

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 8406/2010 & CM No. 21556/2010

Reserved on: 28th January 2011

Decision on: 17th February 2011

GUJARAT AMBUJA EXPORTS LTD AND ORS Petitioners
Through: Mr. P.H. Parekh, Senior Advocate with
Mr. E.R. Kumar, Mr. Sameer Parekh,
Ms. Pallavi Sharma and Ms. Retika, Advocates

versus

UNION OF INDIA AND ORS Respondents
Through: Mr. A.S. Chandhiok, Additional
Solicitor General of India with
Mr. Sachin Datta, CGSC with
Mr. Manikya Khanna, Advocate.

with

W.P.(C) 8407/2010 & CM No. 21558/2010

ZENITH SPINNERS Petitioner
Through: Mr. P.H. Parekh, Senior Advocate with
Mr. E.R. Kumar, Mr. Sameer Parekh,
Ms. Pallavi Sharma and Ms. Retika, Advocates.

versus

UNION OF INDIA Respondent
Through: Mr. A.S. Chandhiok, Additional
Solicitor General of India with
Mr. Sachin Datta, CGSC with
Mr. Manikya Khanna, Advocate.

with

W.P.(C) 8408/2010 & CM No.21559/2010

LOKNAYAK JAYPRAKASH NARYAN SHETKARI SAHAKARI
SOOT GIRNI Ltd. & ORS

..... Petitioners

Through: Mr. P.H. Parekh, Senior Advocate with
Mr. E.R. Kumar, Mr. Sameer Parekh,

Ms. Pallavi Sharma and Ms. Retika, Advocates.

Versus

UNION OF INDIA AND ORS Respondents

Through: Mr. A.S. Chandhiok, Additional
Solicitor General of India with
Mr. Sachin Datta, CGSC with
Mr. Manikya Khanna, Advocate.
with

W.P.(C) 8590/2010 & CM No.21907/2010

TDB SPINNERS PVT. LTD AND ANR Petitioners

Through: Mr. P.H. Parekh, Senior Advocate with
Mr. E.R. Kumar, Mr. Sameer Parekh,
Ms. Pallavi Sharma and Ms. Retika, Advocates.

versus

UNION OF INDIA AND ORS Respondents

Through Mr. A.S. Chandhiok, Additional Solicitor
General of India with
Mr. Sachin Datta, CGSC with
Mr. Manikya Khanna, Advocate.

with

W.P.(C) 8627/2010 & CM No.21962/2010

LAHOTI OVERSEAS LIMITED & ORS Petitioners

Through Mr. P.H. Parekh, Senior Advocate with
Mr. E.R. Kumar, Mr. Sameer Parekh,
Ms. Pallavi Sharma and Ms. Retika, Advocates.

versus

UNION OF INDIA AND ORS Respondents

Through Mr. A.S. Chandhiok, Additional Solicitor
General of India with
Mr. Sachin Datta, CGSC with
Mr. Manikya Khanna, Advocate.

and

W.P.(C) 8548/2010 & CM No.21665/2010

KRISHNA KNITWEAR TECHNOLOGY LTD. Petitioner
Through Mr. Biju Mattam with
Mr. Anupam Dasgupta, Mr. Gaurav Adusumattu
and Ms. Namrata Bedi, Advocates.

versus

UNION OF INDIA AND ORS Respondents
Through Mr. A.S. Chandhiok, Additional Solicitor
General of India with
Mr. Sachin Datta, CGSC with
Mr. Manikya Khanna, Advocate.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of the local newspapers
be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

JUDGMENT
17.02.2011

Introduction

1. The challenge in this batch of writ petitions by manufacturers of cotton yarn is to a ban on the export of cotton yarn with effect from 1st December 2010, first brought about by a Press Release of the Ministry of Textiles (MoT) of that date and later by a Notification dated 22nd December 2010 issued by the Department of Commerce ('DoC') in the Ministry of Commerce and Industries ('MoCI'), Government of India. The Petitioners challenge the validity of the aforementioned Press Release and Notification as being *ultra vires* of the Foreign Trade (Development & Regulation) Act, 1992 ['FTDR Act'] and violative of the fundamental rights under Articles 14

and 19(1)(g) of the Constitution of India.

2. At the outset, it must be noted that the facts in five of the six writ petitions are more or less similar. For the sake of convenience, the facts in the first petition i.e., W.P. (C) 8406 of 2010 by Gujarat Ambuja Exports Ltd. ('GAEL') are set out in detail. The facts in W.P. (C) 8548 of 2010 by Krishna Knitwear Technology Ltd. ('KKTL') are somewhat different as it is a 100% export-oriented unit ('EOU'). The facts concerning KKTL will be discussed separately.

Relevant provisions of the Foreign Trade Policy 2009-2014

3. The Foreign Trade Policy ('FTP') for the period 27th August 2009 to 31st March 2014 was published in the Official Gazette on 27th August 2009. The FTP states that by 2014 India's export of goods and services is expected to be doubled. India's share in the global trade is expected to be doubled by 2020. Prior to the ban on their export, cotton yarn and raw cotton were freely exportable commodities. Para 2.1 of the FTP reads as under:

“2.1 Exports and Imports shall be free, except where regulated by FTP or any other law in force. The item wise export and import policy shall be, as specified in ITC (HS) notified by DGFT, as amended from time to time.”

4. Para 1.5 of the FTP envisages certain transitional arrangements when there is a restriction on exports or imports of commodities. Para 1.5 reads as

under:

“1.5 In case an export of 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, provided that shipment of export of import is made within original validity with respect to available balance and time period of an irrevocable commercial letter of credit, established before date of imposition of such restriction.

However, for operationalizing such irrevocable commercial letter of credit an applicant shall have to register the Letter of Credit and contract with the concerned RA within 15 days of the issue of any such restriction or regulation.”

5. Para 9.12 of the Handbook of Procedures which *inter alia* supplements the FTP reads as under:

“However, wherever the Policy provisions have been modified to the disadvantage of the exporters, the same shall not be applicable to the consignments already handed over to the Customs for examination and subsequent exports up to the date of the Public Notice.

Similarly, in such cases where the goods are handed over to the customs authorities before the expiry of the export obligation period but actual Exports take place after expiry of the export obligation period, such exports shall be considered within the

export obligation period and taken towards fulfillment of export obligation.”

6. In terms of the powers conferred by Section 5 of the FTDR Act read with Para 1.3 and 2.1 of the FTP 2009-14, the central government made the following amendments in Schedule 2, Table B of ITC HS Classifications of Export-Import Items by inserting Serial No. 161 (B), in Chapter 52 by a Notification dated 9th April 2010. The relevant portion of the said notification showing the inserted entry reads as under:

S. No.	Tariff Item Code	Unit	Item Description	Export Policy	Nature of Restriction
161B	5205		Cotton yarn (other than sewing thread), containing 85% or more by weight of cotton not put up for retail sale	Free	The contracts for export of cotton yarn shall be registered with the Textile Commissioner prior to shipment. Clearance of cotton yarn consignments shall be given by Customs after verifying that the contracts have been registered.
	5206		Cotton yarn (other than sewing thread), containing less than 85% by weight of cotton not put up for retail sale		
	5207		Cotton yarn (other than sewing thread), put up for retail sale.		

7. In the General Notes to the Export Policy, an explanation is given for

`free exportability' as under:

“Free Exportability - All goods other than the entries in the export licensing schedule along with its appendices are freely exportable. The free exportability is however subject to any other law for the time being in force. Goods not listed in the Schedule are deemed to be freely exportable without conditions under the Foreign Trade (Development and Regulations) Act, 1992 and the rules, notifications and other public notices and circulars issued there under from time to time. The export licensing policy in the schedule and its appendices does not preclude control by way of a Public Notice Notification under the Foreign Trade (Development and Regulations) Act, 1992.

Goods listed as “Free” in the Export Licensing Schedule may also be exported without an export licence as such but they are subject to conditions laid out against the respective entry. The fulfillment of these conditions can be checked by authorized officers in the course of export.”

8. On 9th April 2010 the Office of the Textile Commissioner in the MoT issued a memorandum setting out the procedural requirements for obtaining Export Authorization Registration Certificate (‘EARC’) of cotton yarn with the Textile Commissioner, Mumbai or its designated regional offices “prior to shipment”. The said memorandum sets out the procedure for submission of an application. The applicant had to submit the export authorization registration form along with, *inter alia*, a copy of the export contract for which registration is being sought, and depending upon the terms of

payment, copies of the letter of credit ('LC'), the advance payment receipt and the contract copy. A first-time applicant had to also submit the Import Export Code ('IEC'), Pan Card, Memorandum and Articles of Association. The application for EARC enclosing a copy of the export contract had to be submitted "within 45 days prior to the date of actual shipment". It was made clear that "if the export is not effected within the stipulated 45 days, then the Export Authorization Registration issued would stand lapsed." An exporter can however seek extension for making the shipment beyond 45 days upon showing justification. If for some reason the export contract is cancelled the exporter is expected to inform the Textile Commissioner within 21 days from the date of the cancellation and surrender the original EARC. The exporter is expected to submit proof of shipment details annexing the EARC copy, Exchange Control copy of the shipping bill and the commercial invoice. Failure to do so within 21 days from the date of the expiry of the permitted shipment period will result in the Textile Commissioner not entertaining any further application for an EARC till such time the proof of shipment is submitted. Importantly, in Clause (xi) of the Memorandum dated 9th April 2010 it was stated as under:

"(xi) The first registration will have to be done on physical presentation of application. For subsequent registration a web based system of registration and reporting compliance of EARCs is being developed, and exporters would be informed through the website of Office of the Textile Commissioner (www.txcindia.gov.in) in this regard."

9. As will be discussed later, the web based system of registration of EARC commenced on 20th November 2010, shortly before the ban on export of cotton yarn took effect.

10. The Petitioners do not question the existence of the power of the central government under the FTDR Act to impose a ban on the export of cotton yarn. Sections 3 and 5 of the FTDR Act which are relevant for the present case read as under:

“3. Powers to make provisions relating to imports and exports.

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

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

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

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

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

.....

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

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

11. Relevant to the present petitions is the procedure outlined in the above provisions as to the manner of imposing a ban on import or export of a commodity and the amendment to the FTP. An order prohibiting any export has to mandatorily be published in the Official Gazette in terms of Section 3(2) FTDR Act. Under Section 5 FTDR Act, an amendment to the FTP also requires to be made only by a notification in the Official Gazette.

Proceedings of the CYAB

12. On 13th September 2010 a notification was issued by the MoT constituting the Cotton Yarn Advisory Board (‘CYAB’) comprising 18 members with the Textile Commissioner as the Chairman and other Members which included the Director General of Foreign Trade (‘DGFT’); the Chairman and the Managing Director, Cotton Corporation of India (‘CCI’); the Chairman, Cotton Textile Export Promotion Council (‘TEXPROCIL’); Chairman, Apparel Export Promotion Council (‘AEPC’); the Chairman, Confederation of Indian Textile Industry (‘CITI’), the

Chairman, South Indian Mills Association (‘SIMA’), Coimbatore; President Tirupur Exports Association (‘TEA’), Tirupur; the Chairman, North India Textile Manufacturers’ Association (‘NITMA’); Chairman, Clothing Manufacturers’ Association of India (‘CMAI’); Chairman, Powerloom Development and Export Promotion Council (‘PDEXCIL’), Mumbai etc. This was published in the Official Gazette on 25th September 2010.

13. The CYAB met on 29th October 2010 under the Chairmanship of the Textile Commissioner, Mumbai. The minutes of the proceedings of the said meeting have been relied upon by both the parties to the present litigation. The said meeting was in continuation of the earlier meetings held on 1st and 8th October 2010. At the latter meeting a serious concern had been expressed by the Minister for Textiles “over the rising yarn/cotton prices and its impact on the downstream segments of the textile industry.” A power-point presentation was made at the meeting on 29th October 2010 by the Member Secretary, CYAB on the domestic/international prices, countwise production vis-à-vis domestic consumption, exports and balance sheet. After noting the submissions of the various members of the CYAB, the CYAB reviewed the Cotton Yarn Balance Sheet for the year 2010-11. The relevant extracts of the minutes of the meeting of the CYAB on 29th October 2010 with regard to the impending imposition of the ban on export of cotton yarn read as under:

“With regard to production and exports the views expressed are as follows:

(in Mn. KG)

Sr. No.	Name of the Association	Projected Production of cotton yarn for 2010-11	Projected Exports of cotton yarn for 2010-11
1	SIMA	3450	750
2	CITI	3400	720
3	NITMA	3400	750
4	PDEXCIL/CMAI/TEA/AEPC	3300	644 (Existing Position)
5	TEXPROCIL	-	800

However, based on the production data available for the first five months of the year 2010-11 and considering the 9.54% increase in five months over the previous year the production was estimated at 3370 mn. kg. Regarding exports CYAB accepted the suggestion of CITI for export of cotton yarn of 720 mn. Kgs. However APEC/TEA gave the dissenting note asking for continuation of the projected exports of 644 mn kgs as estimated in first meeting of CYAB.”

14. Based on the above discussion, the Cotton Yarn Balance Sheet was drawn up. The provisional demand for 2009-10 as estimated by the CYAB on 1st October 2010 was 3300 million kg and for the end of the month, i.e., 29th October 2010, it was projected at 3376 million kg. The corresponding export figures were 644 and 720 million kgs respectively. The minutes further recorded as under:

“However AEPC, TEA, PDEXCIL did not agree to the figures of exports as well as the deliveries for different sectors. They viewed that it reflect only the supply side position and does not take into consideration the actual demand position.

JS informed that cap of 55 lakh bales on export of cotton is considered only policy of the Govt. As of yarn Ministry don't have such a policy. Govt. may come out with this cap if situation demands. Shri Hardeep Singh, Jt. DGFT confirmed that there is no such ceiling on export of cotton yarn."

Impugned Press Release and Notifications

15. On 1st December 2010 a Press Release was issued by the Textile Commissioner in the MoT to the following effect:

"Press Release

Ministry of Textiles has been monitoring the cotton yarn production/consumption/export situation in the country very closely. The Cotton Yarn Advisory Board (CYAB) has been constituted in September 2010 to formulate the Cotton Yarn Balance sheet for the country. Following two meetings of the CYAB on October 1st and 29th 2010, the cotton yarn balance sheet formulated indicates the production/consumption/export figures as follows:

Cotton yarn supply/production	3460 million kgs
Cotton yarn domestic demand	2656 million kgs
Cotton yarn exports	720 million kgs
Closing stock	84 million kgs
Export as % of supply	21%

Yarn exports at 720 million kgs for the year 2010 – 11 would be the highest ever export performance achieved by the Indian spinning industry in comparison to the 589 million kgs in 2009 – 10 and 556 million kgs in 2008 – 09.

In the backdrop of the increased domestic demand and to (*sic* `the') address the price volatility the Government has decided that there shall be no further registration of the cotton yarn exports beyond 720 million kgs. All applications in pipeline above the export registration of 720 million kgs shall not be considered by the Textiles Commissioner, Mumbai.

It is expected that this decision will provide adequate domestic availability of cotton yarn and ensure price stability which will benefit millions of Handloom weavers, Knitwear industry, Garment manufacturers and Power loom weavers.”

16. Simultaneous with the above Press Release dated 1st December 2010 the following Office Memorandum dated 1st December 2010 was issued by the MoT:

“Office Memorandum

Government has decided that there shall be no further registration of cotton yarn exports beyond 720 million kg. All applications in pipeline above the export registration of 720 million kgs shall not be considered by the Textiles Commissioner, Mumbai.

You are advised to take necessary action in pursuance of the above decision. A press release to be issued in this regard is enclosed.”

Present Petitions

17. The facts in the writ petition by GAEL are set out in some detail as it is the lead petition. The facts in the other petitions, excepting KKTL, are more or less similar. GAEL is a company engaged in the manufacture and export

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of cotton yarn. It is stated that it has made a total investment to the extent of Rs. 104.17 crores and employs 1000 persons in its yarn factory in Gujarat. GAEL was granted an EPCG licence dated 7th July 2010 in terms of which GAEL has an export obligation of US \$ 21.36 million. GAEL also holds an advance licence dated 7th May 2010 issued by the Government of India for import of raw cotton and furnace oil as per SOIN under which the Petitioners imported furnace oil at nil duty. It is stated that in terms of the advance licence the Petitioners have incurred an export obligation of 4274 metric tonnes ('MT') of cotton yarn at US \$ 16.99 million. It is stated that the pending value of Export Packing Credit for textiles availed of by GAEL with the Bank of India and the State Bank of Mysore is around Rs. 21 crores which has to be crystallized by discounting the export bills of cotton yarn, failing which GAEL will be liable to pay the commercial rate of interest to the bank.

18. GAEL stated that it had uploaded 17 export contracts online on 27th November 2010 and 9 contracts on 30th November 2010. It is stated that the Deputy Director of the MoCI checked the first lot of 17 applications and found 11 to be in order and 6 to have minor deficiencies which were rectified. It is alleged, however, that EARC was not provided for those contracts. As far as the Petitioner in W.P.(C) 8407 of 2010, Zenith Spinners, is concerned it uploaded seven export contracts between 25th and 30th

November 2010. As regards the other three Petitioners, i.e., W.P.(C) 8408 of 2010 [Loknayak Jayprakash Naryan Shetkari Sahakari Soot Girni Ltd.], W.P.(C) 8627 of 2010 [Lahoti Overseas Ltd.] and W.P.(C) 8590 of 2010 [TDB Spinners Pvt. Ltd.], it is stated that they had made attempts to upload their export contracts on the internet between 25th November 2010 and 1st December 2010 but were unable to do so as the system would not accept it.

19. In the above circumstances, the W.P.(C) 8406 of 2010 was filed by GAEL in this Court assailing the validity of the press release dated 1st December 2010 as being *ultra vires* the FTDR Act and unconstitutional, and for a mandamus to the MoT and the Commissioner of Textiles to register export contracts entered into by the Petitioner GAEL on or before 1st December 2010. The reliefs claimed in the other petitions are similar to the ones prayed for by GAEL.

20. On 16th December 2010 the following order was passed by this Court:

“1. Mr. Parekh, learned counsel for the Petitioners submits that the impugned Press Release was issued by the Ministry of Textiles on the basis of an Office Memorandum of the same date i.e. dated 1st December 2010 directing that there should be no further registration of cotton yarn exports beyond 720 million kg.

2. One of the grounds urged is that the said direction is contrary to Section 3(2) Foreign Trade (Development and Regulation) Act, 1992 whereby prohibition of export of goods by the Central

government can be done by issuance of an order published in the Official Gazette and that too by the Ministry of Commerce, Government of India. It is submitted that the impugned direction is also contrary to the Foreign Trade Policy 2009-14.

3. The Petitioners state that they have export orders worth several hundreds of crores which were finalised long before the impugned Press Release and that severe prejudice would be caused if those exports were now prohibited.

4. Notice. Mr. Dutta, Advocate accepts notice for Respondents 1 and 3 and states that he will have to seek instructions. He requests that matter be kept back by one week for that purpose.

5. Notice be issued to the remaining Respondents.

6. List on 23rd December 2010. It is made clear that the application for interim relief will be considered on the next date.”

Developments subsequent to the filing of the petitions

21. On 23rd December 2010 when the petitions were listed for hearing, the Respondents produced a copy of the following Notification dated 22nd December 2010 issued under Section 5 FTDR Act:

“Government of India
Ministry of Commerce & Industry
Department of Commerce
Udyog Bhawan
Notification No. 14(RE-2010)/2009-14
New Delhi, Dated 22nd December, 2010

Subject: Restriction on export of cotton yarn - regarding

S.O. (E) In exercise of the powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992) read with Para 2.1 of the Foreign Trade Policy, 2009-14, the Central government hereby makes the following amendments in respect of Sl. No. 161 B {ITC(HS) Classification} in the Notification No. 38/2009-14 dated 09.04.2010.

2. The existing entries of Notification No. 38/2009-14 dated 09.04.2010 are substituted as follows with effect from 01.12.2010:-

S.No.	Tariff Item Code	Unit	Item of Description	Export Policy	Nature of Restriction
161B	5205		Cotton yarn (other than sewing thread), containing 85% of more by weight of cotton not put up for retail sale.	Restricted	Export permitted under licence.
	5206		Cotton yarn (other than sewing thread), containing less than 85% by weight of cotton not put up for retail sale.		
	5207		Cotton yarn (other than sewing thread), put up for retail sale		

3. Transitional Arrangement:

(i) The transitional Arrangements as available under para 1.4 &

1.5 of FTP, 2009-14 will **not** be applicable to the export of Cotton Yarn, under this notification.

(ii) However, Exporters who have obtained Registration Certificate from Textile Commissioner, Mumbai before 1st December, 2010 would be permitted to export Cotton Yarn within the quantity limit for which such registration certificate has been issued and within the validity of such registered contract.

(iii) If the validity of such registered contract has expired then the registered contract holder will have no right to export under such registered contract.

4. The effect of this notification:-

The export of cotton yarn (Tariff Codes 5205, 5206 & 5207) was earlier subject to registration of export contracts with Textile Commissioner, Mumbai. Now, the export of cotton yarn has been restricted and export will now be permitted under licence.”

22. A Policy Circular on the lines of the said Notification was also issued by the DGFT on the same date which reads as under:

“Policy Circular No. 07(RE-2010)/2009-14 Dated: 22.12.2010

To

All Regional Authorities,
All Custom Authorities

Sub: Conditions and modalities for applications for grant of export licence for export of Cotton-yarn regarding.

It has been decided in the meeting of Group of Ministers(GoM) on 21.12.2010 that for the present, 720 million

kgs. of Cotton Yarn is to be allowed for export during the year 2010-11(i.e. upto 31.03.2011).

2. Accordingly, Notification No. 14(RE-2010)/2009-14 dt. 22.12.2010 has been issued today, stipulating that henceforth export of cotton yarn will be restricted and will be allowed to be exported under licence. However, Exporters who have obtained Registration Certificate from Textile Commissioner, Mumbai before 1st December, 2010 would be permitted to export Cotton Yarn within the quantity limit for which such registration certificate has been issued and within the validity of such registered contract. The data for the quantity that has already been exported in 2010-11 is being collected. The representations received to review the extent of exportable surplus are also being examined.

3. Exact modalities for submitting applications for grant of export licence would be notified once the quantity of exports already made has been ascertained and the extent of exportable surplus has been reassessed.

4. This issues with the approval of Director General of Foreign Trade.

Sd/-
Joint Director General of Foreign Trade”

23. After noting the above developments in its order dated 23rd December 2010, this Court recorded the submissions of the learned counsel for the Petitioners that they would amend the writ petitions to challenge the said circular. They were permitted to do so. On 24th December 2010 the said

amendment applications were thereafter filed by the Petitioners. The said amendment applications were allowed. Consequently the challenge in these petitions is both to the Press Release dated 1st December 2010 as well as the subsequent Notification issued by the MoCI dated 22nd December 2010.

24. During the course of hearing, Mr. A.S. Chandhiok, learned ASG produced two further Notifications dated 29th December 2010 which substituted Para 3 (ii) of the Notification dated 22nd December 2010 and also explained the effect of the Notification. The relevant portion of the said Notification reads as under:

“2. In Notification No. 14(RE-2010)/2009-14 dated 22.12.2010, the phrase “before 1st December, 2010” appearing at para 3 (ii) relating to Transitional Arrangements will be substituted by the phrase “on or before 1st December, 2010”. The relevant para would read as follows:

“3(ii) However, Exporters who have obtained Registration Certificate from Textile Commissioner, Mumbai on or before 1st December, 2010 would be permitted to export Cotton Yarn within the quantity limit for which such registration certificate has been issued and within the validity of such registered contract.”

3. The effect of this notification:-

The exporters who have obtained Registration Certificate from Textile Commissioner, Mumbai on 1st December, 2010 would also now be permitted to export Cotton Yarn. Earlier notification of 22.12.2010 permitted such exporters who would have got RC before 1st December, 2010. Other conditions like quantity limit of RC so issued, validity of RC will remain the same.”

25. During the course of the hearing the Respondents informed that on 24th January 2011 the following Notification was issued by the MoCI:

“Government of India
Ministry of Commerce & Industry
Department of Commerce
Udyog Bhawan

Notification No. 18 (RE-2010)/2009-14
New Delhi, Dated 24th January, 2011

Subject: Restriction on export of Cotton yarn – Exemption for export of cotton yarn manufactured out of imported raw material – regarding.

S.O. (E) In exercise of the powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992) read with Para 2.1 of the Foreign Trade Policy, 2009-14, the Central government hereby makes the following amendments in Notification No. 14(RE-2010)/2009-14 dated 22.12.2010 read with Notification No. 15(RE-2010)/2009-14 dated 29.12.2010.

2. The following shall be exempted from the restriction imposed on export of cotton yarn vide above notifications:

“Export of cotton yarn by manufacturers who manufacture and export cotton yarn exclusively out of imported raw cotton shall be exempted from the restriction imposed on export of cotton yarn vide above notifications, subject to a certificate from the jurisdictional Central Excise Authority certifying that the yarn has been manufactured exclusively out of the imported raw cotton.”

3. Export of such consignment should be allowed by the customs

after verifying that certificate to the above effect has been issued by the competent jurisdictional Central Excise Authority.

4. The effect of this notification:-

The manufacturers who manufacture and export cotton yarn out of the imported raw cotton shall be exempted from the restriction imposed on export of cotton yarn.”

Submissions of counsel for the Petitioners (other than KKTL)

26. Mr. P.H. Parekh, learned Senior counsel, appearing for the GAEL and four other Petitioners (other than KKTL) submitted that:

(i) The Press Release dated 1st December 2010 was *ultra vires* Section 5 of the FTDR Act inasmuch as a policy change by banning export of cotton yarn could only be made by a notification under Section 5 read with Section 3(2) FTDR Act. Reliance was placed on the decision of this Court in ***Agri Trade India Services Pvt. Ltd. v. Union of India 132 (2006) DLT 500*** which, on this aspect, was upheld by the Supreme Court in ***Union of India v. Asian Food Industries (2006) 13 SCC 542***.

(ii) The Notification dated 22nd December 2010 as amended by the Corrigendum dated 29th December 2010 was also without authority of law. It is further submitted that the said Notification has been issued by the DGFT who had no authority to do so. Reliance is placed on the judgment of the

Supreme Court in *Atul Commodities Pvt. Ltd. v. Commissioner of Customs, Cochin* (2009) 5 SCC 46.

(iii) There was no power in the Central government under Section 5 FTDR Act to issue the Notification retrospectively. The Petitioners sought to invoke the doctrines of promissory estoppel and legitimate expectation. In support of this plea reliance is placed on the decisions in *Motilal Padampat Sugar Mill v. State of UP* (1979) 2 SCC 409; *Shrijee Sales Corporation* (1997) 3 SCC 398; *Pawan Alloys* (1997) 7 SCC 251; *Southern Petro Chemical Industries v. Electricity Inspector* (2007) 5 SCC 447 and *State of Bihar v. Kalyanpur Cement Ltd.* (2010) 3 SCC 274.

(iv) There was no rationale for doing away with the protection under Para 1.5 of the FTP and replacing it with the Para 3(ii) of the impugned Notification which is no protection at all. It is submitted that under Section 5 read with Section 3(2) FTDR Act, the power to impose a restriction on exports and imports has been delegated to the central government.

(v) The delegatee which in this case is the central government cannot, unless expressly permitted by the statute itself, make any rule or notification retrospectively. Reliance is placed on the decision of the Supreme Court in *Mahabir Vegetable Oils (P) Ltd. v. State of Haryana* (2006) 3 SCC 620 as well as certain observations in *Asian Food Industries*.

(vi) Even assuming without admitting that the Notification dated 22nd December 2010 could be retrospective it ought to be held inapplicable to the contracts which had already been submitted by the Petitioners for registration prior to 1st December 2010. The EARCs ought to have been issued within 24 hours of the applications. Reliance is placed on the statement made in the counter affidavit of the Respondents 1 & 2 that the time lag even during heavy load of applications was only 2-3 days. It is accordingly submitted that the Petitioners should be allowed to export all stocks of cotton yarn covered by the contracts uploaded on the website of the Textile Commissioner for registration prior to 1st December 2010.

(vii) There were gross irregularities in the issuance of the EARCs between 20th November 2010 and 1st December 2010. There was no transparency as regards the procedure adopted. While in the counter affidavit it is stated that the said limit of 720 million kgs was reached by 1st December 2010, in the additional affidavit dated 27th January 2011 it is stated that as on 25th January 2011 only 648.973 mn. kgs. had been exported. Inasmuch as the Press Release dated 1st December 2010 is without the authority of law, the protection of Para 3(ii) of the Notification dated 22nd December 2010 should be available till that date, i.e., 22nd December 2010. It is submitted that the Petitioners ought to have been granted EARCs prior to that date.

Facts and submissions on behalf of KKTL

27. Mr. Biju Mattam, learned counsel for KKTL first referred to the facts in W.P. (C) 8548 of 2010. On 29th July 2002 the Respondents had granted KKTL a permit/approval in terms of Para 6.1 of the FTP to set up a 100% EOU for the manufacture and export of cotton yarn with an annual capacity of 5484 MT. The said permit came to be extended on 13th March 2008 for the further period of five years with an enhanced annual capacity of 8568 MT. It was subject to various conditions, violation of which would result in levying of penalty and other financial detriments. KKTL has a workforce of 1000 employees. It has secured loans from banks and financial institutions for setting up and operating the EOU. After the impugned Notification was issued KKTL had to close its operations completely. Production has been stopped since January 2011 and stock of 200 MT is lying unutilized in the warehouse. KKTL was facing difficulty in paying the wages of the workers and in repaying loans to the banks. It is apprehended that non-fulfillment of the projected export performance will also warrant penalty as per the FTP.

28. Mr. Biju Mattam submitted that as a 100% EOU, KKTL constituted a category distinct from the other Petitioners. Unlike the other cotton yarn manufacturers, KKTL could not divert its produce into the local market. It had to necessarily export its entire produce. Therefore, a total ban on the export of cotton yarn would cripple KKTL. In other words the adverse

impact of the ban on KKTL would be disproportionate and far higher than the impact on other non-EOU cotton yarn manufacturers. Since the entire production of KKTL as an EOU was meant for a foreign market, it made little sense to have the ban applied to KKTL since in any event its production and export would not impact on the availability of cotton yarn in the local market thereby affecting its price. It is submitted that in the face of the ban it would be impossible for KKTL to comply with the conditions attached to the permit/approval granted to it. It is submitted that the ban period is also uncertain.

29. In support of the submission that the impugned notification defeats the very object of setting up an EOU, reliance is placed on the observations of the Supreme Court in *Hindustan Granites v. Union of India* 2007 (5) *SCALE* 587. It is submitted that the impugned Notification is disproportionate, unreasonable and arbitrary and violative of Article 14 of the Constitution. Reliance is placed on the decisions in *Punjab Communications Ltd. v. Union of India* (1999) 4 SCC 727 and *Om Kumar v. Union of India* (2001) 2 SCC 386. It is submitted that the Respondents failed to explore the least restrictive alternate measure vis-à-vis the EOU with a view to achieving the objectives underlying the establishing of an EOU while at the same time ensuring regulation of the domestic cotton yarn market. Reliance is placed on the decisions in *East Coast Railways v.*

Mahadev Appa Rao (2010) 7 SCC 678 and *State of Madras v. V.G. Row 1952 SCR 597*. It is submitted that the restriction vis-à-vis an EOU is in effect a total ban on its production of cotton yarn. This therefore constituted an unreasonable restriction in terms of Article 19(1)(g) read with Article 19(6) of the Constitution. There was no overriding public interest that justified this measure. Learned counsel also relied on the cases cited by Mr. Parekh as regards promissory estoppel and legitimate expectation.

30. As regards the meeting of the CYAB, it was submitted by Mr. Mattam that there were divergent views expressed in the meeting and, therefore, the Respondents ought not to have relied on the minutes of the meeting for imposing the impugned ban. Further, in redrawing the cotton balance sheet the consumption requirement of EOUs like KKTL was not accounted for. Even the Notification No. 18 (RE-2010)/2009-14 dated 24th January 2011 which lifts the ban in case the cotton yarn is manufactured out of imported raw cotton did not help KKTL. It is stated that the production of cotton yarn from imported raw cotton would be financially unviable for KKTL. Further, KKTL cannot be compelled to base its production on imported raw cotton especially when there was no actual shortage of domestic raw cotton. As regards the restriction on the export of raw cotton to 55 lakh bales, it is submitted that there has been no replacement of earlier Notification No. 12(RE-2010)/2009-14 dated 16th December 2010 which showed the export

of raw cotton to be 'free'.

Submissions on behalf of the Respondents

31. Mr. Chandhiok, learned ASG submitted that unlike certain other instances in the past concerning banning of imports/exports of commodities, in the present case the ban on the export of cotton yarn was based on the recommendations of the CYAB which had representatives of cotton yarn manufacturers themselves. It is submitted that there was, no doubt, some delay in formally notifying the ban till 22nd December 2010 but the fact of imposition of the ban was known well in advance to the entire cotton and cotton yarn industry. This explained why the applications for registration of export contracts witnessed a sharp increase in the month of November 2010, and a phenomenal upsurge after the system of online registration was introduced on 20th November 2010. Mr. Chandhiok pointed out that although the export of cotton yarn was free, it was subject to two restrictions: obtaining an EARC from the Textile Commissioner and clearance of the consignments by the customs authorities.

32. Mr. Chandhiok referred to the counter affidavit of Respondents 1 and 2 which stated that between April and November 2010 there was a manifold increase in the quantum of contracts and particularly in November 2010. It is submitted that on an average, the Office of the Textiles Commissioner was receiving around 2000 applications every month. In October 2010 this had

increased to around 2800 and in November 2010 to 4359. Despite this the Office of the Textiles Commissioner made efforts to issue EARCs. In any event, there was no question of the EARCs upon the registered quantities reaching the threshold limit of 720 million kgs. Mr. Chandhiok also referred to the additional affidavit which indicated that there was a sharp increase in the price of cotton yarn coinciding with the huge and unprecedented increase in request for issuance of EARCs between the period 1st November 2010 to 1st December 2010. The total quantity for which the EARCs were sought increased from 75602.23 MT in September 2010 to 90424.57 MT in October 2010 and reached a staggering figure of 197606.79 MT in November 2010. It is submitted that if no curb would have been imposed on the exports, it would have been devastating for the domestic industry.

33. As regards the GAEL it is submitted that the number of EARCs sought to be registered by it, increased from a mere 403.03 MT in September 2010 to 970.80 MT in October 2010 and 5470.02 MT in November 2010. On 27th November 2010 alone EARCs for a quantity of 4623.929 MT were sought. A further quantity of 662.736 MT was sought to be registered on 1st December 2010. Likewise, the figures have been given for other Petitioners in detail which show that there was a quantum leap in the months of October 2010 and November 2010 of the quantities for which EARCs were sought. According to Mr. Chandhiok, it was clear that the Petitioners were aware of

the impending ban and were trying to make the best of the situation.

34. As regards KKTL, Mr. Chandhiok pointed out that clause 7 of the terms and conditions of the permit/approval granted to it accounted for contingencies like the present one. Clause 7 of the terms and conditions reads as under:

“7. In the event of the unit failing to fulfill the terms & conditions of Letter of Permission (LOP)/Letter of Intent (LOI) and NFE as prescribed in the EOU Scheme, except when the fulfillment of such condition is prevented or delayed because of any law & order, proclamation; regulation/ordinance of the government of the shortfall in fulfillment of NFE is within the permissible norms specified in the monitoring guidelines given at Appendix 14-IC of the EOU Scheme the unit would be liable for penal action under the provisions of Foreign Trade (Development & Regulation) Act, 1992 and the rules & orders made there under.”

35. The learned ASG submitted that on the EOU making an appropriate representation, permission could be granted, on a case by case basis, for sale of a certain quantity of the production in the domestic market.

36. It is submitted that in matters of economic policy, the Courts will generally not interfere and that a policy does not become arbitrary only because it causes inconvenience to some persons. In support of this submission, reliance is also placed on the decisions in ***Darshan Oils Pvt.***

Ltd. v. Union of India (1995) 1 SCC 345, P.T.R. Exports (Madras) P. Ltd. v. Union of India (1996) 5 SCC 268, S.B. International Ltd. v. Asst. Director General of Foreign Trade (1996) 2 SCC 439, Shrijee Sales Corporation v. Union of India (1997) 3 SCC 398, State of Rajasthan v. J.K. Udaipur Udyog Ltd. (2004) 7 SCC 673 and Sophisticated Marbles & Granite Industries v. Union of India 169 (2010) DLT 110.

Validity of the Press Release dated 1st December 2010

37. The first issue to be considered is whether the ban on export of cotton yarn could have been imposed on 1st December 2010 in the form of a Press Release by the MoT?

38. The facts in *Agri Trade India Services Pvt. Ltd. v. Union of India* were that a ban was imposed on the export of chickpeas with effect from 22nd June 2006. On that date, the Finance Minister announced the ban to the Press soon after the Cabinet Meeting on Pricing. The electronic media reported the ban on 22nd June 2006 itself. The newspapers of 23rd June 2006 prominently reported the ban. However, the formal notification of the ban on the export of chickpeas was issued under Section 5 FTDR Act only five days later on 27th June 2006. A second notification was issued on 4th July 2006 purporting to amend the earlier Notification dated 22nd June 2006. By the said amendment it was announced that transitional arrangements notified under

Para 1.5 of the FTP shall not be applicable for export of pulses against irrevocable LCs opened on or after 22nd June 2006 “as the decision of the Government prohibiting the export of pulses was announced and got widely publicized on 22.6.2006 in the electronic and print media.”

39. The main ground on which the Petitioners in the said case questioned the validity of the Notification dated 4th July 2006 was that it was a piece of a delegated legislation and even if the Central government could restrict or prohibit the export of certain goods it cannot seek to make it retrospective with a view to adversely affect contractual and obligatory rights that have already accrued. It was submitted that the effect of the Notification dated 4th July 2006 prohibiting the export of chickpeas, was to treat the date of the ban as 22nd June 2006 when a decision to that effect was taken by the Cabinet Committee on Pricing and not 27th June 2006 when it was in fact notified in the Official Gazette. Consequently, one of the issues that this Court addressed in the *Agri Trade India Services Pvt. Ltd.*, was whether the Notification dated 4th July 2006 was *ultra vires* Section 5 of the FTDR Act. While answering this question, this Court held (DLT, pp.520-21):

“the only acceptable mode of bringing about the change in Policy is by a notification in the Official Gazette. Admittedly the ban on export of Chickpeas was notified on 27.6.2006 and it must be held that this was the date on which the ban became effective. We accordingly hold that there is no merit in the submission of the respondents that the ban imposed on the export of pulses became effective on 22.6.2006 when

it was announced in the media and not on 27.6.2006 when it was actually notified in accordance with the mandatory requirements of Section 5 of the Act.”

40. The Notification dated 4th July 2006 was struck down on the ground that it had not been gazetted as required by Section 5 read with Para 1.3 of the FTP. This Court also held that by way of the said Notification dated 4th July 2006, Para 1.5 of the FTP which dealt with transitional arrangements could not be done away with.

41. The appeal of the Union of India against the decision of this Court in *Agri Trade India Services Pvt. Ltd.*, and its appeal against the decision of the Gujarat High Court in the case of Asian Food Industries were heard together by the Supreme Court and disposed of by a common judgment in *Union of India v. Asian Food Industries*. The portion of this Court’s decision which held that the ban on export of chickpeas was effective only on 27th June 2006 when it was actually notified in consonance with the mandatory requirements of Section 5 FTDR Act was upheld by the Supreme Court. The conclusion that such a notification could only be prospective was also upheld. Para 48 of the decision of the Supreme Court in *Asian Food Industries*, reads as under (SCC @ p. 554):

“The Delhi High Court, however, in our view correctly opined that the notification dated 4.07.2006 could not have been taken into consideration on the basis of the purported publicity made in

the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of Sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof.”

42. Therefore, in light of the decision of the Supreme Court in *Asian Food Industries*, confirming a similar determination by a Division Bench of this Court in *Agri Trade India Services Pvt. Ltd.*, the first issue is answered in favour of the Petitioners. It is held that the Press Release dated 1st December 2010 issued by the MoT imposing a ban on the export of cotton yarn is *ultra vires* the FTDR Act.

Validity of the Notification dated 22nd December 2010

43. The first ground on which the validity of the Notification dated 22nd December 2010 is challenged is that in terms of Section 5 FTDR Act read with Section 3 (2) thereof it could have been issued only by the central government and not by the DGFT. Reliance in support of this submission is placed on the decision of this Court in *Atul Commodities Pvt. Ltd. v. Commissioner of Customs, Cochin*.

44. The entire text of the Notification dated 22nd December 2010 has already been extracted hereinbefore. A careful perusal of the said Notification shows

that it has been issued by the DoC in the MoCI. Although it is signed by the DGFT, when contrasted with the policy circular issued by the DGFT in terms of the said Notification, it is clear that while the policy circular has been issued from the Office of the DGFT, the Notification itself has been issued by the DoC in the MoCI. The mere fact that the Notification dated 22nd December 2010 is shown as having been signed by the DGFT does not mean that it has been issued by the DGFT.

45. This distinction is important since Supreme Court in *Atul Commodities Pvt. Ltd.*, explained that in terms of Section 5 FTDR Act, it is only the central government that can announce a policy or an amendment to a policy by a notification whereas the DGFT can only issue clarificatory circulars. In fact, the Supreme Court in the said case held that the policy circulars of DGFT would not have the force of law. The Supreme Court however upheld the Notification dated 19th October 2005 which was issued by the central government although signed by the DGFT. In the instant case the above distinction has been correctly observed. The impugned Notification dated 22nd December 2010 has been issued only by the central government although it has been signed by the DGFT. Likewise, the clarificatory Notification dated 29th December 2010 has been issued by the DoC in the MOCI. The said two notifications, therefore, cannot be held to be violative of Section 5 of the FTDR Act on this ground.

46. The other grounds of challenge to the ban on the export of cotton yarn by the Notification dated 22nd December 2010 would be dealt with hereafter. It is urged that the ban could not have been made retrospective. It could not apply to exports which were already in the pipeline prior to 22nd December 2010. In other words, it is sought to be urged that where export contracts have already been submitted for grant of EARCs prior to 22nd December 2010, and in certain cases even prior to 1st December 2010, they should be permitted to go through. Reliance is placed on para 48 of the judgment of the Supreme Court in *Asian Food Industries* upholding the judgment of this Court in *Agri Trade India Services Pvt. Ltd.*, to the extent it held that the ban on export of chickpeas could only be prospective.

47. A perusal of the notifications in *Agri Trade India Services Pvt. Ltd.*, and the Notifications in the present case would show that there are some similarities and differences. The similarity is to extent that the Notification dated 4th July 2006 banning the export of chickpeas in *Agri Trade India Services Pvt. Ltd.*, was made retrospective from 22nd June 2006 and Clause 1.5 of the FTP was made inapplicable to such exports that were in the pipeline prior to that date. In the present case the impugned Notification dated 22nd December 2010 makes Paras 1.4 and 1.5 of the FTP inapplicable from 1st December 2010. However, the transitional arrangement in Clause 3(ii) of the impugned Notification dated 22nd December 2010 was not

present in the Notification dated 4th July 2006 imposing a ban on the export of chickpeas. The second difference is that the Clause 3 (ii) as amended on 29th December 2010 permits all such exports in respect of which EARCs have been granted by the Textile Commissioner “within the quantity limit for which such registration certificate has been issued and within the validity of such registered contract” on or before 1st December 2010.

48. In para 48 of its decision in *Asian Food Industries* the Supreme Court affirmed this Court’s decision that the ban on export of chick peas could only be prospective. However this meant that only those exports were permitted which satisfied the requirements of Section 51 of the Customs Act, 1962 in terms of which the exporter should have paid the duty and the proper officer should have made “an order permitting clearance and loading of the goods for exportation.” In other words, only those consignments that had been cleared for export by the customs prior to 27th June 2006 were allowed to be exported. Consequently, the ban was held inapplicable to the consignments in the Gujarat case which had been cleared for export prior to 27th June 2006. The ban was however held applicable to the consignments in the Delhi cases since only LCs had been opened and the goods had not been cleared for export as on 27th June 2006. To that extent the retrospective impact of the ban was upheld by the Supreme Court. This has to be understood in the context of the following observations in para 49 (SCC, p.

554):

“In construing such a prohibitory order, whereas the rule of strict construction must be followed, the interpretation which subserves the intention of the central government as laid down in the policy as well as in the procedure should be given effect to. A statute as is well known may have to be construed in the light of the subordinate legislations framed thereunder. When subordinate legislation has been framed by the same authority which exercises the power under the policy, the intention of such policy-maker must be found out from the words used therein albeit having regard to the rights of the exporters which are sought to be protected thereby.”

49. Consequently, in the present case it is not possible to hold that the impugned Notification dated 22nd December 2010 is bad in law only because it imposes the ban on export of cotton yarn retrospectively. It is necessary to discern “the intention of the central government as laid down in the policy as well as in the procedure” imposing the ban. Prior to the imposition of the ban, the export of cotton yarn was no doubt free but was subject to two conditions. First, an EARC had to be obtained from the Textiles Commissioner prior to the shipment and second, the Customs Authorities had to clear the consignments after verifying the EARC. The impugned Notification dated 22nd December 2010 imposed an additional requirement that the export had to be within the overall limit of 720 million kgs. Incidentally, this is a further aspect that makes the impugned Notification dated 22nd December 2010 (as amended on 29th December 2010) different

from the Notification dated 27th June 2006 in *Agri Trade India Services Pvt. Ltd.* The decision to place a cap of 720 million kgs on the exports of cotton yarn for the year 2010-2011, i.e. till 31st March 2011 was a policy decision based on prior consultation with the CYAB. The ban would apply once that limit was reached. It could be reached on a date even prior to 22nd December 2011. In the context of the applicability of the ban, it is not the date of the Notification but the date on which the cap on the quantity of exports is reached that is relevant. Even if it is held that the impugned Notification dated 22nd December 2010 is prospective, if in fact the cap of 720 million kgs. is reached on an earlier date, the ban would anyway become operative from that date notwithstanding that an EARC may have been issued thereafter.

50. A unique aspect of the present cases is that the cotton yarn manufacturing industry was aware that there was going to be a ban on the export of cotton yarn at least more than a month prior to the ban actually coming into force. The minutes of the CYAB meeting held on 29th October 2010 make it abundantly clear the decision on imposition of a cap of 720 million kgs on exports was taken on that date. The said decision was taken on the basis of data collected for the past years and for the current year till the end of October 2010. The correlation between the demand for cotton yarn in the domestic market and the quantity of exports was taken note of.

The figure of 720 million kgs was arrived at after reviewing the figures of projected production of cotton yarn and the projected exports for 2010-2011. It has been explained that but for the intervention by the central government, on the advice of the CYAB, the extreme volatility in the prices of cotton and cotton yarn would have had a devastating effect on the domestic industry and the livelihood of millions of handloom weavers, the knit wear industry, the garment manufacturers and power loom weavers. It is therefore not possible to hold the decision to be irrational or arbitrary or without consulting the cotton yarn industry.

51. That the cotton and cotton yarn industry was aware of the impending ban, is apparent from the abnormal increase in the number of EARCs sought by the cotton yarn manufacturers in general and the six Petitioners in this Court in particular. The factual details in this regard set out in the counter affidavit and additional affidavit filed by the Union of India have not been denied by the Petitioners. The EARCs sought by cotton yarn manufacturers for the months of October 2010 and November 2010 were several times higher than those for the previous months of 2010 and the corresponding months in the earlier years. The news of the impending ban triggered a panic reaction in the cotton yarn industry leading to a rush to obtain EARCs. Relevant to the case of GAEL, in the counter affidavit of the Respondents it

is stated as under:

“In the Regional Office of Ahmedabad alone, while the average quantities registered between April 2010 till October, 2010 was in the range of 3708 MT, the quantity for registration submitted in the month of November, 2010 was to the tune of 10378.25 MT. Thus there was an almost 300% increase. In the case of the Petitioner (GAEL) alone, while the average quantity of registration sought between April 2010 and October, 2010 was 875 MT, in November-December 2010 alone a quantity of approx. 6000 MT was sought to be registered. It is, therefore, wholly impractical to suggest that irrespective of the quantity of contracts submitted for registration by the various exporters, the office of the Textile Commissioner was obliged to issue the EARC on the very same day. In any event, when the total quantity of registered contracts reached the thresh-hold limit of 720 Mn. Kgs., further issuance of EARC was stopped altogether. Further, it is submitted that this figure of 720 Kgs was arrived at after careful evaluation of demand and supply figures and taking into account the requirement of domestic industry in general. Notwithstanding, however, the total quantity of EARC issued to the Petitioner during the period April, 2010 to November, 2010 was 6975 MT which is 23.05 % of the total EARC issued by the Ahmedabad office. Having already exported such large quantities, it is not open to the Petitioner to contend that it had the vested right to continue exporting cotton yarn regardless of the devastating impact of unchecked exports on the domestic industry, on the national economy and on the employment of millions of people.”

52. In the above circumstances, the Petitioners can hardly argue that they

were not prepared for the ban which was announced on 1st December 2010. None of them can claim that they had altered their positions to their detriment and were, therefore, taken by surprise when the ban was imposed by the Press Release dated 1st December 2010. The facts of these cases negate the grounds of promissory estoppel or legitimate expectation. They also make these cases different from the decisions cited on the point.

53. The transitional arrangement in the form of Clause 3 (ii) of the impugned Notification dated 22nd December 2010 as amended by the subsequent Notification dated 29th December 2010 blunts the argument that the ban is arbitrary or irrational. The further Notification dated 24th January 2011 offers some relief to cotton yarn manufacturers. It permits exports of cotton yarn manufactured exclusively from imported raw cotton. The Respondents have further clarified in para 7 of the additional affidavit as under:

“7. That out of the total quantities for which EARCs were issued, exports amounting to 648.973 Million Kgs has taken place as on 25.01.11 as per the shipping bills submitted by the exporters. As per the procedure prescribed under the scheme, the exports are required to take place within 45 days of the issuance of EARCs and shipping documents are to be submitted within 21 days of date of shipment by the exporter. For unshipped quantities, the EARCs would stand cancelled. In respect of the balance unshipped quantity which will be known only by 5th Feb 2011, a decision would be taken regarding the criteria for issuance of licenses.”

54. It is expected that the MoT will, for the purposes of making such allotments, consider the pending applications for registration of EARCs in the chronological order in which the said applications have been made. The exact time of the submission of each applications for grant of EARCs would be registered on the computer system. For all of the above reasons, this Court is not persuaded to hold that the impugned Notification dated 22nd December 2010 is arbitrary or unreasonable and, therefore, violative of Articles 14 and 19 (1) (g) of the Constitution.

55. As regards the last submission that the Office of the Textile Commissioner acted with ulterior motives in adopting a 'pick and choose' policy to grant EARCs to some exporters and refuse them to others who applied on the same day, no concrete data has been placed on record by the Petitioners to substantiate such charge. It is stated that some of the Petitioners managed to upload their export contracts on the website of the Office of the Textile Commissioner prior to 1st December 2010 while some others failed to upload them due to the system being shutdown. Whether this was on account of any deliberate omission on the part of the Textile Commissioner's office would require investigation into disputed questions of fact which is not possible to be undertaken by this Court in exercise of its jurisdiction under Article 226 of the Constitution.

The case of KKTL

56. The argument advanced on behalf of KKTL that it is an EOU and therefore constitutes a separate class, is indeed an attractive one. However, given the policy of the need to control the price of raw cotton and cotton yarn in the domestic market, and given the fact that KKTL also purchases raw cotton from the domestic market for the manufacture of cotton yarn, KKTL cannot be said to be outside the purview of the ban on the export of cotton yarn.

57. In examining the submission that there was no overriding public interest to impose a ban on export of cotton yarn manufactured by EOUs, it is necessary to recapitulate the settled principles concerning the scope of judicial review in cases like the present one. In ***State of Madras v. V.G. Row*** it was observed (SCR, p.605):

“15. This Court had occasion in *Dr. Khare's case (1950) S.C.R. 519* to define the scope of the judicial review under clause (5) of article 19 where the phrase "imposing reasonable restriction on the exercise of the right" also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been

authorised. It is important in this context to bear in mind that the test of reasonableness, where ever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restrict and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.”

58. In the context of economic policy it was explained in *P.T.R. Exports (Madras) P. Ltd. v. Union of India* (SCC, p.272):

“5. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the

Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved.”

59. It is possible that the impact of the ban on KKTL would be proportionately far greater compared to the effect on other non-EOU manufacturers of cotton yarn. However that by itself will not persuade the Court to interfere with what is essentially a policy decision of the central government. As explained in *Secy. to Govt. of Madras v. P.R. Sriramulu*, (1996) 1 SCC 345 (SCC, p.356):

“15.....the State enjoys the widest latitude where measure of economic regulations are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria, adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue. It is settled law that in view of the inherent complexity of the fiscal adjustments, the courts give a large discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustment of an economic measure are available, the legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or there are better ways of adjusting the competing interests and the claims as the legislature possesses the greatest freedom in such areas. It is also well settled that lack of perfection in a legislative measure does not

necessarily imply its constitutionality as **no economic measure has so far been discovered which is free from all discriminatory impact and that in such a complex area in which no foolproof device exists, the court should be slow in imposing strict and rigorous standard of scrutiny by reason of which all local fiscal schemes may be subjected to criticism under the Equal Protection clause.**” (emphasis supplied)

60. Further in *Ugar Sugar Works Ltd. v. Delhi Admn. (2001) 3 SCC 635* (SCC, p. 643) it was held:

“It is well settled that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, **the mere fact that it would hurt business interests of a party, does not justify invalidating the policy.** In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State.” (emphasis supplied)

61. The arguments advanced on behalf of KKTL, therefore, do not merit acceptance. However, as stated by learned ASG for the Respondents, this will not preclude KKTL from representing to the Respondents that in view
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of the hardship caused on account of the ban on export of cotton yarn, it should be granted relaxation in the matter of compliance with the export targets and also be permitted to sell its production in the domestic market. Such representation when made will be decided expeditiously by the central government.

Conclusion

62. For all of the above reasons, this Court finds no merit in these petitions and they are dismissed as such with no orders as to costs. All the pending applications also stand dismissed.

S. MURALIDHAR, J.

FEBRUARY 17, 2011

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