subject-matter was one of lack of inherent jurisdiction of the authority in the matter of exercise of power in violation of the Statute creating such authority or in violation of the provisions of the Constitution of India, and thus, the principle laid down in the context of those decisions has no application to the facts of the present case.

20. We, thus, overrule the first objection raised by Mr. Raval on the question of suppression of material facts.

21. Similarly, the question of want of territorial jurisdiction raised by the respondent No. 2 is equally devoid of any merit. There is no dispute that the basis of this writ-application is the action of the respondent No. 2 in invoking the provisions challenged in this application in respect of transactions arising out of the Vadodara Office of the petitioner, and thus, the cause of action has definitely arisen within the State of Gujarat and on that basis, the petitioner can challenge the want of authority on the part of the respondent No. 2 in exercising the so-called jurisdiction. Even in the earlier writ-application before this High Court, when the petitioner challenged the order on merit, the order was set aside and the matter was remanded back to the respondent No. 2. Thus, the absence of territorial jurisdiction was not raised by the Respondents in the earlier proceedings nor have they challenged the order passed by the said Division

Bench setting aside the order impugned. We, therefore, overrule even the second objection raised by Mr. Raval as regards want of territorial jurisdiction.

22. We now propose to enter into the question whether Para 2.3 of the FTP is unconstitutional and ultra vires the FTDR Act and whether Para 8.3.6 of the HOP is ultra vires the FTDR Act as well as FTP and further whether Para 7 of the declaration attached with ANF-8 form read with the provisions of HOP which gives power to the Respondent No. 2 or its subordinates to re-verify or redetermine the duty drawback benefits once such benefits are granted to the claimant is ultra vires the FTDR Act.

23. In order to appreciate the aforesaid questions, it would be profitable to refer to Sections 3, 5, 6, 15, 16, and 19 of FTDR Act which are quoted below:

Section 3. Powers to make provisions relating to imports and exports. -

(1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.

(2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology:

Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.

(3) All goods to which any order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited u/s 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.

(4) Without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder.

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

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

Section 6. Appointment of Director General and his functions. -

(1) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act.

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

(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under Sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.

Section 15. Appeal - (1) Any person aggrieved by any decision or order made by the Adjudicating Authority under this Act may prefer an appeal, -

(a) where the decision or order has been made by the Director General, to the Central Government;

(b) where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the Adjudicating Authority authorized by the Director General to hear the appeal,

within a period of forty-five days from the date on which the decision or order is served on such person:

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the aforesaid period, allow such appeal to be preferred within a further period of thirty days:

Provided further that in the case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of the penalty or redemption charges has been deposited by the appellant:

Provided also that, where the Appellate Authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose.

(2) The Appellate Authority may, after giving to the appellant a reasonable opportunity of being heard, if he so desires, and after making such further inquiries, if any, as it may consider necessary, make such orders as it thinks fit, confirming, modifying or reversing the decision or order appealed against, or may send back the case with such directions, as it may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Provided that an order enhancing or imposing a penalty or redemption charges or confiscating goods (including the goods connected with services or

technology) of a greater value shall not be made under this section unless the appellant has been given an opportunity of making a representation, and, if he so desires, of being heard in his defence.

(3) The order made in appeal by the Appellate Authority shall be final.

Section 16. Review.--The Central Government, in the case of any decision or order made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, may on its or his own motion or otherwise, call for and examine the records of any proceeding for the purpose of satisfying itself or himself, as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit:

Provided that no decision or order shall be varied under this section so as to prejudicially affect any person unless such person -

(a) has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied; and

(b) has been given a reasonable opportunity of making representation and, if he so desires, of being heard in his defence.

Section 19. Power to make rules.--(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the manner in which and the conditions subject to which a special licence may be issued under sub-section (2) of Section 8;

(b) the exceptions subject to which and the person or class of persons in respect of whom fees may be levied and the manner in which a licence, certificate, scrip or any instrument bestowing financial or fiscal benefits may be granted or renewed under sub-section (1) of Section 9;

(c) the class or classes of goods (including the goods connected with service or technology) for which a licence, certificate, scrip or any instrument bestowing financial or fiscal benefits may be granted under sub-section (2) of Section 9;

(d) the form in which and the terms, conditions and restrictions subject to which licence, certificate, scrip or any instrument bestowing financial or fiscal benefits may be granted under sub-section (3) of Section 9;

(e) the conditions subject to which licence, certificate, scrip or any instrument bestowing financial or fiscal benefits may be suspended or cancelled under sub-section (4) of Section 9;

(ea) the matter in which goods the import of which shall be subject to quantitative restrictions, may be identified and the manner in which the causes of serious injury or causes of threat of serious injury in relation to such goods may be determined under sub-section (3) of Section 9A;

(f) the premises, goods (including the goods connected with the service or technology), documents, things and conveyances in respect of which and the requirements and conditions subject to which power of entry, search, inspection and seizure may be exercised under sub-section (1) of Section 10;

(g) the class or classes of cases for which and the manner in which an amount, by way of settlement, may be determined under subsection (4) of Section 11;

(h) the requirements and conditions subject to which goods (including the goods connected with the service or technology) and conveyances shall be liable to confiscation under sub-section (8) of Section 11;

(i) the manner in which and the conditions subject to which goods (including the goods connected with the service or technology) and conveyances may be released on payment of redemption charges under sub-section (9) of Section 11;

(j) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

(3) Every rule and every order made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or the order or both Houses agree that the rule or the order should not be made, the rule or the order, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or the order.

24. It will also be profitable to refer to paras 2.3 and 2.4 of the FTP, Para 8.3.6 of the HOP and Para 7 of the declaration attached with ANF-8 form, which are quoted below -

Para 2.3 of the FTP:

2.3 (a) The decision of D.G.F.T. shall be final and binding on all matters relating to interpretation of policy, or provision of HBP v1, HBP v2 or classification of any item for import/export policy in the ITC (HS).

(b) A Policy Interpretation Committee (PIC) may be constituted to aid and advice D.G.F.T.

Para 2.4 of the FTP:

D.G.F.T. may, specify procedure to be followed by an exporter or importer or by any licensing/regional authority or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made thereunder and FTP. Such procedures, or amendments if any, shall be published by means of a Public Notice.

Para 8.3.6 of the HOP

8.3.6 Subject to procedure laid down in HBP, Customs and Central Excise Duty Drawback Rules, 1995 shall apply mutatis mutandis to deemed exports.

Para 7 of the declaration attached with ANF-8 form

7. I/we further declare that I/we shall immediately refund the amount of drawback obtained by us in excess of any amount/rate which may be re-determined by Government as a result of post-verification.

25. After hearing the learned counsel for the parties and after going through the provisions quoted above, we find that Section 3 of the FTDR Act empowers the Central Government to make appropriate provisions for development and regulation of foreign trade. Similarly, Section 5 of the FTDR Act gives powers to the Central Government to formulate and announce, by way of notification in the Official Gazette, the export and import policy which may be amended from time to time. Pursuant to such power conferred u/s 5 of the FTDR Act, the FTP is issued by the Central Government generally for five years and the same is revised or amended by means of annual supplement each year. At present, the policy which is in force is FTP 2009-2014.

25.1 Section 6 of the FTDR Act empowers the D.G.F.T. to advise the Central Government in the formulation of the Export and Import Policy and the said D.G.F.T. shall be responsible for carrying out that policy. Section 6(3) provides that the Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under the said Act (other than the powers under Sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the D.G.F.T. or such other officer subordinate to the D.G.F.T., as may be specified in the Order.

25.2 Pursuant to the aforesaid power conferred u/s 6 of the FTDR Act under Para 2.3 of the FTP, the D.G.F.T. has been empowered to interpret the FTP policy. According to Para 2.3 stated above, if any doubt or question arises in respect of interpretation of any provision in the FTP or in the matter of classification of any item in the ITC (HS) or in the HOP, the said question or doubt should be referred to the D.G.F.T., whose decision thereon shall be final and binding.

25.3 it appears that the Central Government vide Para 2.4 of the FTP has granted power to the D.G.F.T. to specify procedure to be followed for the purpose of implementing provisions of FTDR Act, the Rules and the Order and such procedures or amendments, if any, shall be published by means of public notice.

25.4 in exercise of such power conferred under Para 2.4 of the FTP, the D.G.F.T. has specified HOP through Public Notice No. 1 (RE-2012)/2009-2014 on 5th June, 2012 which is in the form of an administrative guideline.

25.5 According to Para 8.3.1 of the HOP, to claim duty drawback benefits, a claimant has to fill up ANF-8 form and Para 7 of the declaration of ANF-8 form demands an undertaking from the claimant that in case of re-determination and re-verification, the claimant shall refund the amount paid in excess. It further appears that Para 8.3.6 of the HOP provides that subject to the procedures laid down in the HOP, Customs and Central Excise Duty Drawback Rules, 1995 shall apply *mutatis mutandis* to deemed exports.

26. In the above context, Mr. Ghosh, the learned Advocate appearing on behalf of the petitioner, strenuously contended that the aforesaid provisions, namely, Para 2.3 of the FTP, Para 8.3.6 of the HOP and Para 7 of the ANF-8 form are in gross violation of Article 14 and 19(1)(g) read with Articles 246 and 265 of the Constitution of India and the provisions of FTDR Act.

27. We find that the Respondent No. 2, namely, D.G.F.T., through Para 8.3.6 of the HOP has incorporated by reference the provisions of Duty Drawback Rules *mutatis mutandis* to the FTP and HOP. We find substance in the contention of Mr. Ghosh that the HOP is nothing but an administrative guideline as would appear from a combined reading of Para 2.4 of the FTP and Section 6 of the FTDR Act. We have already pointed out that Section 3 of the FTDR Act grants power to the Respondent No. 1 to make provisions relating to imports and exports and the Respondent No. 1 u/s 5 of the FTDR Act can formulate and announce the foreign trade policy. It further appears from Section 6(3) of the FTDR Act that of the powers conferred upon the Respondent No. 1 under the FTDR Act, except those provided in Sections 3, 5, 15, 16 and 19, all others can be delegated to the Respondent No. 2 by order published in the Official Gazette. We find that the Respondent No. 2 through Para 8.3.6 of the HOP has sought to incorporate the provisions of Duty Drawback Rules to deemed exports *mutatis mutandis* which is not permissible in view of the fact that no power has been granted to the D.G.F.T. under the FTDR Act to legislate either directly or by way of incorporation by reference. It is now a settled law that the separation of power between the Legislature and executive forms part of the basic structure of the Constitution of India and any attempts by the executives to legislate without appropriate authority under the law would amount to violation of the basic structure of the Constitution of India. The power to legislate is incorporated under Article 246 of the Constitution of India and such power has been conferred on the Parliament and the State Legislature. Moreover, the power to frame Duty Drawback Rules under the FTDR Act can be legislated by the Central Government only in exercise of power conferred u/s 19 in the manner prescribed under the FTDR Act and the same cannot be delegated to the Respondent No. 2 as expressly prohibited by Section 6(3) of the above Act.

28. We, thus, find that any attempt by the executives to legislate without the

authority of law should be branded as a colourable device and therefore, the same is in violation of Article 246 of the Constitution of India. If we accept the contention of Mr. Raval that the Respondent No. 2 is authorized to incorporate the Duty Drawback Rules by reference, it would amount to acceptance of the proposition that the Respondent No. 2 is authorized to deal with under the FTDR Act, the similar matters relating to duty and tax refunds as provided u/s 75 of the Customs Act, Section 37 of the Central Excise Act and Section 93A read with Section 94 of the Finance Act, 1994 although not authorized under the FTDR Act. We are in agreement with Mr. Ghosh, the learned advocate for the petitioner, that the conferment of such power to the Respondent No. 2 to adopt the Duty Drawback Rules without any power to legislate either expressly or otherwise would amount to permitting the levy or collection of tax without authority of law in violation of Article 265 of the Constitution of India.

29. We find that the power granted to the Respondent No. 2 under Para 2.4 of the FTP is to lay down the procedure to be followed by an exporter or by any licensing/regional authority or by any other authority for the purposes of implementing provisions of FTDR Act, Rules and the orders made thereunder and FTP and, therefore, those by necessary implication excludes the "Rule making power" conferred u/s 19 of the FTDR Act inasmuch as the powers conferred u/s 19 cannot be re-delegated to the Respondent No. 2 as expressly prohibited u/s 6(3) of the Act.

30. On going through the provisions of the FTDR Act, we find that those do not grant power to the Respondent No. 2 or its subordinates to redetermine or re-verify the deemed export benefits if such benefits have been approved or granted as per the provisions of the FTDR Act except by way of review as provided in Section 16. In the absence of any power under FTDR Act, the Respondent No. 2 or its subordinates cannot assume quasi-judicial power for instance, the power to re-determine or re-verify under the administrative guidelines i.e. Para 7 of the ANF-8 Form. Therefore, by virtue of Para 7 of the ANF-8, the Respondent No. 2 is deriving the quasi-judicial power which is beyond the provisions of FTDR Act. We have already pointed out that according to Section 6 of the FTDR Act, the Respondent No. 2 or the officer subordinate to him cannot usurp the power under Sections 3, 5, 15, 16 and 19 of the FTDR Act. According to Section 3, it is for the Central Government which may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology. According to sub-section (3) of Section 3 all goods to which any Order under sub-section (2) of the said section applies should be deemed to be goods the import or export of which has been prohibited u/s 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly. According to Section 5, it

is for the Central Government which may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy. The proviso to the said section provides that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.

31. Section 15 of the FTDR Act provides for Appeal and, according to the said section, any person aggrieved by any decision or order made by the Adjudicating Authority may prefer an appeal where the decision or order has been made by the Director General, to the Central Government; or where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the Adjudicating Authority authorized by the Director General to hear the appeal within a specified period mentioned therein. The said Section, however, gives power to the Appellate Authority to condone the delay in preferring the appeal on sufficient cause being shown, The said section puts certain other restrictions on preferring the appeal.

31.1 Section 16, on the other hand, authorizes the Central Government, in the case of any decision or order made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, to act on its own motion or otherwise, by calling for and examining the records of any proceeding for the purpose of satisfying itself or himself, as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit. The proviso, however, says that no decision or order shall be varied u/s 16 so as to prejudicially affect any person unless such person has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied and has been given a reasonable opportunity of making representation and, if he so desires, of being heard in defence.

31.2 Section 19 of the Act gives the Central Government the power to make rules for carrying out the provisions of the Act.

32. We, thus, find that although specifically prohibited u/s 6 of the Act, the D.G.F.T. has been illegally vested with the power to intervene in the subject-matters coming within the purview of Sections 3, 5, 15, 16 and 19 in clear violation of sub-section (3) of Section 6 of the FTDR Act. In other words, what is specifically prohibited by the FTDR Act, by taking aid of the HOP, the D.G.F.T. has assumed such power in colourable exercise of the power conferred upon it.

33. In this connection, Mr. Ghosh also drew our attention to the provisions contained in three different statutes, viz. : Section 119 of the Income Tax Act, 1961, Section 37B of the Central Excise Act, 1944 and Section 151A of the Customs Act, 1962. For the sake of convenience, those sections are quoted below:

Section 37B of the Central Excise Act, 1944.

Instructions to Central Excise Officers.--The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board:

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions.

XX XX XX

Section 151A of the Customs Act, 1962.

Instructions to officers of customs.--The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon or for the implementation of any other provision of this Act or of any other law for the time being in force, in so far as they relate to any prohibition, restriction or procedure for import or export of goods issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions.

XXX XXX XXX

Section 119 of the Income Tax Act, 1961:

119. (1) The Board may, from time to time, issue such orders, instructions and directions to other income tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any income tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner (Appeals) in the exercise of his appellate functions.

(2) Without prejudice to the generality of the foregoing power,

-(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work, of assessment and collection of revenue, issue from time to time (whether by way of realisation of any of the provisions of sections 115P, 115S, 115WD, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK, 139, 143, 144, 147, 148, 154, 155, 158BFA, sub-section (1A) of Section 201, Sections 210, 211, 234A, 234B, 234C, 271 and 273 or otherwise, general or special orders in respect of any class of incomes or fringe benefits or class of cases, setting forth directions or instructions (not being prejudicial to assessee) as to the guidelines, principles or procedures to be followed by other income tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;

(b) The Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income tax authority, not being a Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law.

(c) The Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VI-A where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:--

(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and

(ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed:

Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament.

(Emphasis supplied by us).

33.1 Mr. Ghosh points out in the aforesaid three Acts, a similar provision has been made by giving power to the concerned Board to issue order or instruction or directions to the subordinate authorities for proper administration of the aforesaid three Acts with a further stipulation that such authorities and all other persons employed in the execution of those Acts should observe and follow such orders, instructions or directions of the Board. Mr. Ghosh further points out that in the aforesaid three Acts, there is a specific prohibition that those orders, instructions or directions shall not be issued so as to require any authority under those Acts to make a particular assessment or to dispose of a particular case in a particular manner or to interfere with the discretion of the quasi-judicial authorities prescribed under those Acts. Mr. Ghosh, thus, contends that the power conferred under para 2.3 of FTP by empowering the respondent No. 2 to interpret FTP should not be applicable to the functionaries acting quasi judicially under the provisions of the Act.

34. On a plain reading of the provisions contained in paragraph 2.3 of the FTP, we find that the interpretation of any provisions in the FTP or in the matter of classification of any item in the ITC (HS) or in the HOP should, no doubt, bind the authorities under him in exercise of the provisions of the FTDR Act; but if such guidelines are in conflict with the view or interpretation given by the judicial authorities such as the High Courts or the Supreme Court, in our opinion, the authorities functioning quasi judicially under the FTDR Act should be bound by the interpretation of the High Courts and the Supreme Court. In the event, an existing order or interpretation issued by the respondent No. 2 is in conflict with the law laid down by the High Courts or the Supreme Court, in our view, the authorities under the FTDR Act, while acting quasi judicially, should ignore such interpretations of the respondent No. 2 and follow the one declared by the High Courts or the Supreme Court.

35. In our opinion, the real need to issue an interpretation by the respondent No. 2 arises when there is no authoritative pronouncement of the High Courts or the Supreme Court on the subject of interpretation. Once a particular relevant issue is decided by the High Courts or the Supreme Court, the very basis of that particular interpretation no longer exists. The law laid down by various High Courts and the Supreme Court will ensure uniformity in the decisions at all levels. When the Constitution, by express provision, has declared that the law declared by the Supreme Court is binding on all the Courts within the territory of India, it necessarily follows that such law is binding on all Tribunals and authorities and also upon the High Courts. Similarly, Article 226 of the Constitution, on the other hand, has vested the High Court with the authority of judicial review of all judicial or quasi-judicial adjudication made within the territorial limit of the High Court. If we accept the submissions of Mr. Raval that the interpretation given by the respondent No. 2 even in a matter relating to quasi-judicial adjudication affecting the right of a citizen will have overriding effect, in that event, even the law declared by the Supreme Court or various High Courts will lose its authority on a subject covered by the FTDR Act and FTP.

We are, thus, unable to accept such contention of Mr. Raval that the interpretation given by the respondent No. 2 will have overriding effect upon the decisions of the Supreme Court or various High Courts while making judicial review of a decision passed by an authority under the FTDR Act.

36. We, therefore, hold that the interpretation given by the respondent No. 2 in terms of Paragraph 2.3 of the FTP, no doubt, binds all the officers or the authorities under the FTDR Act provided however that there is no existing interpretation on the relevant point given by the High Courts or the Supreme Court and at the same time, such interpretation given by the Respondent No. 2 will not be binding upon the High Courts or the Supreme Court while making judicial review of any decision taken by the adjudicating authorities under the Act.

37. We now propose to deal with some relevant decisions relied upon by the learned counsel for the parties.

37.1 In the case of Kunj Behari Lal Butail and Others Vs. State of H.P. and Others, , a three-Judge Bench of the Supreme Court repeated the well settled proposition of law that a delegated power to legislate by making rules for carrying out the purpose of the Act is a general delegation without laying down any guidelines and in such circumstances, such power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities not contemplated by the provision of the statute itself. By relying upon the above decision, Mr. Ghosh, in our opinion, rightly contended that the HOP cannot create any substantive right in favour of the Respondent No. 2 by taking aid of delegated power and, therefore, we should declare the provisions mentioned in this application as ultra vires as it is for the Central Government to make substantive right by virtue of the delegation provided in the Act itself but the D.G.F.T. has not been given any power to legislate.

37.2 In the case of Union of India (UOI) and Others Vs. Inter Continental (India), a Bench of the Supreme Court held in the context of customs exemption notification that the Revenue could not, by issuing circular subsequent to the notification, add a new condition to the notification thereby either restricting the scope of exemption notification or whittle it down. By relying upon the aforesaid decision, Mr. Ghosh rightly contended before us that by taking aid of HOP issued by the D.G.F.T. which has no statutory value, a concluded decision taken by the respondent-authority cannot be altered merely on the basis of a pre-consent taken by virtue of paragraph 7 of the declaration attached to ANF-8 form read with the provisions of HOP. We find substance in the above contention in view of the fact that HOP has no force of statute and, thus, it cannot create any additional right in favour of the respondent No. 2, apart from the right created under the Act itself.

37.3 In the case of State of Kerala and Others Vs. M/s. Travancore Chemicals and Manufacturing Co. and Another, , a question arose whether the provision contained in Section 59A of Kerala General Sales Tax Act, 1963 was ultra vires

the provisions of Article 14 of the Constitution of India. According to the provisions contained in Section 59A, if any question arises as to the right of tax leviable under the said Act on the sale or purchase of any goods, such question should be referred to the Government for decision and the decision of the Government thereon shall, notwithstanding any other provision of the said Act, be final. In the above context, the Supreme Court made the following observations:--

13. Plain reading of Section 59A shows that if any question relating to the rate of tax leviable under the Act on any goods is referred to the Govt. then its decision thereon, notwithstanding any other provision in this Act is final. This section does not indicate as to who can make a reference to the Govt. There is no obligation on the Government to hear any dealer before it decides as to the rate of tax leviable on the sales or purchase of any type of goods. In fact, as we have noticed earlier, by an omnibus order dated 23rd April, 1984 the Govt. decided rates of tax payable in respect of various items without any opportunity of being heard having been granted to any of the dealers. Lastly Section 59A clearly states that the decision so given by the Govt. shall be final and would have an overriding effect.

14. There is no warrant in our opinion in trying to read down the provisions of Section 59A. The words (sic) of the said provision are clear and unambiguous. The said section gives absolute power to the Govt. to decide any question regarding the rate of tax leviable on the sale or purchase of goods in any manner it deems proper and finality is given to such a decision.

15. Section 59A enables the Govt. to pass an administrative order which has the effect of negating the statutory provisions of appeal, revision etc. contained in Chapter VII of the Act which would have enabled the appellate or revisional authority to decide upon questions in relation to which an order u/s 59A is passed. Quasi-judicial or judicial determination stands replaced by the power to take an administrative decision. There is nothing in Section 59A which debars the Government from exercising the power even after a dealer has succeeded on a question relating to the rate of tax before an appellate authority. The power u/s 59A is so wide and unbridled that it can be exercised at any time and the decision so rendered shall be final. It may well be that the effect of this would be that such a decision may even attempt to override the appellate or the revisional power exercised by the High Court u/s 40 of the Act as the case may be. The section enables passing of an executive order which has the effect of subverting the scheme of a quasi-judicial and judicial resolution of the lis between the State and the dealer.

37.4 The above decision, in our opinion, fully supports the case of the petitioner that by virtue of administrative decision, no provision can be made by which gives rise to a substantive right created in favour of either of the parties, which is not there in the statute itself.

38. On consideration of the entire materials on record, we, therefore, hold that Para 2.3 of the FTP should be read to this effect that the interpretation given by the respondent No. 2 as provided therein will not be binding upon the Supreme Court or High Courts while making judicial review of any decision taken by the adjudicating authorities under the FTDR Act and in the absence of any such interpretation by the High Courts or the Supreme Court on a particular point, the same will be binding upon the authorities under the Act.

38.1 We further hold that Para 8.3.6 of the HOP, by which the Customs and Central Excise Duty Drawback Rules, 1995 has been adopted, is ultra vires the provisions of the FTDR Act which has not conferred such power upon the respondent No. 2, but it is only the Central Government which can in exercise of its power u/s 19 of the FTDR Act by issuing appropriate notification in the Official Gazette and after complying with the requirement of the said Section 19 make appropriate rules for carrying out the provisions of the above Act and in the process, may make rules similar to the ones indicated in the Customs and Central Excise Duty Drawback Rules.

38.2 Similarly, we also hold that the Para 7 of the declaration attached with ANF-8 form read with the provisions of HOP cannot lawfully confer any power upon the Respondent No. 2 or its subordinates to recall any adjudication under the Act by taking aid of such declaration attached with ANF-form. The right of review, it is needless to mention, is a creature of Statute and according to the FTDR Act, a review can be made only in accordance with the provision contained in Section 16 thereof and in a manner provided therein and not beyond the scope of said Section 16.

39. We, thus, allow this writ-application to the extent indicated above. In the facts and circumstances, there will be, however, no order as to costs.

FURTHER ORDER

40. After this judgment was pronounced, the learned counsel appearing on behalf of the Union of India prays for stay of our above judgment.

41. After holding that the aforesaid provisions are ultra vires the provisions of the FTDR Act, there is no question of issuing any stay of operation of our judgment permitting ultra vires provisions to continue.

42. The prayer is, thus, refused. However, if applied for, certified copy be given by tomorrow.