

(2019) 04 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition No. 14290 Of 2018

Siddhi Vinayak

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 02-04-2019

Acts Referred:

Foreign Trade (Development & Regulation) Act, 1992 — Section 3, 3(ii), 20
General Clauses Act, 1897 — Section 6
Customs Act, 1962 — Section 11, 59
Imports And Exports (Control) Act, 1947 — Section 4
Constitution Of India, 1950 — Article 226

Citation : (2019) 04 BOM CK 0005

Hon'ble Judges : S.C. Dharmadhikari, J; M.S. Karnik, J

Bench : Division Bench

Advocate : Prakash Shah, Jas Sanghvi, Pradeep S. Jetly, Devesh Tripathi

Judgement

S. C. Dharmadhikari, J

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2. By this writ petition under Article 226 of the Constitution of India, the petitioners are claiming the following two reliefs:-

"(a) this Hon'ble Court may be pleased to issue writ of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records and proceedings pertaining to the impugned Notifications and after examining the legality and validity thereof be pleased to quash and setting aside Notification No.32/2015-2020 dated 30.08.2018 and Notification No.37/ 2015-2020 dated 28.09.2018 both issued by Respondent No.2;

(b) this Hon'ble Court may be pleased to issue writ of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent Nos.3 and 4 to forthwith permit clearance

whole Green Peas in terms of Sales Contract No.CS0001083 dated 19.04.2018 including consignment of 188.60 MTS of Whole Green Peas lying in the bonded warehouse."

3. The factual background in which these reliefs are claimed is that the petitioner is a partnership firm duly registered under the Indian Partnership Act, 1932, having its registered office at the address mentioned in the cause title and is inter alia engaged in the business of import and sale of pulses, cereals, spices etc.

4. Respondent no. 1 is the Union of India. Respondent no.2 is an officer of respondent no. 1 discharging duties and exercising powers conferred upon him under the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "the FTDR Act") and the Foreign Trade (Development and Regulation) Rules, 1993 (hereinafter referred to as "the FTDR Rules"). Respondent nos. 3 and 4 are officers of respondent no.1 discharging duties and exercising powers conferred upon them under the Customs Act, 1962 and the rules framed thereunder.

5. In the ordinary course of its business, the petitioner entered into Sales Contract No. CS0001083 dated 19.04.2018 for supply of 30,000 MTS (+/- 10% at the Seller's option) of Whole Yellow or Green Peas falling under Exim Code 0713 1000 packed in bulk containers of foreign origin through their overseas supplier M/s ILTA Agribusiness DMCC, Dubai. The terms of the said contract require part sale consideration payment in advance and the balance payment in Cash against documents through petitioner's bank at site.

6. In terms of the said Sales Contract No. CS0001083 dated 19.04.2018, the petitioner has already paid 60,000 USD to ILTA DMCC, Dubai on 20th April, 2018. In the meantime, respondent no. 2 issued Notification No.04/2015-2020 dated 25th April, 2018 seeking to amend the import policy for import of "Peas" under Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy), thereby restricting import of peas (*Pisum Sativum*) from 1st April, 2018 to 30th June, 2018.

7. The respondent no. 2 issued further Notification No.05/2015-2020 dated 25th April, 2018 amending para 1.05(b) of the Foreign Trade Policy (2015-2020) providing that 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. Respondent no. 2 issued another Notification No.15/2015-2020 dated 2nd July, 2018 extending the restriction on peas imports under HS Code 07131000 till 30th September, 2018.

8. The petitioner, in terms of the said Sales Contract No.CS0001083 dated 19th April, 2018, imported 188.600.00 MTS of Green Peas (hereafter referred to as "Imported Goods") in Bulk in 7 Containers from M/s. ILTA DMCC, Dubai covered by bill of lading No.577981797 dated 28th August, 2018. The said goods were shipped from the load port on 28th August, 2018.

9. The respondent no. 2 vide Notification No.31/2015-2020 dated 29th August,

2018, withdrew Notification No.15/2015-2020 dated 2nd July, 2018. Subsequently, respondent no. 2 issued one more Notification No.32/2015-2020 dated 30th August, 2018 imposing restriction on imports of peas till 30th September, 2018.

10. Respondent no. 2 issued another Notification No.37/2015- 2020 dated 28th September, 2018 extending the restriction on imports of peas till 31st December, 2018.

11. On arrival of the said goods, the petitioner filed Bill of Entry No.8728014 dated 3rd November, 2018 for clearance of imported goods for home consumption.

12. The grievance of the petitioner is that it was orally informed by respondent nos. 2 and 3 that the clearance of the imported goods will be allowed for home consumption only upon the petitioner producing the Special Import Licence (SIL) from the second respondent, as, according to them, the import of the goods is restricted by respondent no.2 under various notifications issued by him.

13. Hence, the petitioner, on 14th November, 2018, requested the fourth respondent to allow it to convert the bill of entry from home consumption to warehouse in terms of section 59 of the Act. Exhibit 'K' is a copy of this letter. The said permission was granted and the goods are presently lying at the bonded warehouse. The petitioner had to warehouse the goods to prevent further demurrage and detention charges.

14. Even the appraising officer has taken the same stand and now the petitioner is stuck and the goods cannot be claimed by it for home consumption.

15. The petitioner maintains that there was no restriction on peas import from 1st July, 2018 till 29th August, 2018 and import of peas with bills of lading on and between these dates should be allowed to be cleared by the Customs and the Directorate General of Foreign Trade (hereinafter referred to as "DGFT").

16. The petitioner has been representing its case by inviting the attention of the authorities to orders of various High Courts staying the impugned notification. The petitioner is, thus, not allowed the clearance of the imported goods until it provides the SIL. This is the understanding of the respondents and they believe that without this licence, the import of imported goods, which is restricted by the above notifications, is impermissible in law.

17. It is the above actions which are challenged in this petition on several grounds. The grounds are enumerated at pages 9 to 12 of the writ petition.

18. Upon a copy of this petition, which is filed in this court on 13th December, 2018, being served, the Deputy Director General of Foreign Trade has filed his affidavit in reply. The affidavit in reply proceeds on the footing that the validity and legality of the notifications has already been considered by this court. These notifications embodied a policy decision of the Ministry of Commerce and

Industry, Government of India. The policy decision, therefore, cannot be a subject matter of challenge before this court in its writ jurisdiction.

19. After referring to the legal provisions, it is submitted that a decision was taken to issue the subject notifications and in public interest. Thereafter, the stand of the respondents in their affidavit is as under:-

8. I say that after Inter-Ministerial Consultations among Secretary, Department of Food & Public Distribution, Department of Agriculture, Cooperation and Farmers, Welfare, Department of Consumer Affairs, Department of Commerce, Department of Revenue, Director General of Foreign Trade and Food Corporation of India, it was decided to restrict the import of Peas (*Pisumsativum*), under Exim Code 0713 10 00. Accordingly, the Government vide Notification No.4 dated 25th April, 2018 amended the import policy of Peas (*Pisumsativum*), under Exim Code 0713 10 00, from "Free" to "Restricted" for the period from 1st April, 2018 to 30th June, 2018 subject to the following Policy condition 4 of Chapter 7 of ITC (HS), 2017, Schedule-I (Import Policy) :

"During the period from 01st April to 30th June, 2018 total quantity of one lakh MT of yellow peas minus the quantity already imported from 01-04-2018 till date will be allowed against license as per procedure to be notified by DGFT".

"Already Imported" will include shipment already arrived from 01-04-2018 till 25-04-2018 and those shipments backed by Irrevocable Commercial Letter of Credit (ICLC) and Advance Payment made through Banking Channel before 25-04-2018. Both these categories will be required to be registered with Jurisdictional Regional Authority as per Para 1.05 of Foreign Trade Policy, 2015-20.

9. I say that the background to the above Notifications is to safeguard the interests of the farmers. The farmers are one of the most important stakeholders in matters related to import/export of agricultural goods and the Government is required to strike a balance between the interests of domestic producers and importers. Whenever it is observed that large imports of an item are adversely impacting the interest of the domestic producers, due to fall in prices in the local market, the Government in consultation with all the stakeholders tries to protect the interests of the domestic producers by way of putting various kind of restrictions viz. port restrictions, imposition of Minimum Import Price (MIP) and Quota Restrictions.

10. I say that the considering that despite imposition of import duty of 60% and reward of 7% under MEIS, the average domestic prices of gram in major producing states namely M.P., Maharashtra and Karnataka were ruling below MSP of Rs.4400/quintal and that the current average domestic prices of gram in M.P., Maharashtra and Karnataka were Rs.3452/quintal, Rs.3425/quintal and Rs.3662/quintal respectively, which was leading to considerable distress among Chana/Gram growing farmers in these states the government was constrained to take steps to soothe the farming community.

11. I say that the Government also noted that flour of peas/yellow peas being cheaper is frequently used to mix flour of gram for preparing besan. Significant quantities of peas/yellow peas are imported into the country and used as an alternative to gram for preparing besan. Peas constitute nearly 45-50 percent of total pulses imported by India and unit value of import of peas works out to be much below that of chana/gram despite the 50% duty, which acts as an incentive to blend pea flour with gram flour for preparing besan.

12. I say that consequently, in order to boost the mandi prices of chana/Bengal gram the Government decided to restrict the import of yellow peas (HS Code 07131000) up to one lakh tons for three months from date of issue of Notification to restrict supply of peas and create demand for chana/gram which is currently being harvested in various part of the country.

13. I say that based on the demands from the trading community and keeping in view the trade impact, the Government took a conscious decision to review the situation and the Inter-Ministerial Committee under the Chairmanship of Secretary, Department of Food & Public Distribution with Members of Department of Agriculture, Cooperation and Farmers, Welfare, Department of Consumer Affairs, Department of Commerce, Department of Revenue, Director General of Foreign Trade and Food Corporation of India, decided to relax the provisions so that the traders who had made the advance payments to the suppliers do not lose their money.

14. I say that vide Trade Notice No.10 dated 16th May, 2018, it has been clarified that the Import Policy of item under Exim Code 07131000-Peas (*pisumsativum*) includes all Peas i.e. Yellow peas, Green peas, Dun peas, and Kaspas peas, and the effect is not restricted to only "Yellow Peas", but to all items classified under Exim Code 07131000. It is further clarified that in cases where the import shipment of Peas is dated 1-4-2018 till 24-4-2018, no registration with DGFT is required for shipments with B/L prior to 25th April, 2018 (i.e. 1-4-2018-24-4-2018), as the Notification No.4 restricting import of peas was issued only on 25-4-2018.

15. I say that the Government considered the representations/applications received from various associations/importers requesting for allowing imports which are backed by part advance payments. Considering the hardship faced by the trade, the Government vide Trade Notice No.19/2018-19 dated 5th July, 2018 decided to allow imports of Peas under Exim Code 0713 1000 against advance payments for that much quantity proportional to the part advance payment made before 25-04-2018.

16. I say that the considering that the clarification on inclusion of all kind of peas under 07131000 was issued on 16-5-2018, the issue as to how to treat the peas (other than Yellow Peas) imported during the period 25-4-2018 to 15-5-2018 was clarified vide Trade Notice No.21/2018-19 dated 6th July, 2018 that consignment of peas (other than Yellow peas) imported during the period

25-4-2018 to 15-05-2018 and awaiting clearance at Customs or consignments of peas (other than Yellow peas) with Bill of Lading is prior to 16-5-2018 are permitted freely.

17. Further, considering the representations/applications from various small importers, the Government vide Trade Notice No.25/2018-19 dated 17th August, 2018 decided to allow import of minimum 125 MT (5 FCL) of Peas (under Exim Code 0713 10 00) per contract or less (entire quantity as applied), irrespective of the advance payment made before 25-04-2018.

18. I say that the above sequence of events amply clarifies that despite the amendment in the import policy of "peas" from "free" to "restricted", the Government took all possible steps to address the grievances of the trade sector.

19. Further, as the quantum of peas decided to be imported for the fiscal year is already exhausted, on the recommendation of the Inter-Ministerial Committee, the Government extended the restriction on import of Peas classified under Exim Code 0713 10 00 (including Yellow peas, Green peas, Dun Peas and Kaspas peas), for a further period of three months, i.e., till 30-09-20 vide Notification No.15/2018-19 dated 2nd July, 2018."

20. It is, therefore, their case that whatever may be the confusion or ambiguity, that has been removed by the clarificatory notifications and now the measures taken by the Government are aimed at striking a balance between the interest of the farmers and the importers. The paramount consideration is the interest of the public. Hence, it is claimed that there is no merit in this petition and it must be dismissed.

21. Mr.Prakash Shah appearing for the petitioner submits that the effect of the notification dated 29th August, 2018 is that there was no restriction on import of peas till 29th August, 2018. Notification No.32 of 2015-2020 dated 30th August, 2018 imposed restriction on import of peas till 30th September, 2018 and that restriction was extended till 31st December, 2018 by the notification dated 28th August, 2018. The petitioner's goods were shipped on 28th August, 2018 when there was no restriction. The bill of lading is dated 28th August, 2018. Mr.Shah then submits that the Notifications issued in exercise of powers conferred by Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 are subordinate legislations.

22. It is submitted by Mr.Shah that Section 6 of the General Clauses Act, 1897, does not apply to Notifications issued under in this case. Section 3 of the Foreign Trade (Development & Regulation) Act, 1992. The effect of the withdrawal of the Notification dated 29.08.2018, is that there was no restriction on import of peas upto 29.08.2018. Paragraph 1.05(b) of the Foreign Trade Policy deals with transitional provisions. Paragraph 1.05(b) was revised vide Notification dated 25.04.2018. The existing paragraph 1.5(b) permitted import of restricted goods subject to the condition that the shipment of the of export or import is made within the original validity period of an irrevocable commercial letter of credit,

established before the date of imposition of such restriction. The condition that the shipment should be covered by irrevocable letter of credit is dispensed with in the revised paragraph 1.05(b). The revised paragraph 1.05(b) permits the import of restricted/ prohibited/state trading or 'otherwise regulated' goods if the import/export already made before the date of such regulation/restriction will not be affected. If the date of import/export is earlier, then, the restriction is inapplicable. The date of import/export is defined in para 2.17 of the FTP 2015-2020.

23. Mr. Shah submits that the Bill of Lading in the present case is dated 28.08.2018. The restriction is imposed on 30.08.2018. The petitioner is covered by the revised paragraph 1.05(b) of the FTP. Thus, in the present case the Bill of Lading of the goods imported by the petitioner is prior to the imposition of restriction.

24. Mr.Shah further submits that this Hon'ble Court in its judgment dated 03.07.2018 passed in Writ Petition (Lodging) No.1810 of 2018, in the case of Taj Agro Commodities Private Limited Versus Union of India & Ors. and other connected Writ Petitions, considered and examined paragraph 1.05(b) of the FTP before its substitution and the validity of Trade Notice No.05/2018 dated 09.05.2018. The ratio of judgment in the case of Taj Agro has no application to the facts of the present case. This Hon'ble Court did not consider and examine the effect of revised paragraph 1.05(b) and Notification dated 29.08.2018 withdrawing the restriction imposed on import of Peas.

25. Mr.Shah submits that this Court in its judgment dated 21st September, 2018 in Writ Petition No.2968 of 2018 in the case of M/s. Shah Nanji Exports Pvt. Ltd., held that in view of withdrawal of notification dated 02nd July 2018, on 29th August, 2018, there was no ban on 29th August, 2018 till its imposition on 30th August, 2018. The Notification dated 30th August, 2018, is not an extension of Notification dated 02.07.2018. The Notification dated 30th August, 2018 has to operate prospectively.

26. In view of the aforesaid, the consignment imported by the Petitioner prior to the imposition of restriction on 30.08.2018 is not covered by the restriction imposed on 30.08.2018 and the Petitioner is entitled to clear the consignment in view of revised paragraph 1.05(b) of the Policy.

27. Mr.Shah placed reliance upon the order passed by this court (Nagpur Bench) on 21st September, 2018 in Writ Petition No.2968 of 2018.

28. On the other hand, Mr.Jetly supported the impugned actions. He invites the attention of this court to the affidavit in reply and urges that the writ petition has no merit and must be dismissed.

29. Mr. Jetly submits that the judgment of this court in the case of Taj Agro Commodities Pvt. Ltd. vs. Union of India and Ors. Writ Petition No.1810 of 2018, decided on 3rd July, 2018 considers all the matters and issues and that judgment

is binding on the parties. Once that judgment is binding and concludes all issues, then, this writ petition all the more deserves to be dismissed.

30. For properly appreciating the rival contentions, it would be desirable to refer to the notification dated 30th August, 2018. Copy of the same is at Exhibit 'A' and it reads as under:-

To be published in the Gazette of India Extraordinary part-II,

Section-3, Sub-Section (ii)

Government of India

Ministry of Commerce & Industry

Department of Commerce

Udyog Bhawan, New Delhi.

Notification No.32/2015-2020

Dated the 30th August, 2018

Subject:- Amendment in the import policy of Peas 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, makes the following amendment in ITC (HS) 2017, Schedule I (Import Policy):

Import of Peas classified under Exim Code 0713 10 00 (including Yellow peas, Green peas, Dun peas and Kaspas peas) is "Restricted" till 30.09.2018.

Effect of this Notification: Import of Peas classified under Exim Code 0713 10 00 (including Yellow peas, Green peas, Dun peas and Kaspas peas) is "Restricted" till 30.09.2018.

This issues with the approval of the Commerce and Industry Minister.

(ALOK VARDHAN CHATURVEDI)

Director General of Foreign Trade & Ex-Officio Additional Secretary to the Government of India Email: dgft@nic.in"

31. A perusal of this notification reveals that there is an amendment in the import policy of peas and import of peas, including Yellow Peas, Green Peas, Dun Peas and Kaspas Peas, is restricted till 30th September, 2018.

32. Exhibit 'B' is a notification dated 28th September, 2018 and it seeks to make the amendment so as to restrict the import of the above till 31st December, 2018.

33. The sales contract, copy of which is at Exhibit "D-1" at page 28 of the paper book, mentions the date as 19th April, 2018 and the foreign party is located at Dubai. It is the seller. The petitioner is a buyer and the goods are Whole Yellow Peas/Whole Green Peas. The country or the origin is shown as France, Canada, Ukraine, Russia etc. and the quantity is 30,000 metric tons. The Load Port is any port in France, Canada, Ukraine, Russia etc. and the Discharge Port is Kolkata/ Nhava Sheva/ Kandla/ Hazira (at seller's option). The shipment is between 1st August, 2018 to 31st January, 2019 and the payment terms are USD 60,000 to be paid as advance on or before 24th April, 2018 and the balance to be paid cash against documents through buyer's bank at site.

34. On 25th April, 2018, there was an amendment in the import policy of peas and that notification is numbered as Notification No.4/2015-2020 (Exhibit 'E'). That notification reads as under:-

"To be published in the Gazette of India Extraordinary Part-II,

Section-3, Sub-Section (ii)

Government of India

Ministry of Commerce & Industry

Department of Commerce

Directorate General of Foreign Trade

Notification No.04/2015-2020

New Delhi, Dated 25 April, 2018

Subject : Amendment in import policy of Peas 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 1000

Peas (Pisum sativum)

Free

Restricted

Restricted for the period from 01st April to 30th June, 2018 and subject to Policy Condition 4 of this Chapter

Policy Condition 4 : During the period from 01st April to 30th June, 2018 total quantity of one lakh MT of yellow peas minus the quantity already imported from 01.04.2018 till date will be allowed against license as per procedure to be notified by DGFT.

"Already Imported" will include shipment already arrived from 01.04.2018 till 25.04.2018 and those shipments backed by irrevocable Commercial Letter of Credit (ICLC) and Advance Payment made through Banking Channel before 25.04.2018. Both these categories will be required to be registered with Jurisdictional Regional Authority as per Para 1.05 of Foreign Trade Policy, 2015-20.

2. Effect of this Notification : Import policy of Yellow Peas under Exim Code 0713 1000 is revised from free' to 'restricted' for a period of three month only.

(Alok Vardhan Chaturvedi)

Director General of Foreign Trade

Email: dgft@nic.in"

35. A perusal of this notification would reveal that the existing policy made the import free. Thus, import of peas was free and the revised import policy made that import restricted for the period from 1st April, 2018 to 30th June, 2018 and subject to policy condition 4 of this Chapter. The policy condition 4 was that during this period, total quantity of one lakh MT of Yellow Peas minus the quantity already imported from 1st April, 2018 till 25th April, 2018 will be allowed against licence as per the procedure to be notified by the DGFT and then, the term "already imported" was understood to include shipment already arrived from 1st April, 2018 to 25th April, 2018 and those shipments made through banking channel before 25th April, 2018. Both these categories will be required to be registered with the Jurisdictional Regional Authority. Then, there is an effect of the notification set out and at Exhibit 'F' at page 35, there is an amendment and which amendment reads as under:-

"To be published in the Gazette of India Extraordinary Part-II,

Section-3, Sub-Section (II)

Government of India

Ministry of Commerce & Industry

Department of Commerce

Directorate General of Foreign Trade

Notification No. : /2015-2020

New Delhi, Dated : April, 2018

Subject : Amendment in Para 1.05(b) of Foreign Trade Policy 2015-2020.

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 provision in Para 1.05 (b) of the Foreign Trade policy (2015-20) on Transitional Arrangements as under :

1.05 : Transitional Arrangements

Existing Para

Revised Para

(b) In case an export or Import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restriction and it shall be restricted to the balance value and quantity available and time period of such irrevocable letter of credit. For operationalising such irrevocable letter of credit, the applicant shall have to register the Letter of Credit with jurisdictional Regional Authority (RA) against computerized receipt, within 15 days of the imposition of any such restriction or regulation.

(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 operationalising 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.

2.Effect of this Notification: Transitional Arrangements provision has been detailed under para 1.05(b) of Foreign Trade Policy (2015-20).

(Alok Vardhan Chaturvedi)

Director General of Foreign Trade

Email: dgft@nic.in"

36. As far as the petitioner is concerned, it relies upon Exhibit 'G' at page 36, which is a notification dated 2nd July, 2018 bearing No. 15/2015-2020 and that makes the amendment set out therein. That extends the restriction on import of peas effective till 30th June, 2018 till 30th September, 2018. Exhibit 'H' is a copy of bill of lading which is dated 28th August, 2018 and then, we have a notification at Exhibit 'I' at page 39 of the paper book, which reads as under:-

"To be published in the Gazette of India Extraordinary Part-II,

Section -3, Sub-Section (ii)

Government of India

Ministry of Commerce & Industry

Department of Commerce

Udyog Bhawan, New Delhi

Notification No.31/2015-2020

Dated the 29 August, 2018

Subject :- Withdrawal of Notification No.15 dated 02.07.2018 regarding amendment in import policy of Peas under Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy).

S.O. (E) : In pursuance of the Order dated 28th June, 2018 of the Hon'ble High Court of Judicature at Madras in W.P.Nos.15921 to 15924 of 2018 and W.P.Nos.18916, 18917, 18919, 18920, 18922, 18923, 18925 and 18926 of 2018 and in compliance with the directions dated 24th August, 2018 in WP No.21083 & 21084 of 2018 filed by M/s AMRR Maharaja Dhall Mill the Notification No 15 dated 02.07.2018 extending the restriction on import of Peas classified under Exim Code 0713 10 00 (including Yellow peas, Green peas, Dun peas and Kaspas peas) till 30.09.2018, is withdrawn.

2. Effect of this Notification:Notification No 15 dated 2. 07.2018 extending the restriction on import of Peas classified under Exim Code 0713 10 00 till 30.09.2018, is withdrawn.

(ALOK VARDHAN CHATURVEDI)

Director General of Foreign Trade & Ex-Officio Additional Secretary to the Government of India Email: dgft@nic.in"

37. Hence, the argument of Mr.Shah is that the petitioner has imported Green Peas from Canada. Having forwarded all the documents and considering the cumulative impact of the notification, it is evident that the restriction up to 30th September, 2018 issued by the notification dated 2nd July, 2018 was withdrawn and then reinstated by notification dated 30th August, 2018. In other words, there was no restriction on import of peas from 1st July, 2018 to 29th August, 2018. Therefore, all consignments of peas with bill of lading on and between 1st July, 2018 till 29th August, 2018 have to be allowed to be cleared by the Customs and the DGFT.

38. On the other hand, it is argued that the petitioner's contention is totally incorrect and that there was a restriction insofar as import of peas from 1st July, 2018 to 29th August, 2018.

39. If we consider the factual position, the sales contract in this case is dated 19th April, 2018 and the petitioner claims to have made payment of 60,000 USD on 20th April, 2018. The petitioner was aware that the import policy was amended and import of peas was restricted from 1st April, 2018 to 30th June, 2018. Then, the petitioner refers to the notification of 25th April, 2018 and further notification of 2nd July, 2018 extending the restriction on import of peas till 30th September, 2018. However, the petitioner says that it had imported the goods prior to any restriction and relies upon the copy of the bill of lading dated 28th August, 2018 (Exhibit 'H'). The petitioner says that Notification No.15/2015-2020 dated 2nd July, 2018 was withdrawn by the second respondent on 29th August, 2018 and then, it has issued one more notification imposing restriction till 30th September, 2018 and finally, Notification No.37/2015 dated 28th September, 2018 extends the restriction till 30th December, 2018. In para 14, the petitioner has said that it filed a bill of entry dated 3rd November, 2018 for clearance of imported goods for home consumption, but it was orally informed that the petitioner will be required to produce the SIL as the import of peas is restricted.

40. The petitioner, therefore argues that the policy has been amended by respondent no.2 and it had no jurisdiction to amend it.

41. Insofar as that aspect is concerned, Mr.Jetly is right that this aspect of the matter is covered by the judgment of this court in the case of Taj Agro (supra).

42. In dealing with similar arguments, in paras 34 to 36, this court has held as under:-

34 It is no doubt that the principle, which is settled as far as administrative law is concerned, in unequivocal terms says that the statutory notifications, if required to be altered or amended in future, then, the same route has to be adopted and no administrative orders/executive instructions and circulars can then be issued

so as to interfere with, much less amend the statutory prescriptions. A Notification in this case, according to the learned senior counsel appearing for the parties, has been issued in exercise of the statutory powers conferred by section 3 of the FTDR Act. Therefore, an amendment to the Notification has to be in like manner. Section 3 of the FTDR Act falls in Chapter II. Sub-section (1) says that 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. The Central Government, by sub-section (2) is empowered to make provision for prohibiting, restricting or otherwise regulating in all cases or in specified classes of cases and subject to such exception, if any, as may be made by or under the order, the import or export of goods or services or technology. Sub-section (3) says 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 under section 11 of the Customs Act, 1962, and all the provisions of that Act shall have effect accordingly. Then, sub-section (4) says that 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. Thus, by sub-section (2) of section 3, there is a power conferred in the Central Government to publish an order making prohibition or prohibiting or otherwise regulating the import or export of goods or services or technology. This can be subject to exceptions.

35 Section 4 continues the existing orders made under the Imports and Exports (Control) Act, 1947, which is an Act repealed by section 20 of the FTDR Act. Section 5 provides for formulating and pronouncing FTP. If it is formulated and announced by a Notification in the Official Gazette, it can also be amended by the Central Government. In the instant case, what we have on record is the FTP of 2015-2020. The relevant para of this is contained in Chapter 1A titled as Legal Framework And Trade Facilitation. Clause 1.00 provides for legal basis of foreign trade policy (FTP) and says that it is traceable to section 5 of the FTDR Act. Para 1.01 sets out the duration of FTP. The amendment to FTP is provided by para 1.02 and the right to amend the FTP, by means of notification in public Gazette, is reserved in the Central Government. The Handbook of Procedure (HBP) can be issued in terms of para 1.03. Then, para 1.04 sets out that the specific provision will prevail over the general. Transitional provisions are to be found in para 1.05. This para is reproduced for ready reference:-

"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. 5-12-2017 shall continue to be valid for the purpose and duration for which it was issued, such Licence/ Authorisation/ Certificate/ Scrip/ any instrument bestowing financial or fiscal benefit Authorisation was issued, unless otherwise

stipulated.

(b) In case an export or import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restriction and it shall be restricted to the balance value and quantity available and time period of such irrevocable letter of credit. For operationalising such irrevocable letter of credit, the applicant shall have to register the Letter of Credit with jurisdictional Regional Authority (RA) against computerized receipt, within 15 days of the imposition of any such restriction or regulation."

36 A perusal of this para would indicate as to how clause (a) provides for continuation of a licence/authorisation, certificate etc bestowing financial or fiscal benefit issued commencement of FTP, 2015-20. Clause (b) says that in case of an export or import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restriction and it shall be restricted to the balance value and quantity available and time period of such irrevocable letter of credit. For operationalising such irrevocable letter of credit, the applicant shall have to register the Letter of Credit with jurisdictional Regional Authority (RA) against computerized receipt within 15 days of the imposition of any such restriction or regulation."

43. Then, para 37 onwards, this court referred to the restriction. Additionally, we find that in paras 21, 22 and 23 of the affidavit in reply, the legal position is clarified and summarised in para 30 by urging that the notification has already been issued by the Central Government and not by the DGFT. The DGFT has only signed the notification on behalf of the Central Government.

44. A perusal of all the notifications in the field leaves us in no manner of doubt that it is the Central Government which has made the amendments and all that the DGFT has done is to make the amendments in the import policy of peas under Chapter 7 of the ITC(HS), 2017, Schedule 1 (Import Policy). Hence, the first contention has no merit.

45. The second contention is that there was a restriction imposed by Notification No.15/2015-2020 dated 2nd July, 2018 on import of peas, but that was withdrawn by the second respondent by notification of 29th August, 2018. In view thereof, there is no restriction in force during the period 1st July, 2018 to 29th August, 2018 and the purported restriction was imposed only from 30th August, 2018. At the time of the import of goods i.e. on 28th August, 2018, no

restriction was prevailing and not permitting clearance of imported goods is unsustainable. In that regard, we have carefully perused the notification and what we find is that on 30th August, 2018, the import of peas was restricted till 30th September, 2018. By Notification No.37/2015-2020 dated 28th September, 2018, the restriction is extended till 31st December, 2018. Prior thereto, by the notification dated 2nd July, 2018, the restriction already in force and effective till 30th September, 2018 as per Notification No.04/2015-2020 dated 25th April, 2018 has been extended till 30th September, 2018. That has been withdrawn by the notification of 29th August, 2018.

46. Thus, the earlier Notification No.15/2015-2020 dated 2nd July, 2018 extended the restriction on import till 30th Sept., 2018 and that has been withdrawn on 29th August, 2018. That does not mean that the notifications prior to this date are completely wiped out for there was a restriction till 30th September, 2018. 2nd July, 2018 is the notification which was prevailing on the date of the import dated 28th August, 2018 and it is only on 29th August, 2018 that the said notification was withdrawn.

47. If Mr.Shah is right in his contentions, then, it would mean that there was no restriction on import of peas till 28th August, 2018. That is incorrect. On the date of shipment of goods on 28th August, 2018, there was indeed a restriction and the restriction has been withdrawn only on 29th August, 2018 (see Exhibit 'I' at page 39). The withdrawal cannot be made effective from a date prior to the date of this Notification No. 31 dated 29th August, 2018. It is clear that this notification was issued in pursuance of an order that was passed by the High Court of Judicature at Madras and the issue that was considered in those matters has been referred by the respondents in their affidavit. They have pointed out that there was a restriction already in place and which was extended by Notification No.15 dated 2nd July, 2018 till 30th September, 2018. There were orders of the High Court of Judicature at Madras and which are referred to in para 20 of this affidavit. It is clarified that Notification No.31 dated 29th August, 2018 was issued purely on technical reasons. That is simply because a confusion was sought to be created and that confusion has been cleared by issuance of Trade Notice No.29 dated 30th August, 2018 (see para 21 of the affidavit in reply at running page 57). The clarification is to the effect that the notifications were signed by the DGFT and published in the Gazette of India and it was projected as if there was no approval of the Central Government and consequently, stay was sought from various courts across the country on the application of the notifications. The clarification is that each of these notifications have been issued with the approval of the competent authority, namely, the Central Government through the Ministry of Commerce and Industry and in exercise of the powers conferred by section 3 of the FTDR Act, 1992 read with para 1.02 and 2.01 of the FTP/2015-2020 as amended from time to time. The notifications are merely signed by the DGFT as an authenticating officer on behalf of the President of India under the Government of India Authentication (Orders and other Instruments) Rules, 2002. This order is also traceable to the notification dated

16th February, 2002 and an order of 24th March, 1993 by the Ministry of Commerce and Industry. The Central Government, therefore, in this case, issued Notification No.32 continuing the restriction till 30th September, 2018.

48. To our mind, therefore, once the notification of 25th April, 2018 is extended till 30th September, 2018 and the notification of 29th August, 2018 not wiping out the restriction as projected, but promptly restoring the earlier notifications and continuing the restriction till 30th September, 2018, further extending it by the notification at Exhibit 'B' till 31st December, 2018, makes the position clear. There was a restriction and insofar as that notification continuing the restriction till 30th September, 2018 having been withdrawn does not mean that the restriction is not in place. The restriction is continuing and withdrawal of the notification will not have that effect as urged by Mr.Shah. The argument of Mr.Shah misses the point totally.

49. A careful perusal of notification Exhibit 'I', which is a copy of the Notification No.31 dated 29th August, 2018 leaves us in no manner of doubt that the subject of this notification is withdrawal of notification No. 15 dated 2nd July, 2018. The effect of this notification is that the restriction which was extended till 30th September, 2018 is withdrawn and at best with effect from 29th August, 2018. It does not mean that this restriction is wiped out for it is evident that by the notification dated 30th August, 2018 bearing No.32, copy of which is at Exhibit 'A', the restriction is again restored and the date till which it was to continue is the same, namely, 30th September, 2018. Had this not been the position, then, the restriction already in place could not have been continued by the further notifications. The withdrawal of the notification dated 2nd July, 2018 will not wipe out the effect of Notification No. 4 dated 25th April, 2018 for that is extended till 30th September, 2018. That notification was in force and that was not withdrawn. It is only the notification of 2nd July, 2018 which is withdrawn albeit for a day. Hence, the restriction was operative and Mr.Jetly is right in contending that the argument that there was no restriction on import of peas till 29th August, 2018 is untenable in law.

50. We have no hesitation in rejecting this argument. There is no question of any saving clause and in-built and to be found or discernible from the notification dated 29th August, 2018. Once the effect is understood in the aforesaid terms, then, this argument of Mr.Shah need not detain us. Mr. Shah is not right in urging that there was no restriction on import of peas up to 29th August, 2018.

51. Once we reject this argument of the petitioner, then, there is no hesitation in restricting the other arguments which are founded on this primary argument and to the effect that the bill of lading is prior to the issuance of the notification. The bill of lading in this case is dated 28th August, 2018 and on that day, the ban was in force.

52. Then, what remains is the reliance of Mr.Shah on the order passed by the Nagpur Bench of this court on 21st September, 2018 in Civil Writ Petition

No.2968 of 2018. There, the argument was that the respondent to that petition on 29th August, 2018 issued a notification which withdraws the notification extended by Notification No.15 dated 2nd July, 2018. Notification No.31 is on subject of withdrawal of that notification and also mentions the orders of the Madras High Court. Before us, there is no question or issue of any prospective or retrospective change in policy. The argument simpliciter is on the effect of the notification dated 29th August, 2018. That has been understood by the Division Bench at Nagpur to be a withdrawal of the restriction. Once we clarify that the withdrawal of notification does not mean a withdrawal of the restriction, then, the conclusion of the Nagpur Bench of this court need not detain us. In any event, that order passed by the Bench came to be stayed by the Bench itself for a period of one week.

53. Mr.Shah may rely upon paras 7 to 9 of this order of the Nagpur Bench, but what he omits to point out is that in that case the documents filed by the petitioner before the Nagpur Bench showed that against two contracts, the balance 90% amount was paid on 23rd May, 2018 and 4th June, 2018. The shipments were laid on 28th April, 2018 and 10th May, 2018 and have reached the port of discharge on 23rd May, 2018 and 31st May, 2018 respectively. The details showed that Before 30th August, 2018, the contract was fully executed. Further, it was clarified to the Division Bench and by a reply affidavit in two civil applications taken out in the matter that on 31st August, 2018 against two contracts, the petitioners before the Nagpur Bench sought leave to import 125 MT each i.e. 250 MT of Yellow Peas from Ukraine and the respondents to that petition have considered that request and granted it. The official authorisation is forwarded to the petitioner and due to the relaxation, the grievance was redressed. The surviving issue actually did not arise for consideration, but since some submissions were canvassed, the Division Bench considered it.

54. With great respect to the Division Bench and in the absence of full particulars and details, we do not think that the observations in the paragraph relied upon by Mr.Shah would constitute a ratio decidendi. These observations have been made after the grievance was redressed. Hence, this order is of no assistance to the petitioner before us.

55. As far as other issues are concerned, they are covered by the judgment and order of this court in the case of Taj Agro (supra). To be fair, Mr.Shah has also not reopened any of the matters concluded by this judgment.

56. We also hold that the respondents committed no error in refusing to take note of the representation dated 4th December, 2018, copy of which is at Exhibit 'M' to the petition. That representation is based on an incorrect and improper understanding of the notifications as well as the provisions of the Customs Act, 1962.

57. As a result of the above discussion, this writ petition fails. Rule is discharged. There would be no order as to costs.