

(2021) 04 BOM CK 0017
In the Bombay High Court
Case No : Writ Petition (ST) No.96678 Of 2020

Rika Global Impex Limited

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 08-04-2021

Acts Referred:

Customs Act, 1962 — Section 49

Foreign Trade (Development & Regulation) Act, 1992 — Section 3, 5

Citation : (2021) 04 BOM CK 0017

Hon'ble Judges : Ujjal Bhuyan, J;Milind N. Jadhav, J

Bench : Division Bench

Advocate : Vineet Naik, Sukand Kulkarni, S.S. Bobde, Jas Sanghavi, Durga Prasad, PDS Legal, Pradeep S. Jetly, J.B. Mishra, Rui Rodrigues, N.R. Prajapati

Final Decision : Allowed

Judgement

Milind N. Jadhav, J

1. Heard Mr. Vineet Naik, learned senior advocate for the petitioner; Mr. Pradeep S. Jetly, learned senior advocate for respondent Nos.1 to 3; and Mr. Rui Rodrigues, learned advocate for respondent Nos.4 to 6.

2. By the present petition, petitioner has prayed for a writ of mandamus to respondent No.2 i.e. the Commissioner of Customs (NS-I) and respondent No.3 i.e. the Assistant Commissioner of Customs, Appraising Group - I & IA to allow clearance of 2,650 MTs of Pigeon Peas covered under Bill of Entry Nos. (i) 9029721 dated 02.10.2020, (ii) 9028987 dated 02.10.2020, (iii) 9028862 dated 02.10.2020, (iv) 8845847 dated 17.09.2020, (v) 8843086 dated 17.09.2020, (vi) 8842485 dated 17.09.2020, (vii) 8985829 dated 29.09.2020, (viii) 8987173 dated 29.09.2020, (ix) 8982222 dated 28.09.2020, (x) 8994149 dated 29.09.2020, (xi) 9008104 dated 02.10.2020, (xii) 9029328 dated 02.10.2020, and (xiii) 9029262 dated 02.10.2020 for home consumption (hereinafter referred to as "the bills of entry") which have been held up inspite of having valid registration of Advance Payment Certificate bearing File No.03/27/008/ 00161/

AM18 dated 06.09.2017 and issued on 27.09.2017 by the ofce of the respondent No.5 i.e. the Director General of Foreign Trade (hereinafter referred to as "the DGFT") permitting import of Pigeon Peas under the Foreign Trade Policy 2015-2020 (hereinafter referred to as "the FTP").

3. Before we advert to the submissions made by learned counsel for the respective parties, it will be apposite to briefly refer to the relevant facts as pleaded for adjudication of the lis.

3.1. Petitioner is a company incorporated under the Companies Act, 2013 and engaged in the business of import and export of agricultural commodities. Petitioner is a regular importer and exporter of agricultural produce including Pigeon Peas (Toor) from Sudan, Myanmar, Tanzania and Mozambique. Petitioner has been allotted import / export code and accorded status of 'Star Trading House' by respondent No.5 i.e. the DGFT.

3.2. In the ordinary course of business petitioner had entered into contract dated 26.05.2017 with Agricom International General Trading LLC (hereinafter referred to as the "foreign supplier") for purchase of Pigeon Peas; the contract was mutually amended from time to time vide 8 addendums whereby some terms of the contract were amended and shipment period was extended. Petitioner notified the addendums to the ofce of respondent No.6 i.e. the Additional Director General of Foreign Trade, Mumbai. Petitioner's contract for import of Pigeon Peas is under the provisions of the FTP, validity of which now stands extended till 31.03.2021.

3.3. By notification No.19/2015-20 dated 05.08.2017, DGFT amended the import policy of certain items under Chapter 7 of the ITC (HS) 2017, whereby, import of Pigeon Peas was regulated / revised from 'free' to 'restricted' category stating that import shall be subject to an annual fscal quota of 2 lakh MT. By trade notice No.13/2015-20 dated 11.08.2017 it was clarified that though 2 lakh MT was already imported during the said current fscal year, import of Pigeon Peas in respect of which irrevocable letters of credit were opened prior to 05.08.2017 and subsequently registered with the jurisdictional Regional Authority as per provisions of the FTP was permitted. By another trade notice No.15/2015-20 dated 31.08.2017, DGFT provided further relaxation allowing registration of contracts for import of Pigeon Peas wherein advance payment had been made (full or in part) prior to 05.08.2017 and for which a contract / purchase invoice and payment details certified by the concerned bank were available.

3.4. Petitioner being covered by the conditions stated in the trade notice dated 31.08.2017 applied for registration of contract and was accordingly issued an Advance Payment Certificate vide File No.03/27/008/00161/AM18 dated 06.09.2017 i.e. registration certificate (hereinafter referred to as "the RC") by the DGFT on the basis of advance payment made to its supplier. Initially the RC granted to the petitioner was for import of Pigeon Peas from Sudan; however subsequently by amendment sheet No.01 dated 02.11.2017, petitioner was

permitted to import Pigeon Peas from Malawi, Myanmar, Mozambique and Tanzania.

3.5. DGFT issued 5 RCs to the petitioner against the trade notice dated 31.08.2017. Petitioner imported Pigeon Peas against 4 RCs to the extent of 11000 MTs by 2018. Import against the 5th RC in respect of balance 11000 MTs was to be completed between 2018 to 2020.

3.6. In view petitioner's contractual obligations shipment was to reach India between February and March 2020 but due to Covid - 19 pandemic and the resultant lockdown enforced by many countries there was delay and the shipment of Pigeon Peas arrived in the month of September 2020. Initially petitioner fled 3 bills of entry bearing Nos. (i) 8845847 dated 17.09.2020, (ii) 8843086 dated 17.09.2020 and (iii) 8842485 dated 17.09.2020 seeking clearance of Pigeon Peas for home consumption.

3.7. Petitioner's shipment was not cleared for home consumption by respondent Nos.2 & 3 as a result of which petitioner incurred demurrage / detention charges due to delay in clearance. Petitioner therefore addressed letter dated 22.09.2020 to the DGFT seeking clarification as to whether the RC dated 06.09.2017 issued to the petitioner was valid for import of Pigeon Peas in the year 2020 and also approached respondent No.3 who informed the petitioner that respondent No.3 had sought clarification from the DGFT with respect to validity of its RC dated 06.09.2017. During pendency of this action, additional quantity of Pigeon Peas imported by the petitioner arrived at Nhava Sheva port in Mumbai for which petitioner fled additional 10 bills of entry bearing Nos.(i) 9029721 dated 02.10.2020, (ii) 9028987 dated 02.10.2020, (iii) 9028862 dated 02.10.2020, (iv) 8985829 dated 29.09.2020, (v) 8987173 dated 29.09.2020, (vi) 8982222 dated 28.09.2020, (vii) 8994149 dated 29.09.2020, 3.9. Since petitioner's goods are perishable in nature, by letter dated 29.09.2020 addressed to the Deputy Commissioner of Customs, petitioner sought permission for storage of the goods in bonded warehouse under Section 49 (viii) 9008404 dated 02.10.2020, (ix) 9029328 dated 02.10.2020 and (x) 9029262 dated 02.10.2020 seeking clearance for home consumption.

3.8. The total quantity of Pigeon Peas under the aforesaid 13 bills of entry is 2650 MT clearance of which is the subject matter of the present writ petition. Petitioner has pleaded that the balance 8350 MT of Pigeon Peas is also ready to be shipped by its foreign supplier, but due to detention of the present consignment, petitioner has requested its foreign supplier to keep the shipment on hold for the present. of the Customs Act, 1962 to avoid detention and ground rent charges.

3.10. Thereafter petitioner entered into correspondence with the respondents seeking clarification on the validity of its RC but received no reply. By letter dated 10.11.2020 petitioner requested Deputy Commissioner of Customs (Import) to permit the petitioner to convert the bills of entry from home consumption to

warehousing so as to enable the petitioner to transfer the goods to the actual warehouse who was the license holder in order to stop further losses being suffered by the petitioner due to non-clearance of the goods and due to its perishable nature. Petitioner also addressed online complaint on 12.11.2020 to the Grievance Redressal Committee of the FTP.

3.11. By letter dated 12.11.2020 respondent No.3 i.e. Assistant Commissioner of Customs, Appraising Group - I & IA rejected the petitioner's request for conversion of the 13 bills of entry from home consumption to warehousing.

3.12. Being aggrieved by the non-clearance of the shipment of approximately 2650 MT of Pigeon Peas imported vide RC dated 06.09.2017 under the 13 bills of entry, petitioner has approached this Court by the present petition seeking the relief(s) as indicated above.

4. Mr. Vineet Naik, learned senior counsel appearing on behalf of the petitioner, at the outset has informed that the tenure of the FTP 2015-2020 now stands extended till 31.03.2021 vide notification dated 31.03.2020. He submitted that import against 4 RCs was completed by the petitioner in 2018, whereas import against the 5th RC was to be completed between 2018 to 2020; import was thus continuous from the date of issuance of the RCs to the petitioner; RC dated 06.09.2017 issued to the petitioner was without specifying any validity period or date of shipment but categorically stated that the RC would remain valid till the entire quantity is imported; petitioner extended the contract mutually with its foreign supplier from time to time, intimation of which was given to the DGFT at all times; petitioner's RC was fully covered by the Notification dated 05.08.2017 and the clarificatory trade notices dated 11.08.2017 and 31.08.2017 issued under the FTP; there was no embargo on the petitioner to import the goods only during the fiscal year 2017-18 as contended by respondents and the import of the entire quantity of goods could be made during the tenure of the FTP. He submitted that since petitioner's contract was entered into prior to 05.08.2017, RC issued to the petitioner did not mention any expiry date; as such the validity of the RC is till the FTP is in force or till completion of import, whichever is earlier; hence petitioner is entitled to clearance of the imported goods under the RC and non-clearance of the goods is illegal and contrary to the provisions of the FTP.

5. PER CONTRA Mr. Rui Rodrigues, learned counsel appearing on behalf of respondent Nos.4 to 6 has defended the action of non-clearance of the goods and in this connection has drawn our attention to the affidavit-in-reply dated 05.01.2021 and additional affidavits dated 21.01.2021 and 02.03.2021 filed by the DGFT and contended that validity of the RC issued to the petitioner was only for the fiscal year 2017-18 and date of expiry of the RC is the date of expiry of the notification; petitioner's claim that its contract and addendums be treated as a single document did not find any import in view of the relaxation provided by trade notice dated 31.08.2017 in respect of paragraph 1.05 of the FTP; trade notice being issued in order to address the genuine hardship faced by importers / exporters; no relaxation criteria for extension of contract was prescribed in the

trade notice; thus in the absence of any explicit relaxation or extension, validity of the petitioner's shipment in 2020 as per petitioner's contract is to be considered as on the date of registration of the contract and it cannot be extended indefinitely by various addendums allegedly addressed to the office of the Additional Director General of Foreign Trade ; the said office did not accept / receive the alleged addendums as no computerised acknowledgment was issued to the petitioner; notification dated 05.08.2017 was specifically issued to restrict import of Pigeon Peas in order to protect the domestic farmers from unbridled imports; this notification imposed restriction on the import of annual quota; notification dated 31.08.2017 was issued only to protect the importers who had already entered into contracts with advance payment prior to 05.08.2017 and relaxation was provided beyond the quota but the same was to be completed during the fiscal year 2017-18 and could not be extended indefinitely by entering into addendums; thus in the absence of any validity endorsed on the RC issued to the petitioner, the quantity, value and shipment period in the contract as on the date of registration has to be treated as a limiting factor; contention of the petitioner that the FTP permitted import under the RC for the entire duration of FTP is erroneous as trade notice dated 31.08.2017 allowed for registration of contracts as per the terms of the contract as on the date of its registration with the balance value, quantity and shipment period available in the contract as the limiting factor; the relaxation provided was only to alleviate the immediate suffering of the importers and could not be mis-utilized by extending the relaxation beyond the fiscal year 2017-18; petitioner while applying for amendment in the RC for adding country of origin did not mention that its contract was extended till 28.09.2020; the RC issued to the petitioner cannot be treated as open ended and it has to be linked with the notification and year of issuance i.e. 2017-18 only.

5.1. He referred to the additional affidavit dated 02.03.2021 and contended that petitioner was initially issued 2 RC's of 11000 MTs each on the basis of its contract; petitioner's application dated 05.09.2017 was considered by respondent No.6 in view of the contract entered into by the petitioner against advance payment made by the petitioner to its foreign supplier and consolidated RC bearing File No.03/27/008/ 00161/AM-18 dated 06.09.2017 permitting import of 26250 MT's of Pigeon Peas under 5 different contracts for which 5 advance payments were made was issued; however on the request of the petitioner 5 separate RC's in respect of 5 different contracts having separate registration numbers were issued to the petitioner; reading of trade notices dated 11.08.2017 and 31.08.2017 leave no doubt in mind that the applicability of any relaxation granted to the petitioner by way of amendment in the RC by respondent No.6 pertained only to the quota prescribed for the financial year 2017-18 and could never have been extended beyond the said fiscal year; contracts submitted by the petitioner clearly indicated that its shipments were due on 20 July / 20 September 2017; or August / 15 September 2017 or August / September 2017; and August / September / October 2017; in so far

addendum No.1 to the contract dated 26.05.2017 is concerned though the shipment period was extended by 45 days, the extended period was however still within the fiscal year 2017-18 and was therefore permissible; hence the subsequent addendums submitted by the petitioner after issuance of the RC were invalid.

5.2. He submitted that Petitioner's reliance on notification No.04/2015-2020 dated 25.04.2018 on the basis of which fresh RC dated 04.05.2018 for import of Yellow Peas for 200 MT was issued cannot be applied to the present case as it was in respect of the quota pertaining to the fiscal year 2018-19 and released with restriction for the period until 30.09.2018 as subsequently indicated in notification No.15/2015-2020 dated 02.07.2018; absence of validity explicitly on the RC dated 06.09.2017 issued to the petitioner did not entitle the petitioner to claim extension / relaxation beyond the fiscal year 2017-18 as it runs contrary to the spirit of the notification dated 05.08.2017 read with the two trade notices dated 11.08.2017 and 31.08.2017; reliance was placed on the clarification issued by the Deputy Director of General of Foreign Trade vide letter dated 24.12.2020 to the Commissioner of Customs, Nhava Sheva, inter alia, clarifying that in the case of the petitioner, validity of the RC was only for the fiscal year 2017-18 as the provision for registering RCs was made with reference to notification No.19/2015-2020 dated 05.08.2017 and the date of expiry is the date of lapse of notification i.e. 31.03.2018. He therefore prayed for dismissal of the petition on the basis of the above submissions.

6. Mr. Pradeep Jetly, learned senior counsel appearing on behalf of respondent Nos.1 to 3 in his reply, at the outset adopted the submissions made on behalf of respondent Nos.4 to 6 and has drawn our attention to the affidavit-in-reply dated 17.12.2020 filed by the Deputy Commissioner of Customs to contend that since the RC dated 06.09.2017 does not bear any validity or expiry clause, the matter was referred to the DGFT; extension of the original contract was never intimated by petitioner and the contract was never revalidated; therefore the petitioner is not entitled to the reliefs claimed in the petition.

7. Mr. Vineet Naik, learned senior counsel for the petitioner in his rejoinder submission has drawn our attention to the rejoinder affidavit and additional affidavits filed by the petitioner dated 01.01.2021, 08.01.2021 and 10.02.2021 and submitted that petitioner's contract was admittedly prior to 05.08.2017 and the contract along with addendum No.1 dated 07.08.2017 was registered; RC was issued for the contract and addendums are to be treated as part of the contract; the addendums were duly intimated to the DGFT immediately on execution from time to time; while making application for amendment regarding addition of country of origin there was no necessity for the petitioner to seek extension of term of shipment as it was within the tenure of the FTP; the question of getting the addendums approved cannot arise as they are to be treated as part of the contract.

7.1. He submitted that notification dated 05.08.2017 nowhere states that it is

valid only till 31.03.2018; notification dated 11.08.2017 made it clear that while issuing notification dated 05.08.2017 the annual quota of 2 lakh MT for the fiscal year was already imported, thus the contention that import was to be completed within the fiscal year is without merit; validity of RC is co-terminus with the validity of contract during the tenure of the FTP; contract of petitioner was not based on letters of credit but on advance payment and hence reliance placed on para 1.05 of the FTP requiring the petitioner to register with the jurisdictional R.A. was not applicable to the petitioner's case.

7.2. He submitted that on 29.10.2020 Deputy Director of General of Foreign Trade, Zonal Additional DGFT Mumbai addressed an email to the Deputy Director General (PC-2) DGFT endorsing a copy to the Mumbai DGFT and Joint DGFT, inter alia, clarifying that the application of the petitioner was made under trade notice dated 31.08.2017 against advance payment to supplier and the shipping date as per proforma contract / addendums is 31.03.2021; RC is a document issued by the Ministry of Commerce and Industry, Government of India and nowhere mentions the validity or expiry date save and except the quantity to be imported; hence unless the entire quantity is imported, the RC remains valid during the tenure of the FTP; the DGFT cannot add something into the RC to contend that the RC is valid only for the first fiscal year of the FTP.

8. Submissions made by the parties have received the due consideration of the Court. Materials on record have been perused.

9. Before we advert to the submissions made by the respective counsel, it would be apposite to consider the relevant provisions of the Foreign Trade Policy 2015-2020 as applicable in the present case.

9.1. Chapter 1 of the Foreign Trade Policy (2015-2020) deals with the legal framework and trade facilitation. The relevant provisions are extracted as under:-

1.00 Legal Basis of Foreign Trade Policy (FTP)

The Foreign Trade Policy, 2015-20, (as updated) w.e.f. 05.12.2017 is notified by Central Government, in exercise of powers conferred under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992) [FT (D&R) Act], as amended.

1.01 Duration of FTP

The Foreign Trade Policy (FTP), 2015-2020, (as updated) w.e.f. 05.12.2017 incorporating provisions relating to export and import of goods and services, shall come into force with effect from the date of notification and shall remain in force upto 31st March, 2020, unless otherwise specified. All exports and imports made up to the date of notification shall, accordingly, be governed by the relevant FTP, unless otherwise specified.

1.02 Amendment to FTP

Central Government, in exercise of powers conferred by Section 5 of FT (D&R)

Act, 1992, as amended from time to time, reserves the right to make any amendment to the FTP, by means of notification, in public interest.

1.03 Hand Book of Procedures (HBP) and Appendices & Aayat Niryat Forms (AANF)

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

1.04 Specific provision to prevail over the general

Where a specific provision is spelt out in the FTP/Hand Book of Procedures (HBP), the same shall prevail over the general provision.

1.05 Transitional Arrangements

(a) Any License / Authorisation / Certificate / Scrip / instrument bestowing financial or fiscal benefit issued before commencement of FTP, 2015-20 (as updated) w.e.f. 05.12.2017 shall continue to be valid for the purpose and duration for which it was issued, such License / Authorisation / Certificate / Scrip / any instrument bestowing financial or fiscal benefit Authorisation was issued, unless otherwise stipulated.

(b) Item wise Import / Export Policy is delineated in the ITC (HS) Schedule I and Schedule II respectively. The importability /exportability of a particular item is governed by the policy as on the date of import / export. The date of import / export is defined in para 2.17 of HBP, 2015-20. Bill of Lading and Shipping Bill are the key documents for deciding the date of import and export respectively. In case of change of policy from 'free' to 'restricted / prohibited / state trading' or 'otherwise regulated', the import /export already made before the date of such regulation / restriction will not be affected. However the import through High Sea sales will not be covered under this facility. Further, the import / export on or after the date of such regulation / restriction will be allowed for importer / exporter has a commitment through Irrevocable Commercial Letter of Credit (ICLC) before the date of imposition of such restriction / regulation and shall be limited to the balance quantity, value and period available in the ICLC. For operational listing such ICLC, the applicant shall have to register the ICLC with jurisdictional RA against computerized receipt within 15 days of imposition of any such restriction / regulation. Whenever, Government brings out a policy change of a particular item, the change will be applicable prospectively (from the date of Notification) unless otherwise provided for.

9.2. From the above it can be seen that paragraph No.1.01 of chapter 1 of the FTP states that the FTP shall come into force with effect from the date of notification and shall remain in force upto 31.03.2020, unless otherwise specified

as stated; the said policy now stands extended upto 31.03.2021. Paragraph No.1.05 relates to transitional arrangements and clause (b) thereof states that in case of change of policy from 'free' to restricted / prohibited / state trading or otherwise regulated, the import / export already made before the date of such regulation / restriction will not be affected. It further states that any import / export on or after the date of such regulation / restriction will be allowed for the importer / exporter if he has a commitment through Irrevocable Commercial Letter of Credit (ICLC) before the date of imposition of such restriction / regulation. Clause (b) however does not apply to the case of an importer / exporter whose commitment is through advance payment which needs to be noted in the present case.

9.3. Notification No.18/2015-20 dated 05.08.2017 issued by the DGFT pertaining to amendment in the import policy of Pigeon Peas is relevant to the present case and is extracted as under :-

Government of India

Ministry of Commerce and Industry

Department of Commerce

Directorate General of Foreign Trade

Notification No. 19/2015-2020

New Delhi, Dated : 05 August, 2017

Subject : Amendment in import policy of Pigeon Peas (*Cajanus Cajan*) / Toor Dal under Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy).

S.O. (E) : In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992 read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020 as amended from time to time, the Central Government hereby amends the import policy of items of Chapter 7 of the ITC(HS)2017. Schedule- I (Import Policy) as under:

Exim Code

Item Description

Existing Policy

Existing Policy Condition

Revised Import Policy

Revised Policy Condition

0713 60 66

Pigeon Peas (*Cajanus Cajan*) Toor Dal

Free

-

-

Restricted

Subject to Policy Condition 2 of this Chapter

0713 90

Other :

0713 90 10

Split

Free

-

Free except Pigeon Peas (Cajanus Cajan) / Toor Dal which is restricted

Import of Pigeon Peas is subject to Policy Condition 2 of this Chapter

0713 90 90

Other

Free

-

Free except Pigeon Peas (Cajanus Cajan) / Toor Dal which is restricted

Import of Pigeon Peas is subject to Policy Condition 2 of this Chapter

Policy Condition 2: Import shall be subject to an annual (fiscal year) quota of 2 lakh MT as per procedure to be notified. This restriction will not apply to Government's import commitments under any bilateral / regional Agreement / MOU.

2. Effect of this Notification: Import Policy of Pigeon Peas (Cajanus Cajan) / Toor Dal under EXIM Codes 0713 60 00, 0713 90 10 and 0713 90 90 is revised from 'free to 'restricted'.

sd/-

(Alok Vardhan Chaturvedi)

Director General of Foreign Trade E -mail : dfgt@nic.in

[Issued from File No. M-5012/300/2002-PC 2(A)]

9.4. By the above notification amendment in the import policy of Pigeon Peas under chapter 7 of the Indian Trade Classification (HS) 2017 for the FTP is made

specifically in respect of import of Pigeon Peas whereby the import is changed from free to restricted category. A further condition is incorporated stating that import shall be subject to an annual (fiscal year) quota of 2 lakh MT as per the procedure to be notified. Condition No.2 states that import shall be subject to an annual quota of 2 lakh MT. From this it can be safely inferred that the import under the FTP is for the duration of the FTP and not for the fiscal year 2017-2018.

9.5. Similarly trade notices No.13/2015-2020 dated 11.08.2017 and No.15/2015-2020 dated 31.08.2017 issued by the DGFT are also directly relevant to the present case and are extracted as under :-

Government of India

Ministry of Commerce and Industry

Department of Commerce

Directorate General of Foreign Trade

11th August, 2017

TRADE NOTICE NO. 13/(2015-2020)

To

1. ALL RA's of DGFT
2. All Customs Commissionerate
3. Members of Trade

Subject : Implementation of Notification No. 19 dated 5.8.2017-reg.

Reference is invited to Notification No. 19 dated 5.8.2017 amending the import policy of Pigeon Peas (*Cajanus Cajan*) / Toor Dal under Chapter 7 of the ITC(HS) 2017. Vide the said notification, import policy of Toor Dal has been modified to "restricted", subject to an annual (fiscal year) quota of 2 lakh MT as per procedure to be subsequently notified.

2. However, as per the import data base, 2 lakh MT of Pigeon Peas/Toor Dal has already been imported during the current fiscal year. Therefore, the requirement of issuing detailed procedure for import of Toor Dal no longer exists and no authorization in terms of para 2.08 of the Foreign Trade Policy (2015-2020) will be issued. However, import [as per para 2.17 and 9.11 of the Handbook of the Procedure (2015-2020)] of Pigeon Peas/Toor Dal for which irrevocable Letters of Credit have been opened prior to 5th August, 2017 and subsequently registered with the jurisdictional RAs, as per provisions of Para 1.05 of the Foreign Trade Policy (2015-20), are permitted.

sd/-

(S.P. Roy)

Joint Director General of Foreign Trade

E-mail : shyama.roy@nic.in [Issued from File No. M-5012/300/2002-PC 2(A)]

Government of India

Ministry of Commerce and Industry

Department of Commerce

Directorate General of Foreign Trade 31st August, 2017

TRADE NOTICE NO.15/(2015-2020)

1. To ALL RA's of DGFT
2. All Customs Commissionerate
3. Members of Trade

Subject : Implementation of Notification No. 19 dated 5.8.2017-reg.

Reference is invited to Notification No. 19 dated 5.8.2017 amending the import policy of Pigeon Peas (*Cajanus Cajan*)/Toor Dal under Chapter 7 of the ITC(HS) 2017 and Trade Notice No 13 date 11.8.2017 on the above subject.

2. Trade Notice No.13 dated 11.8.2017 has provided for import [as per para 2.17 and 9.11 of the Handbook of the Procedure (2015-2020)] of Pigeon Peas/Toor Dal for which irrevocable Letters of Credit have been opened prior to 5th August, 2017 and subsequently registered with the jurisdictional F.As. as per provisions of Para 1.05 of the Foreign Trade Policy (2015-20).

3. Subsequently representations have been received indicating that some firms have entered in contracts prior to 5th August, 2017 for import of Pigeon Peas/Toor Dal with either (i) advance payment , (ii) some advance payment and rest amount payable in Cash against Documents (CAD), or (iii) 100% CAD.

4. The matter has been considered and the Director General of Foreign Trade, in exercise of powers under Para 2.58 of the Foreign Trade Policy (2015-20), by relaxing the provisions of Para 1.05, hereby allowed registration of such Contracts with the Regional Authorities of DGFT for import of Pigeon Peas (*Cajanus Cajan*) / Toor Dal, wherein advance payment had been made (full or in part) prior to 5.8.2017 and for which contract / purchase invoice and payment details certified by the bank are available.

5. Further, in relaxation of the provision of time limit for registration of contracts, as in Para 1.05 of FTP, such contracts must be registered with the Jurisdictional Regional Authorities headed only by the Additional DGFTs, latest by 7th September, 2017 (5.00 p.m.). Applicants seeking relaxation in Para 1.05 of FTP (2015-20) may submit their application to the jurisdictional RAs headed by Addl. DGFT, for registration of their contracts wherein advance payment had been made prior to 5.8.2017, by making an online payment of Rs 2000/- as

application fee for seeking relaxation in Policy/procedure as per Appendix 2K.

6. Accordingly, such contracts shall be registered by the Zonal RAs i.e Chennai, Delhi, Kolkata, Mumbai and RAs of Ahmedabad, Bangalore, Hyderabad and Ludhiana as per their jurisdiction, only after verifying that frms have entered into contracts prior to the date of issuance of the notification and where advance payments have been made against a contract / purchase invoice and where the payment objective intent is clearly mentioned in the payment transaction document by the bank concerned as import of Pigeon Peas / Toor Dal. The registration will be permitted only with the approval of the Head of Ofce.

sd/-

(S.P. Roy)

Joint Director General of Foreign Trade

E-mail : shyama.roy@nic.in

[Issued from File No. M-5012/300/2002-PC 2(A)]"

9.6. By trade notice No.13/2015-2020 dated 11.08.2017 it was made mandatory for importers having an Irrevocable Letter of Credit opened prior to 05.08.2017 to register with the jurisdictional Regional Authority as per the provisions of paragraph 1.05 of the FTP for permitting their import. This was because as 2 lakh MT of Pigeon Peas had already been imported during the said fscal year (2017-2018). In trade notice No.15/2015-2020 dated 31.08.2017 it was stated that in the case of importers who had made advance payment to its foreign supplier (full or in part) prior to 05.08.2017 and for which contract / purchase invoice and payment details certified by the bank were available, such importers were allowed to register with the jurisdictional Regional Authority by 07.09.2017. Petitioner's case is covered by this trade notice as can be seen.

10. In the backdrop of the above provisions the basic facts pertaining to the petitioner's case need to be scrutinized in order to appreciate applicability of the relevant provisions of the FTP and notification dated 05.08.2017 read with the two clarifcatory trade notices dated 11.08.2017 and 31.08.2017. Petitioner entered into the contract dated 26.05.2017 with its foreign supplier i.e. Agricom International General Trading LLC for purchase of 22000 MT of Pigeon Peas. Petitioner vide letter dated 05.09.2017 applied for registration of contract for import of the entire quantity of 22000 MT under trade notice dated 31.08.2017. It is seen that the application dated 05.09.2017 was fled along with copy of application submitted online, copies of the fve contracts alongwith addendums, copies of swift messages from bank indicating remittance as per contracts and copy of bank certifcate issued by the bank under the category of advance payment being made prior to 05.08.2017. Respondent No.6 initially issued two RCs both dated 06.09.2017 permitting import of 11000 MTs of Pigeon Peas per certificate. We have seen that both the RCs are identical except for the bold letter "E" in the second RC.

11. For the sake of convenience, one of the RCs dated 06.09.2017 issued by the Foreign Trade Development Ofcer in the ofce of respondent No.6 is extracted below for reference as under :-

GOVERNMENT OF INDIA

OFFICE OF THE ADDITIONAL DIRECTOR GENERAL OF FOREIGN TRADE

Nishta Bhavan, 48, Vithaldas Thackersey Marg,

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File No.03/27/008/00161/AM18

REGISTRATION OF IRREVOCABLE LETTER OF

CREDIT/ ADVANCE PAYMENT UNDER PARA 1.05 (B)

OF THE FTP 2015-20202

(A) Applicant's Details

Name of the Firm / Company

RIKA GLOBAL IMPEX LIMITED

Address

2ND FLOOR, SAKHAR BHAVAN, 230, NARIMAN POINT, MUMBAI - 400021

E - Code Number

0207011061

issuing Authority

OFFICE OF THE DIRECTOR GENERAL OF FOREIGN TRADE, CALCUTTA

(B) L/C Registration Details

Notification No.

19/(2015-2020)

Notification Dt.

05.08.2017

Trade Notice No.

13/(2015-2020)

Trade Notice Dt.

11.08.2017

Trade Notice No.

15/(2015-2020)

Trade Notice Dt

31.08.2017

L/C No. / Advance Payment Details

Bank Reference No.

Bank Reference No

Amount in US\$

Proforma Invoice No

Proforma Invoice Dt

Import Quantity

0902300510117

28.07.2017

525288.57

RIY/07/SPP/ 17-18

26.05.2017

11000.00

Import Item

Total Import Quantity

Pigeon Peas (Cajanus Cajan) /Toor Dal

11000.00 MTS

Foreign Seller's Details

Name of Seller

Postal Address

Country of Origin

AGRICOM INTERNATIONAL GENERAL TRADING LLIC

341/A, 3RD FLOOR GHURAIR BUSINESS TOWER, P.O. BOX 118294, ALRIQQA,
DEIRA, DUBAI - U.A.E

SUDAN

(C) Date of Receipt of Application : 06.09.2017

Date of Issue : 27.10.2017

sd/-

(C.V. ARONDEKAR)

Foreign Trade Development Ofcer,

For Addl. Director General of Foreign Trade.

11.1. Perusal of the RC dated 06.09.2017 shows that there is no validity period or expiry date stated therein. The RC is in respect of the FTP (now extended upto 31.03.2021). The amendment sheet No.1 dated 02.11.2017 alters the country of origin in the RC and adds four more countries in the column of country of origin in the RC. Contention of the respondents that under para 1.05(b) petitioner has not registered with the jurisdictional RA due to change in policy of import of Pigeon Peas from free to restricted category cannot apply to the petitioner's case as the petitioner's contract was based on advance payment to the supplier and not on the basis of ICLC (Irrevocable Commercial Letter of Credit). Hence this submission of the respondents cannot be accepted.

12. Further it is seen that petitioner was permitted to import Pigeon Peas for the fiscal years 2018-19 and 2019-20; this fact is clear on perusal of the shipments of the Pigeon Peas cleared for home consumption on 32 different occasions by respondent No.3 between 28.02.2018 to 25.07.2020. This data is placed on record in the additional affidavit dated 10.02.2021 filed by the petitioner at page Nos.165 to 167 of the paper book and is not denied or controverted by the respondents; it is also seen that respondents were duly informed by the petitioner about the extended period of shipment and the subsequent addendums with its foreign supplier and therefore the respondents' objection about the validity period of the RC being restricted to the fiscal year 2017-18 cannot be accepted. It is pertinent to note that if any restriction with respect to prescribing limitation of time limit is required to be imposed on any import then the RC should have an endorsement to that effect; in the instant case both the RCs presented before us do not have any such endorsement limiting the import of Pigeon Peas only during the fiscal year 2017-18 and therefore there is substantial merit in the case of the petitioner.

13. The notification dated 05.08.2017 and trade notices dated 11.08.2017 and 31.08.2017 nowhere state that the concerned import should be limited upto 31.03.2018. In that case there should have been an express endorsement in the notification or in the trade notices about their expiry or there should have been a subsequent notification superseding the notification / notices. It is also seen that the DGFT has considered the addendums while issuing the RC. In any case, by these addendums, terms of contract are not substituted or changed, only period of shipment is extended. In case of any material change in terms of contract, petitioner would have applied to the concerned ministry for seeking amendment.

Petitioner had earlier applied for amendment for change of country of origin and the same was allowed. Customs have allowed the import even after 31.03.2018, the last import being made on 25.07.2020. Respondents therefore now cannot take a completely contrary stand that the import was restricted only upto 31.03.2018 in the petitioner's case.

14. We therefore have no hesitation to hold that in the facts of the present case the RC is binding on the respondents until the completion of the import quota mentioned therein and considering that the petitioner has imported the import item before 31.03.2021, petitioner's import is required to be declared as valid import under the FTP. We may state that petitioner's application for import was specifically filed under notification dated 05.08.2017; only pre-condition prescribed therein being registration of contract if advance payment was made prior to 05.08.2017; petitioner qualified such pre-condition considering that its contract was registered on 26.05.2017 in respect of the import item and advance payment already made; the subsequent addendums did not vary the principal contract save and except the date of shipment and the country of origin; petitioner having approached the DGFT for seeking change of country of origin and the same having been granted; the addendums were merely for convenience of the parties for actual shipment of the import item and most importantly the addendums were informed to the DGFT; therefore contention of the respondents that the addendums are to be treated as a supplementary contract or fresh contract cannot arise as it is to be treated as part and parcel of the principal contract between the parties. On perusal of the notification dated 05.08.2017 it cannot be said that it imposed restriction to complete the import of goods only during the fiscal year 2017-18; though there is a reference to the fiscal year appearing in condition No.2 of the said notification as regards the quota of 2 lakh MT per annum; this reference is merely for the purposes of procedure to be notified for such import in terms of para 2.08 of the FTP; however the subsequent trade notice dated 31.08.2017 which directly concerns the petitioner's case in hand does not mention its applicability to the fiscal year 2017-2018 and categorically specifies its applicability to the contract under the FTP.

15. We may also note the contents of the clarificatory email dated 29.10.2020 issued by the Deputy DGFT, Mumbai and addressed to the Deputy (PC-2) DGFT endorsing a copy to the Mumbai DGFT and Joint DGFT which supports the petitioner's case. For the sake of convenience the clarification provided in the email is extracted as under.

"1. The application was made under Trade Notice No.15(2015-20) dated 31.08.2017.

2. It is made against part advance payment and rest amount payable against the documents.

3. The RC was not issued against any other document.

4. The application was made against advance payment. There was no IC involved.

5. The shipping date as per proforma - contract / addendums is 31st March, 2021."

15.1. Perusal of the clarifactory email shows that it is clarified by the DGFT that petitioner's application for import is made under the trade notice dated 31.08.2017 against part advance payment and most importantly the shipping date as per proforma - contract / addendums is 31.03.2021. This date i.e. 31.03.2021 is relatable to the last addendum No.8 dated 15.09.2020 under the original contract dated 26.05.2017 which is annexed at page 80 of the paper book by the petitioner. Thus this clearly surmises that the office of the DGFT has all along taken due cognizance of the addendums and issued the clarification. Copy of this email has been placed on record in the affidavit-in-rejoinder dated 08.01.2021 filed by the petitioner. Respondent Nos.4 to 6 have filed affidavit-in-reply dated 21.01.2021 of the Deputy DGFT to the rejoinder dated 08.01.2021, wherein they have conveniently chosen not to deal with the above email. Additional affidavit dated 02.03.2021 is also filed by respondent Nos.4 to 6, wherein once again a stoic silence is maintained about the above email issued by the Deputy DGFT and a contrary argument of limiting the import only to the fiscal year 2017-18 is advanced.

16. In view of the above discussion it is clearly discernible that petitioner's import of 22000 MTs of Pigeon Peas under the RCs issued to the petitioner is valid upto 31.03.2021 and the case of the respondents that the same is restricted only to the fiscal year 2017-18 is clearly untenable.

17. We may add that the respondents are statutory authorities and in the facts of the present case have not functioned responsibly. Petitioner's shipment of Pigeon Peas of 2650 MT had arrived at the port in September 2020. Petition was filed on 25.11.2020. Petitioner had pleaded urgency for hearing. On 08.02.2021, respondent Nos.4 to 6 raised preliminary objection on maintainability by placing internal communication dated 24.12.2020 addressed by the Deputy DGFT to the respondent No.3 issuing clarification regarding validity of the FTP 2015-2020. This letter is extracted as under:-

"No.M.5012/300/2012/PC-2 (AV) Vol/Part - VI/P-9396

Government of India Ministry of Commerce and Industry Department of
Commerce Directorate General of Foreign Trade

.....

Udyog Bhawan, New Delhi

Dated 24th December 2020

The Office of the Commissioner of Customs (NS-1)(Kind Attn.: Shri Anil K. Pundir,
Asstt. Commissioner) Jawaharlal Nehru Custom House, Nhava Sheva

Tal - Uran, District : Raigad

MAHARASHTRA - 400 707.

Subject : Verification of Irrevocable Letter of Credit / Advance Payment under para 1.05. of the FTP 2015-2020 - reg.

Sir,

I am directed to refer to the letter No.S/26-Misc-184/2011-12 GR. I & IA (Pt.III) dated 24.09.2020 on the subject cited above seeking following clarifications from the O/o Addl. Director General of Foreign Trade, Mumbai :

- i. Whether the above said ILC / Advance payment dated 27.10.2017 is still valid ?
- ii. If yes, please furnish date of expiry of the same.
- iii. Whether the consignments covered under subject 03 bills of entry can be cleared against the said ILC or otherwise ?
- iv. Whether the said ILC / Advance Payment can be utilized for further such imports if any by the importer ?

2. In this regard the following clarification is issued in- seriatim :

- i. The validity of RC was only for the fiscal year 2017-18; as the provision for registering RCs was made with reference to Notification No.19/2015- 2020 dated 5th August, 2017.
- ii. The date of expiry is the date of lapse of Notification i.e. 31.03.2018.
- iii. & (iv) Customs may like to take a decision based on the clarification furnished above.

3. This issues with the approval of Competent Authority.

Yours faithfully

sd/-

(S.K. Mohapatra)

Deputy Director General of Foreign Trade

Tel : 2306 1562 / Extn. 277

E-mail : mohapatra.sk@nic.in copy to : The O/o Additional Director General of Foreign Trade, Nishte Bhawan, 48, Vithaldas Thackersey Marg, Churchgate, Mumbai - 20.

17.1. In the above letter the Deputy DGFT clarified that the validity of the RC was only for the fiscal year 2017-18 as the provision for registering RCs was made with reference to Notification No.19/2015-2020 dated 05.08.2017 and the date of expiry is the date of lapse of notification i.e. 31.03.2018.

18. We have already dealt with in detail as alluded to herein above the issue of

validity and expiry of the RC in the petitioner's case. Though this letter is dated 24.12.2020, it was not placed on record by respondent Nos.4 to 6 in their reply affidavit dated 05.01.2021 and affidavit-in-reply to petitioner's rejoinder affidavit dated 21.01.2021. This letter was tendered in court for the first time on 08.02.2021 and after hearing the parties the following order was passed by this Court:-

" Date : 08.02.2021

Mr. Rui Rodrigues, learned counsel for respondent

Nos.4, 5 and 6 has raised a preliminary objection as to maintainability of the writ petition qua the said respondents. He has taken us to the pleadings and prayers made in the writ petition to support his contention that no relief has been claimed against respondent Nos.4, 5 and 6.

2. In the course of raising preliminary objection, Mr. Rodrigues has also tendered a document dated 24.12.2020 issued by Deputy Director General of Foreign Trade and addressed to the Commissioner of Customs (Nhava Sheva-I) issuing clarifications on the letter dated 24.09.2020.

3. Since this document is not on record and may have a bearing on the outcome of the adjudication, we grant liberty to learned counsel for the petitioner to bring it on record by way of an additional affidavit since the copy of the document was tendered in Court by Mr. Rodrigues; copy of which was also furnished to learned counsel for the petitioner.

4. We also grant liberty to the petitioner to make an averment in the said additional affidavit about the documents in the compilation sought to be relied upon by the petitioner. Let the additional affidavit be filed within two days.

5. In so far the preliminary objection raised by Mr. Rodrigues is concerned, certainly that will be considered by the Court but the Court intends to pass a composite order on preliminary objection as well as on merit.

6. Stand over to 12.02.2021."

19. If the aforesaid objection raised by respondent Nos.4 to 6 is to be countenanced, then there was no reason for the respondents to clear the 25 shipments of the petitioner after 31.03.2018, i.e. from 23.04.2018 to 25.07.2020. The stand adopted by the respondents especially respondent Nos.4 to 6 is against the spirit and contents of the FTP. Para 1.07 of Chapter 1 of the FTP 2015-2020 states that DGFT has a commitment to function as a facilitator of exports and imports. Focus is on good governance, which depends on efficient, transparent and accountable delivery systems. It further states that in order to facilitate international trade, DGFT consults various Export Promotion Councils as well as Trade and Industry bodies from time to time. Thus the DGFT is required to act as a facilitator which is however not seen in the present case. We may also refer to chapter 9 of the FTP which concerns with definitions and we may usefully

extract the following definitions to understand the terminology. Paragraph 9.23 defines 'free' and states that free as appearing in the context of import / export policy for items means goods which do not need any 'Authorisation' / license or permission for being imported into the country or exported out. Paragraph No.9.43 defines 'quota' to mean the quantity of goods of a specific kind that is permitted to be imported without restriction or imposition of additional duties. Therefore the objection raised by respondent Nos.4 to 6 that the notification dated 05.08.2017 and the two trade notices dated 11.08.2017 and 31.08.2017 would restrict the import of Pigeon Peas only upto 31.03.2018 stands squarely rejected. Paragraph 9.47 defines 'restricted' to mean a term indicating the import or export policy of an item, which can be imported into the country or exported outside, only after obtaining an Authorization from the office of DGFT.

20. Petitioner's import consignment of Pigeon Peas is a perishable commodity. The 2650 MT consignment has been lying at Nhava Sheva port due to suspension of clearance since October 2020. Petitioner has also prayed for reimbursement of costs of Rs.1,40,00,000.00 with interest incurred by the petitioner on bonding / debonding and withholding charges, though no pleadings and material to that effect has been pleaded or urged during arguments. The only pleading relating to loss / costs incurred by the petitioner is found in paragraph No.37 of the petition which is extracted as under :-

"The Petitioner states that shipment of approximately 2650 MT of Pigeon Peas imported under the said File No.03/27/008/00161/AM18 dated 06.09.2017 has already arrived at the port and delivery of 8350 MTs of Pigeon Peas has been put on hold in view of Respondent Nos.2 and 3 not permitting clearance of the imported Pigeon Peas. The Petitioner will be saddled with costs for the said stoppage by its seller which is evident from letter dated 05.10.2020. The Petitioner states that the stoppage of shipment is on Petitioner's request and costs for which will have to be borne by the Petitioner."

20.1. Petitioner has referred to letter dated 05.10.2020 received from its foreign supplier, but it relates to future consignment and not the subject 2650 MT which is stranded at the port. Hence petitioner's claim for bonding / debonding and withholding charges in the absence of any material and / or pleadings cannot be gone into. Needless to say petitioner shall be at liberty to prosecute any such remedy as available to it in the appropriate forum / court in accordance with law.

21. Thus on a thorough consideration of the submissions made by the parties and pleadings on record, we are inclined to pass the following orders:-

(i) Respondents shall allow clearance of 2650 MT of Pigeon Peas covered under Bill of Entry Nos.(i) 9029721 dated 02.10.2020, (ii) 9028987 dated 02.10.2020, (iii) 9028862 dated 02.10.2020, (iv) 8845847 dated 17.09.2020, (v) 8843086 dated 17.09.2020, (vi) 8842485 dated 17.09.2020, (vii) 8985829 dated 29.09.2020, (viii) 8987173 dated 29.09.2020, (ix) 8982222 dated 28.09.2020, (x) 8994149 dated 29.09.2020, (xi) 9008104 dated 02.10.2020, (xii) 9029328

dated 02.10.2020, and (xiii) 9029262 dated 02.10.2020 for home consumption to the petitioner forthwith;

(ii) Considering the lapse of time from the date of filing of the petition i.e. November 2020 till the present order is passed, we direct that respondents shall allow clearance of the balance 8350 MT of Pigeon Peas if imported by the petitioner for home consumption under the RC File No.03/27/008/00161/AM18 dated 06.09.2017 upto a period of 6 weeks from the date of passing of the present order.

22. Ordered accordingly.

23. Consequently, writ petition is allowed in the above terms. However, there shall be no order as to costs.