

(2018) 07 BOM CK 0094

In the Bombay High Court

Case No : Writ Petition (L) No. 1808, 1809, 1810, 1827, 1904, 2079 2018
With Chamber Summons (L) No. 239 of 2018

Taj Agro Commodities Pvt. Ltd

APPELLANT

Vs

Union of India And Ors.

RESPONDENT

Date of Decision : 03-07-2018

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 3, 3(2), 5, 20
Customs Act, 1962 — Section 11
Imports and Exports (Control) Act, 1947 — Section 4
Central Excise and Salt Act, 1944 — Section 5A(1)
Constitution of India 1950 — Article 14, 226

Citation : (2018) 07 BOM CK 0094

Hon'ble Judges : S.C. DHARMADHIKARI , J;BHARATI H. DANGRE, J

Bench : Division Bench

Advocate : Vikram Nankani, Prithwiraj Chaudhary, Sharon Patole, V. Sridharan, Prakash Shah, Laxmi Menon, Prasad Paranjape, V.A. Thorat, Prachi Tatke, Kamlesh Tiwari, Shyam Dewani, Chirag Chanani, Pradeep S. Jetly, Y.R. Mishra, D.P. Singh

Final Decision : Dismissed

Judgement

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S.C. Dharmadhikari, J",,,,,

1 In Writ Petition (L) No. 1810 of 2018, an affidavit is filed and a stand, which is stated to be a common one in all the petitions, is taken. Since we",,,,,

have heard the parties at length and extensive arguments have been canvassed, we dispose of these writ petitions finally.",,,,,

2 We grant Rule in all these writ petitions. Respondents waive service.,,,,,

3 The only question in these petitions under Article 226 of the Constitution of India is whether the Government of India, Ministry of Commerce and",,,,,

Industry, Department of Commerce, Directorate General of Foreign Trade's Notification No.4 /215-220 dated 25th April, 2018, and particularly the",,,,,

Policy condition No.4 therein has been creating, according to some Regional authorities of the Directorate General of Foreign Trade, a situation where",,,,,

clarification was required to be obtained from the Government of India and particularly the Ministry as aforesaid.,,,,,

4 We will take the facts from two petitions, one of which was argued by Mr. V.A. Thorat, learned senior counsel and another by Mr. Vikram",,,,,

Nankani, learned senior counsel.",,,,,

5 In the writ petition argued by Mr. Thorat, being Writ Petition (L) No.2079 of 2018, Shadiram and Sons Private Limited, a company incorporated",,,,,

under section 56 has filed this petition against the Union of India through the Joint Secretary of Commerce, Director General of Foreign Trade (for",,,,,

short â??DGFTâ?), the Joint Director General of Foreign Trade, the Zonal Additional Director General of Foreign Trade and the Commissioner of",,,,,

Customs.,,,,,

6 The writ petition itself clarifies that the Union of India represented by this Ministry is entrusted with the responsibility of formulation and",,,,,

enforcement of foreign trade policy and export-import guidelines. The Directorate is a Directorate set up under the Foreign Trade (Development and",,,,,

Regulation) Act, 1992 (for short â??FTDR Actâ?).",,,,,

7 The petitioner is engaged in the business of import and export of agricultural products, including peas.",,,,,

8 The petitioner entered into a contract with J.K. International Pty. Ltd. (the seller) for supply of yellow peas. A copy of this contract is annexed to",,,,,

the petition and marked as Exhibit-A. In terms of the contract, the petitioner says that he made the agreed advance payment of USD 100000 on 16th",,,,,

April, 2018, which is evidenced by a copy of the receipt and annexed as Exhibit-B. Â Then the petitioner made an application to the fourth",,,,,

respondent to register this contract against which advance payment was made prior to 25th April, 2018, by a letter, copy of which is at Exhibit-C dated",,,,,

17th April, 2018.",,,,,

9 In terms of the powers conferred under the FTDR Act, the second respondent amended the import policy pertaining to import of peas (yellow peas)",,,,,

by Notification dated 25th April, 2016. The emphasis in the writ petition is that

this policy changed the categorization from free to restricted with" ,,,,,
regard to the subject product and further on the conditions mentioned in this Notification. ,,,,,

10 Then, it is claimed that in terms of this Notification, the petitioner was informed according to it by the DGFT officers that as a contract is entered" ,,,,,

into prior to 25th April 2018, for which the advance payment was made prior to this date, that is eligible to be registered with the officers of the DGFT" ,,,,,

as per the procedure prescribed. Then, there is reliance placed on a trade notice, copy of which is at Exhibit-E dated 9th May, 2018. It is stated that" ,,,,,

after the petitioner's application was processed, the Registration Certificate was granted on 14th May, 2018." ,,,,,

11 The complaint is that in total contrast to the earlier trade notice dated 9th May, 2018, as also contrary to the condition stipulated in the Notification" ,,,,,

dated 25th April, 2018, the impugned trade notice dated 18th May, 2018, has been issued and that curtailed what was the stipulation earlier and as" ,,,,,

understood by the trade so also by the DGFT. Meaning thereby, only those contracts against which full or 100% advance payment was made prior to" ,,,,,

25th April, 2018, are eligible to be registered in terms of the Notification dated 25th April, 2018. Accordingly, instructions were issued to all the" ,,,,,

Regional authorities to cancel / recall the registration certificates already issued to various parties. A copy of the impugned trade notice dated 18th ,,,,,

May, 2018, is annexed as Exhibit-G to the petition." ,,,,,

12 The prayers in the writ petition thus are for quashing and setting aside of the impugned trade notice and thereafter to restrain the respondents from ,,,,,

giving effect to it and further commanding and directing by a writ of mandamus or any other appropriate writ, order or direction, the fifth respondent" ,,,,,

Commissioner of Customs to clear the goods as and when imported by the petitioner in line with the registration certificate dated 14th May, 2018." ,,,,,

13 An identical challenge is laid in Writ Petition (L) No.1810 of 2018 by M/s. Taj Agro Commodities Pvt. Ltd. It also says that it is in identical ,,,,,

business. It also says that it has five contracts with various sellers for supply of the same product, copies of which are at Exhibits A-1 to A-5 and it" ,,,,,

has made similar payments with advance as per the terms. It also refers to the same Notification of 25th April, 2018, with modifications, the same" ,,,,,

registration application and registration granted and the same trade notice

issued, one of which of 18th May, 2018, is styled as the impugned one." ,,,,,

Pertinently, each of these petitions were moved before a Vacation Bench on 30th May, 2018, but the first respondent was expected to file its" ,,,,,

affidavit-in-reply and without any ad-interim relief, the petitions were simplicitor adjourned." ,,,,,

14 A counter affidavit has been tendered today, affirmed by the Deputy Director General of Foreign Trade on behalf of the respondent Nos.1 to 4." ,,,,,

The stand taken in this affidavit is that paragraph 1.02 of the Foreign Trade Policy 2015-2020 is issued and referable to the power of the Central ,,,,,

Government under section 5 of the FTDR Act. Then, it is stated that import of peas under Exim Code 0713 1000 is restricted for the period 1st April ,,,,,

2018 to 30th June, 2018, subject to Policy Condition No.4 of Chapter 7 of the ITC (HS) 2017 Schedule-I (Import Policy). It is explained that the" ,,,,,

farmers of this country are most important stake holders in matters relating to import/export and particularly the framing of its policy on agricultural ,,,,,

products. ,,,,,

The Government is required to strike a balance between the interest of the domestic producers and importers. Whenever it is observed that large ,,,,,

scale imports of an item is adversely impacting the domestic product due to slide in prices in the local market, the Government, in consultation with all" ,,,,,

the stake holders tries to protect the interest of the domestic producers by way of placing restrictions which could be either port restrictions, imposition" ,,,,,

of minimum import price and quota restrictions. Bearing in mind the high agricultural production in the country resulting in prices of pulses sliding ,,,,,

below the minimum support price and owing to increase in area under crop production leading to further fall of price, in consultation with the stake" ,,,,,

holders, the Government has imposed quota restrictions on import of mung beans, black lentils and pigeon peas. Then, the affidavit refers as to how in" ,,,,,

the fiscal year 201718 quota restrictions on import of pigeon peas, mung and urad dal were imposed taking into account the huge domestic production" ,,,,,

resulting in price falling below the minimum support price. Relying upon paragraph 1.05 of the Foreign Trade Policy as also paragraph 2.58 thereof, it" ,,,,,

is stated that the relaxation as granted from the Policy is not a right. It is granted on the merits of each case. ,,,,,

15 In the current fiscal 2018-19, the Government found the situation to be

identical and, therefore, similar quota restriction was placed on import of" ,,,,,

pulses. The stand of the Government, to be more specific and in its own words, is as under:" ,,,,,

â??I say that during the current and fiscal year i.e. 2018-19, it was however observed that the importers anticipating similar Quota Restrictions on" ,,,,,

import of pulses, tried to take advantage of the prevailing situation and paid a token advance to the suppliers for importing pulses. The Government" ,,,,,

Exim Code,"Item

Description","Existing

Policy","ExistingÂ

Policy

condition","Revised

Import

Policy",Revised Policy condition

0713 1000,"P eas (Pisum

sativum)","Free,,Restricted,"RestrictedÂ forÂ the

st

period from 01 April

th

to 30 June 2018 and

subject to Policy

Condition 4 of this

Chapter

Members of Trade,,,,,

Subject: Implementation of Notification No.4 dated 25.4.2018-reg,,,,,

Reference is invited to Notification No.4 dated 25.4.2018 amending the import policy of Peas under Exim Code 0173 1000 Chapter 7 of the ITC (HS),,,,,

2017 on the above subject.,,,,,

2 In this regard, as already notified, total quantity of Peas available for import during thee period from 01st April to 30th June, 2018 is one lakh MT" ,,,,,

minus the quantity already imported from 01.01.2018.,,,,,

3 Accordingly, to assess the remaining balance, importers who have already contracted for import of peas before the date of issue of the Notification",,,,,
and have paid in advance (full or in part) for the same or have opened irrevocable letters of credit for such imports before 25.04.2018, they may",,,,,
furnish such documents indicating the quantity contracted and amount paid, so as to enable this Directorate to lay down further procedure for import",,,,,
of the remaining quantity.,,,,,

4 The requisite information, alongwith supporting documents may kindly be furnished latest by 18th May, 2018 (5:00 p.m.) at policy2-dgft@nic.in and",,,,,
shyama.roy@nic.in.,,,,,

Sd/-.,,,,,

(S.P. Roy),,,,,

Joint Director of Foreign Trade.,,,,,

Â Â Â Â Email : shyama.roy@nic.in.,,,,,

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DGFT TRADE NOTICE.,,,,,

-COPY OF-,,,,,

TRADE NOTICE NO.10/2018-19 Dated 16 Â th May, 2018",,,,,

To.,,,,,

1 Members of Trade.,,,,,

2 All Customs Commissionerates.,,,,,

3 JS (Customs), CBEC, New Delhi",,,,,

4 RAs of DGFT Clarification regarding DGFT Notification No.4 & 5 The Directorate General of Foreign Trade has been receiving a number of.,,,,,

queries seeking clarification on the Notification No.04/2015-20 dated 25th April, 2018 vide which the import policy of Peas under Chapter 7 of the ITC",,,,,

(HS) 2017 has been amended.,,,,,

In the matter, it has been observed that even though the Notification clearly lays down that the Import Policy of 07131000 â?" Peas has been revised",,,,,

with revised policy condition, the effect of Notification, it has been indicated that the Import Policy of Yellow Peas has been restricted. Accordingly,",,,,,

vide this Trade Notice it is clarified that the Import Policy of item under Exim Code 07131000- Peas (pisum sativum), which includes all Peas (Yellow",,,,,

peas, Green peas, Dun peas, and Kaspa peas), has been restricted, and the effect is not restricted to only "Yellow Peas", but to all items",,,,,

classified under Exim Code 0713 1000.,,,,,

It is further clarified that in cases where the import shipment of Peas are 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.,,,,,

In this regard, please refer to Notification No.5 dated 25.4.2018 wherein the revised Para 1.05 of FTP (2015-20) clarifies 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.",,,,,

Sd/-.,,,,,

^ (S.P. Roy)^.,,,,,

18 A perusal of these Notifications which we have already referred above and the contents thereof are reproduced above reveals the policy of the.,,,,,

Government. The first Notification, copy of which is at page 54 and reproduced above, in clearest terms says that it is on the subject of amendment in",,,,,

import policy of peas under Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy).",,,,,

19 The powers that are substantially conferred to issue such Notification are to be found in section 3 of the Foreign Trade (Development) Regulation.,,,,,

Act, 1992 read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy 2015-2020 as amended from time to time. By this Notification, the Central",,,,,

Government, through the Ministry of Commerce and Industry, Department of Commerce, Directorate General of Foreign Trade, amended the Import",,,,,

Policy of items of Chapter 7 of the ITC (HS) 2017 conditionally. What falls for consideration is Policy Condition No.4. That is clarifying that during.,,,,,

the period 1st April 2018 to 30th June, 2018, total quantity of one lakh metric tonnes of yellow peas minus the quantity already imported from 1st April," ,,,,,

2018 till the date of issuance of this Notification will be allowed against licence as per procedure to be notified by the DGFT.,,,,,

20 "Already Imported" has been further clarified to include shipment already arrived from 1st April, 2018 till 25th April, 2018. ^ With regard to",,,,,

this, the parties are ad-idem and that is not an issue before us. It is only the

subsequent part, namely, of those shipments backed by irrevocable" ,,,,,

commercial letter of credit (ICLC) and advance payment made through banking channel before 25th April, 2018, which is highlighted in these" ,,,,,

petitions. It is stated that both these categories will be required to be registered with jurisdictional Regional Authority (RA for short) as per paragraph ,,,,,

1.05 of the FTP ,,,,,

21 The second clause of this Notification, however, has not been referred to, but is equally important, namely, the effect of the Notification. The Trade" ,,,,,

Notice dated 9th May, 2018 is on the subject of implementation of Notification No.4 dated 25th April, 2018. A reference is made to this Notification in" ,,,,,

this Trade Notice and clause No.2 thereof makes reference to Policy Condition No.4. However, while implementing this Notification, the Joint" ,,,,,

Director of Foreign Trade was approached and he clarified that to assess the remaining balance, importers who have already contracted for import of" ,,,,,

peas before the date of issue of the Notification and have paid in advance (full or in part) for the same or have opened the ICLCs for such imports ,,,,,

before 25th April, 2018, they may furnish such documents indicating the quantity contracted and the amount paid so as to enable the Directorate to lay" ,,,,,

down further procedure for import of remaining quantity. Thus, the total quantity of peas available for import during the period 1st April, 2018 to 30th" ,,,,,

June, 2018, is one lakh tonnes minus the quantity already imported from 1st April, 2018. It is to assess this balance that the importers who have" ,,,,,

already contracted for their imports, but before the date of issuance of the Notification and have paid in advance, full or part for the same or have" ,,,,,

opened the ICLCs before 25th April 2018, it is in relation to their imports that the Directorate decided to take the further steps. Thereafter comes the" ,,,,,

Trade Notice which is impugned and dated 14th May, 2018. That says that there is a clarification which is sought by some Regional Authorities and" ,,,,,

whether advance payment in the Notification No.4 will include part advance or full advance. The clarification is that apart from ICLC only those ,,,,,

shipments which are backed by one hundred per cent advance payments before 25th April, 2018, will qualify to be registered by the Regional" ,,,,,

Authorities of DGFT. As a fall out of this, where regional authorities have already registered contracts with part advance payments, such cases may" ,,,,,

be treated as recalled / cancelled henceforth. ,,,,,

22 It is aggrieved by the trade notice dated 14th May, 2018, that the petition has been filed and in answer to such a petition, there is a counter affidavit",,,,,,

filed on behalf of the respondent Nos.1 to 4.,,,,,,

23 In the writ petition filed by Taj Agro Commodities Pvt. Ltd., it is argued by Mr. Nankani learned senior counsel that there is a ban on import of",,,,,,

pulses, but it is the Central Government, which carved out an exception to this ban. It was to give the imports, which have been already made, an",,,,,,

exclusion by relaxing the ban. It may be that the relaxation is conditional, but the Notification at page 54 of the paper book dated 25th April, 2018, is",,,,,,

not being challenged. However, this conditional Notification can always be interpreted and consistent with the object sought to be achieved. If this is",,,,,,

an amendment to the import policy and by that amendment, the Government/DGFT sought to revise the Exim Code from free to restricted for a period",,,,,,

of three months only, then, the words "advance payment" as defined will take their colour from the terms of the contract. Mr. Nankani would",,,,,,

submit that in the instant case, the factual position is that the shipment is before 9th May, 2018. The attention of this Court is invited to Exhibit 'F' at",,,,,,

page 61 to indicate that there are details, which have been provided, styled as irrevocable commercial letter of credit and advance registration details.",,,,,,

This document indicated the bank reference number, bank reference date, amount in US\$, the quantity metric ton, sales contract date. All of this",,,,,,

would indicate that on 24th April, 2018, these details were very much available. That is how the contract qualified for registration and the registration",,,,,,

certificate was granted. In these circumstances, the intent was not to deprive the importers like the petitioners of the benefit of the relaxation or",,,,,,

concession or departure in the form of amendment to the policy. If what was free has now been made restricted to, yet, there is a window, then",,,,,,

consistent with this policy, the importers should be allowed to enjoy the benefit. In other words, the trade notices cannot be said to be overriding the",,,,,,

Notification. If the Notification is taken to be the mode of amending the policy and adopted in the first instance, then, that is the mode, which has to be",,,,,,

adopted and throughout. By a trade notice, the Notification cannot be amended for the Notification is issued in exercise of the powers conferred by",,,,,,

section 3 of the FTDR Act and it unambiguously says that all contracts against which advance payment has been made are liable to be registered",,,,,,

then, it is not open to respondent no. 3 to amend or read additional conditions into this Notification by circumventing the statutory process and by" ,,,,,

issuing the impugned trade notice. This is also done retrospectively and in violation of the mandate of Article 14 of the Constitution of India. ,,,,,

24 A counter affidavit has been filed in the matter of Taj Agro Commodities Pvt. Ltd. and the Government has highlighted as to how the important ,,,,,

stake holders of the country, namely, the farmers have suffered adversely because of the imports. There was huge inflow of pulses into the domestic" ,,,,,

market. Hence, to avoid frustration of the quota restriction, the Government has taken a conscious policy decision. It is stated that in a policy decision, " ,,,,,

there is hardly any scope to interfere. Interference is not permissible on the ground that a better policy measure could have been devised. Interference ,,,,,

is permitted only on restricted grounds and none of the said grounds are made out. ,,,,,

25 It is stated that the petitioners are wrongly interpreting the term "advance payment" as a partial/token payment, whereas, it is actually advance" ,,,,,

payment and the amount of the contracted price has to be paid in full and if that is found to be paid in full in advance, then, the policy condition as set" ,,,,,

out in the Notification is fulfilled. The understanding of the trade and the business circles cannot, therefore, control the interpretation of the policy" ,,,,,

condition and there was a clear attempt to mislead the regional authorities. The affidavit explains as to how respondent No. 3 received a ,,,,,

representation from importers, who had made full payment in advance to their suppliers. The Policy Relaxation Committee under the" ,,,,,

chairmanship of DGFT, taking into account that the quantity of such import, where advance payments are made, are not such as would completely" ,,,,,

disturb the essential and underlying decision, namely, not to flood the market with the imports of pulses to the detriment of the interest of the Indian" ,,,,,

farmers, granted the relaxation, but with conditions." ,,,,,

26 It may be that after these petitions were argued, some more documents have been tendered by the petitioners, but the essential nature of the" ,,,,,

controversy does not change by bringing in these materials. The materials are in the form of a chart and some Notifications/trade notices for Toor ,,,,,

Dal/Urad/Moong Dal and registration certificates issued to various importers. ,,,,,

27 The respondents canvassed their arguments consistent with the affidavit in

reply and maintained that no material in addition to the annexures to the,,,,,
petitions be now allowed to be relied upon and this court should not take into
consideration the same.,,,,,

28 Mr. Sridharan learned senior counsel appearing for the intervener also
supported the respondents and submitted that their stand is the only one.,,,,,

possible in this case. He has taken us through the Notifications amending para
1.05 of the FTP and trade notices to urge that this is not a case where.,,,,,

we should allow any principle of law to be canvassed and to the effect that this
Notification issued under the exercise of statutory powers has to be.,,,,,

amended in like manner and not by a circular or any trade notice. Mr. Sridharan,
therefore, submits that the writ petition be dismissed." ,,,,,

29 These arguments of the petitioners (Taj Agro), are also canvassed in the other
petitions and Mr. Thorat who argued the case of Shadi-Ram and" ,,,,,

Sons Private Limited urged that an executive action cannot modify the statutory
prescription. He also relied upon the wording of the Notification and.,,,,,

the documents, which have been annexed to the petitioner by Shadi-Ram and
Sons Pvt. Ltd." ,,,,,

30 We have one more petition, which was argued by Mr. Shyam Dewani, namely,
Writ Petition (L) No. 1904 of 2018. In addition to adopting some of" ,,,,,

the arguments of Mr. Nankani and Mr. Thorat, Mr. Dewani invited our attention to
the judgment of the Hon'ble Supreme Court in the case of Sandur" ,,,,,

Micro Circuits Limited vs. Commissioner of Central Excise, Belgaum . He
emphasised the principles set out in paras 4 to 6 of this judgment and" ,,,,,

particularly to the effect that a circular cannot affect the binding character of the
Notification statutorily issued. It cannot whittle down the impact or.,,,,,

effect of the Notification. To the similar effect are the observations of the Hon'ble
Supreme Court and to be found in the judgment in the case of Tata.,,,,,

Teleservices Ltd. vs. Commissioner of Customs . ,,,,,

31 Mr. Dewani also submitted that there is an import policy of yellow peas. A
trade notice has been issued on 16th May, 2018 clarifying that the" ,,,,,

import policy of Item Exim Code 07131000 in relation to peas, which includes all
peas (Yellow Peas, Green Peas, Dun Peas and Kaspas peas) has" ,,,,,

been restricted and the effect is not restricted to only yellow peas, but to all
items classified under the said Exim Code. However, there is a" ,,,,,

clarification that in cases where the import shipment of peas are dated 1st April,

2018 till 24th April, 2018, no registration with DGFT is required for",,,,,

shipments with B/L prior to 25th April, 2018, as Notification No. 4 restricting import of peas was issued only on 25th April, 2018. Mr. Dewani,",,,,,

therefore, submits that with these additional materials, the writ petition filed, namely, Writ Petition (L) No. 1904 of 2018 be allowed.",,,,,

32 All the counsel appearing for the petitioners relied upon certain interim orders and which have been passed by the High Court of Rajasthan at,,,,,

Jaipur and the High Court of Gujarat. It is submitted that we must follow identical course and issue the interim orders.,,,,,

33 At the out set, we have clarified to the learned senior counsel as also the learned counsel appearing for the respondents that having heard all the",,,,,

parties and counsel at great length, it would not be now proper to pass only some interim or tentative orders. We have, with their consent, disposed of",,,,,

the petitions finally by this judgment and order.,,,,,

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 subsection (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 subsection (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 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:-,,,,,

â??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.â??",,,,,

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.,,,,,

37 It is, therefore, very apparent that it is the FTP vide its paras, which is stipulating certain measures and when there is any restriction placed on the",,,,,

imports, which are otherwise stated to be free. â??Unless otherwise stipulatedâ? are the words and expressions appearing in clause (b) of para 1.05,",,,,

which would enable us to understand that it is not because there is a blanket provision made in para 1.05 that the restriction or regulation,,,,,

notwithstanding the export or import will ordinarily be permitted. If there is a stipulation otherwise, then, these wide or general words will not be of any",,,,,

assistance. As far as the subject Notification is concerned, it is apparent from a bare reading thereof that it is issued in exercise of the powers",,,,,

conferred by section 3. There is a clear stipulation therein and in that regard, the language of the same is important. The FTP, as amended from time",,,,,

to time, contains stipulations with regard to import. Now the import policy of certain items of Chapter 7 of the ITC (HS) 2017 stands amended. The",,,,,

revised import policy is restricted, which was free. The revised policy condition says, it is restricted for the period from 1st April, 2018 to 30th June,",,,,

2018 and subject to Policy Condition 4 of the Chapter. Thus, the policy condition 4 appearing in this very notification cannot be ignored. If the revision",,,,,

of the import policy results in import of peas being restricted, then, the restriction subject to policy condition would have to be understood and",,,,,

construed as a whole. Policy Condition 4 says that from 1st April, 2018 to 30th June, 2018, total quantity of one lakh metric ton of yellow peas minus",,,,,

the quantity already imported from 1st April, 2018 till 24th April, 2018, will be allowed against licence as per procedure to be notified by the DGFT.",,,,,

There was never any intent, therefore, to allow any quantity to be imported exceeding this one lakh metric ton. This is the total quantity which is",,,,,

allowed to be imported between the period from 1st April, 2018 to 30th June, 2018. From this, what is to be subtracted is the quantity already imported",,,,,

from 1st April, 2018 till 25th April, 2018. That will include shipment already arrived and with regard to that part, there was never any dispute nor any",,,,,

confusion in understanding the condition. Thus, the shipment, which has arrived containing this deducted quantity between this 1st April, 2018 till 25th",,,,,

April, 2018, would be understood as the quantity already imported. The next aspect of this is shipments, which are backed by irrevocable commercial",,,,,

letter of credit and advance payment made through banking channel before 25th April, 2018. We do not understand what could be the confusion for a",,,,,

irrevocable commercial letter of credit would back those shipments in regard to which the price has been stipulated in the contract and the price in full,,,,,

is secured by this ICLC. If it is so secured and backed up or it is a shipment backed by advance payment made through banking channel, then, that",,,,,

will be understood as complying with the Policy Condition 4. That would be taken as quantity already imported from 1st April, 2018 to 25th April,",,,,

2018.,,,,,

Â 38 One could not have, therefore, found any fault nor any confusion is resulting from this clear wording. No doubts should be entertained by the",,,,,

Regional Authorities. However, we leave the matter at that and possibly some vested interests have been able to persuade the Regional Authorities to",,,,,

seek a clarification resulting in issuance of a circular dated 9th May, 2018. That circular refers to Notification No. 4 dated 25th April, 2018 and para 2",,,,,

of this trade notice refers to the Policy Condition No. 4. Para 3 of the same enables assessing the remaining balance. With regard to that, importers",,,,,

who have already contracted the import of peas before the date of issuance of the Notification and have paid any advance (full or part) for the same,,,,,

or have furnished irrevocable commercial letters of credit, before 25th April, 2018, were allowed to forward documents indicating the quantity",,,,,

contracted and the amount paid so as to enable the DGFT to lay down further procedure. We do not see how from this paragraph any benefit can be,,,,,

derived, much less additional advantage, by the parties like the petitioners or importers placed on par with them. It is only to assess the remaining",,,,,

balance that the Regional Authorities could have sought the details in terms of para 3. However, what we find is that the impugned trade notice refers",,,,,

to certain clarifications, which were sought by the Regional Authorities. The Regional Authorities were of the view that whether advance payment in",,,,,

the above paragraph will include part advance or the full advance payment be clarified and for that the DGFT had to step in. It stepped in not to,,,,,

amend the notification, as is wrongly understood and argued before us. It is only to remove the doubts expressed by the Regional Authorities and issue",,,,,

the clarification that this trade notice was issued. Its language and particularly that of para 3 is consistent with the notification itself. The argument that,,,,,

the earlier trade notice of 9th May, 2018 makes reference to payment in advance (full or in part) does not cause any confusion and the expression",,,,,

â??advance paymentâ? was always understood to be so is without any merit. What has been provided by the Notification No. 4 is that the expression,,,,,

â??already importedâ? will include shipment already arrived from 1st April, 2018 till 25th April, 2018 and those shipments backed by irrevocable",,,,,

commercial letter of credit and advance payment made through banking channel before 25th April, 2018. Both these categories will be eligible to be",,,,,

registered with jurisdictional Regional Authority as per para 1.05 of the FTP. In the sense, if the contracted quantity and in terms of a contract",,,,,

between the local importer and the person abroad is specified, in relation to that, if the entire payment has been secured in terms of this ICLC or full",,,,,

advance payment, irrespective of whether the delivery of the goods will be made in part, would, therefore, be covered by the expression or words",,,,,

â??already importedâ?. This is what Policy Condition No. 4 speaks of. It is only, therefore, to take care of the quantity between 1st April, 2018 till",,,,,

25th April, 2018 and for enabling the deduction or subtraction of that quantity from the total permissible 1 lakh MT that this Notification was issued.",,,,

This Notification amends Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy). The condition, subject to which the existing policy has been",,,,,

revised and the import is restricted, also specifies the period. The period is 1st April, 2018 to 30th June, 2018. The total quantity is one lakh metric ton",,,,,

of yellow peas.,,,,,

There was a quantity already imported from 1st April, 2018 to 25th April, 2018, which is the date of issuance of the Notification. How that quantity,",,,,

which is already imported, has to be dealt with is provided in this policy condition and because that condition employs the words â??already",,,,,

importedâ?, the ambit and scope of these words and expression had to be clarified. If that is clarified in unequivocal, clear and unambiguous terms, as",,,,,

held above, then, we do not see how we can accept the argument that the impugned trade notice amends the Notification. It does not do anything of",,,,,

that kind, but removes the confusion in the minds of the Regional Authorities. It is not that there was confusion throughout, but some Regional",,,,,

Authorities entertained doubts. Else, the trade has clearly understood that condition. If there is a ICLC, then, the shipments backed by such ICLC and",,,,,

already imported between 1st April, 2018 to 25th April, 2018 would be registered under the jurisdictional Regional Authorities as per paragraph 1.05 of",,,,,

the FTP 2015-20. In relation to those where advance payments have been made, but to the extent of 100% of the contracted quantity, they would also",,,,,

qualify to be registered by the Regional Authorities of the DGFT. It is quite likely that taking advantage of the fact that the contracted quantity has to",,,,,

be delivered in part or the contracted quantity is agreed, but there are separate or distinct contracts under which the contracted quantity is sold, there",,,,,

is a party delivery and yet, the benefit would be taken by insisting that such contract should also be registered by the jurisdictional Regional Authorities,",,,,

then, confusion to that extent has been removed by the impugned trade notice. We do not see how we can accept the argument that this amends the",,,,,

Notification and it is a substantive exercise carried out in terms of the statutory powers. We see nothing of this kind resulting from the issuance of the",,,,,

trade notice dated 18th May, 2018 and impugned in this petition. It is but a clarification issued during the implementation of the Notification dated 25th",,,,, April, 2018.",,,,,

39 In these circumstances, the transitional arrangement, which has been clarified by this trade notice does not contravene the substantive provisions of",,,,, the notification or section 3 of the FTDR Act in the Central Government.,,,,,

40 To such an exercise, the principles pressed into service by Mr. Thorat and Mr. Dewani have no application. In the case of Tata Teleservices Ltd.",,,,,

(supra), the Customs Notifications exempting the goods from duty and the issue of their interpretation was under consideration. The circular impugned",,,,,

has imposed a limitation on the exemption Notification, which the exemption Notification itself did not provide. Thus, this was a clear attempt to",,,,,

overreach/override or amend the exemption notification. If an exemption Notification had to be amended, then, the amendment must follow in like",,,,,

manner, namely, by issuing another notification and a circular could not have purported to amend it. Such is not the case in the present matter and this",,,,,

principle, therefore, does not apply at all.",,,,,

41 In the case of Sandur Micro Circuits Limited (supra), the argument was that a circular was issued by the Central Board of Excise and Customs.",,,,,

There was a Notification of 4th January, 1995 as amended by Notifications of 11th April, 1997, 2nd June, 1995 and 1st July, 1996. It was held that",,,,,

these Notifications override the circular. Therefore, 50% of the aggregate Customs duty on the goods cleared to the domestic tariff area would not",,,,,

mean that the payment of the tax has been made. The circular was issued on the basis of representation of the assessee and thus, the Notification",,,,,

could not have, therefore, stood in the way of the assessee. On the other hand, it was argued that the Notification is statutorily issued and that has",,,,,

overriding effect by virtue of the power conferred by sub-section (1) of section 5A of the Central Excise and Salt Act, 1944. The issue has been",,,,,

examined in several cases by the Hon'ble Supreme Court and the settled principle was reiterated that a circular cannot take away the effect of the",,,,,

Notification statutorily issued. This principle is also not applicable in the facts and circumstances of the present case.,,,,,

42 In the end, we must refer to the orders passed by the High Court of Rajasthan and the High Court of Gujarat. These are but interim orders. We",,,,,

have taken a final view of the matter. At best, these interim orders, which are tentative and, prima facie, have a persuasive value. They have no" ,,,,, binding effect.,,,,,

43 Mr. Dewani sought to press before us and equally Mr. Nankani additional materials. The argument was that there are trade notices, which have" ,,,,, been issued and on the same subject, namely, revised policy condition. It submitted that the import policy of yellow peas has been restricted, but the" ,,,,, import policy of items, includes all peas. The policy is not restricted to only yellow peas. Mr. Dewani would argue that what is imported is not yellow" ,,,,, peas and what has been argued and considered by us refers only to yellow peas. This argument is stated only to be rejected. There is no question of ,,,,, the trade notices referring to any restricted items. Each of these documents, which we have extensively referred, contain the item description as peas." ,,,,, Hence, no bifurcation such as yellow peas, green peas, dun peas and kaspa peas is then permissible. The item description was clear and this item was" ,,,,, freely importable. However, the revised import policy restricts the imports of all peas and therefore, the bifurcation, as desired by Mr. Dewani cannot" ,,,,, be made.,,,,,

44 For the reasons aforesaid, each of these writ petitions fail. Rule is discharged. They are dismissed, but there would be no order as to costs." ,,,,,

45 In the light of the dismissal of the writ petitions, the chamber summons does not survive and stands disposed of as such." ,,,,,