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IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION (CIVIL) NO. 2491/2016

Reserved on: 26th October, 2018

VIRAJ IMPEX PRIVATE LIMITED Petitioner
Through: Mr. Balbir Singh, Sr. Advocate
with Mr. Rajesh Rawal, Advocate and Mr.
Ashok Kumar, AR of the petitioner.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Ravi Prakash, CGSC with
Mr. Nitish Gupta, Advs. for R-1 & R-2.
Mr. Sanjeev Narula, Sr. Standing Counsel
with Mr. Abhishek Ghai, Advocate for
CBEC.

WRIT PETITION (CIVIL) NO. 2502/2016

K. AMISHKUMAR TRADING PVT. LTD. Petitioner
Through: Mr. Balbir Singh, Sr. Advocate
with Mr. Rajesh Rawal, Advocate and Mr.
Ashok Kumar, AR of the petitioner.

Versus

UNION OF INDIA & ORS. Respondents
Through: Ms. Shreya Mathur and Mr.
Atul Batra, Advs. for UOI in W.P.(C)
2502/2016.
Mr. Sanjeev Narula, Sr. Standing Counsel
with Mr. Abhishek Ghai, Advocate for
CBEC.

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WRIT PETITION (CIVIL) NO. 2795/2016

RKB GLOBAL PVT. LTD.

..... Petitioner

Through: Mr. Balbir Singh, Sr. Advocate
with Mr. Rajesh Rawal, Advocate and Mr.
Ashok Kumar, AR of the petitioner.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Anurag Ahluwalia,
Advocate for UOI.

Mr. Sanjeev Narula, Sr. Standing Counsel with
Mr. Abhishek Ghai, Advocate for CBEC.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

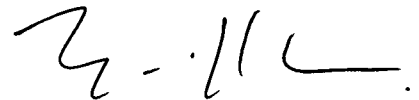
HON'BLE MR. JUSTICE CHANDER SHEKHAR

JUDGMENT

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21.12.2018

For detailed order, see *Vinayaga Marine Petro Limited versus Union of India and Others*, pronounced today.



SANJIV KHANNA, J.



CHANDER SHEKHAR, J.

DECEMBER 21, 2018

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WRIT PETITION (CIVIL) NO. 2489/2016

Reserved on : 26th October, 2018
Date of decision: 21st December, 2018

VINAYAGA MARINE PETRO LTD. Petitioner
Through: Mr. Balbir Singh, Sr. Advocate
with Mr. Rajesh Rawal, Advocate and Mr.
Ashok Kumar, AR of the petitioner.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Ravi Prakash, CGSC with
Mr. Nitish Gupta, Advs. for R-1 & R-2.
Mr. Sanjeev Narula, Sr. Standing Counsel
with Mr. Abhishek Ghai, Advocate for
CBEC.

WRIT PETITION (CIVIL) NO. 2491/2016

VIRAJ IMPEX PRIVATE LIMITED Petitioner
Through: Mr. Balbir Singh, Sr. Advocate
with Mr. Rajesh Rawal, Advocate and Mr.
Ashok Kumar, AR of the petitioner.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Ravi Prakash, CGSC with
Mr. Nitish Gupta, Advs. for R-1 & R-2.
Mr. Sanjeev Narula, Sr. Standing Counsel
with Mr. Abhishek Ghai, Advocate for
CBEC.

WRIT PETITION (CIVIL) NO. 2502/2016

K. AMISHKUMAR TRADING PVT. LTD. Petitioner

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Through: Mr. Balbir Singh, Sr. Advocate
with Mr. Rajesh Rawal, Advocate and Mr.
Ashok Kumar, AR of the petitioner.

Versus

UNION OF INDIA & ORS. Respondents
Through: Ms. Shreya Mathur and Mr.
Atul Batra, Advs. for UOI in W.P.(C)
2502/2016.
Mr. Sanjeev Narula, Sr. Standing Counsel
with Mr. Abhishek Ghai, Advocate for
CBEC.

WRIT PETITION (CIVIL) NO. 2795/2016

RKB GLOBAL PVT. LTD. Petitioner
Through: Mr. Balbir Singh, Sr. Advocate
with Mr. Rajesh Rawal, Advocate and Mr.
Ashok Kumar, AR of the petitioner.

Versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Anurag Ahluwalia,
Advocate for UOI.
Mr. Sanjeev Narula, Sr. Standing Counsel
with Mr. Abhishek Ghai, Advocate for
CBEC.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

The afore-captioned writ petitions raise similar issues and, therefore,
are being disposed of by this common order and judgment. The petitioners

herein Vinayaga Marine Petro Limited, Viraj Impex Private Limited, K. Amish Kumar Trading Private Limited and RKB Global Private Limited are private limited companies incorporated under the Companies Act, 1956 engaged in import and trading of various items including mild steel varieties like Hot Rolled Coils, Cold Rolled Coils, Hot Rolled Steel Plates, Pre Painted Steel Coils etc.

2. "Mild Steel Items" fall under Chapter-72 of the Indian Trade Clarification (Harmonized System) ('ITC-HS', for short)-2012, Schedule-I of the Foreign Trade Policy, 2015-20. These items were freely importable.

3. On 5th February, 2016, Notification No.38/2015-2020 ('Notification No. 38/2105-2020', for short) was issued by the Ministry of Commerce and Industry, Government of India, Directorate General of Foreign Trade by way of trade notice fixing Minimum Import Price ('MIP', for short) as per the annexure by amending Import Policy Conditions against Codes under Chapter-72 of the ITC (HS)-2012, Schedule-I. Notification No. 38/2015-2020 (dated 5th February, 2016) was subsequently published vide SO No. 391(E) in the Gazette of India on 11th February, 2016. Notification as published in the Official Gazette reads:-

"Ministry of Commerce and Industry
(Department of Commerce)
(DIRECTORATE GENERAL OF FOREIGN TRADE)

Notification

New Delhi, the 5th February, 2016

No. 38/2015-2020

Subject: Minimum Import Price (MIP) on Iron and Steel under Chapter 72 of ITC (HS), 2012 – Schedule -1 (Import Policy): amendment in import Policy Conditions.

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S.O. 391(E).:- In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992 read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends the Import Policy Conditions against 173 HS Codes under **Chapter 72** of ITC (HS), 2012 – Schedule -1 (Import Policy) as per the Annex subject to the following conditions:

a) Imports under Advance Authorisation Scheme are exempted from Minimum Import Price (MIP) under this Notification;

b) MIP is also exempted for all API grade steel conforming to X-52 and higher API grades for manufacturing pipes used for pipeline transportation systems in the petroleum and natural gas industries; and

c) MIP conditions laid down in this Notification are valid for six months from the date of the notification or until further orders, whichever is earlier;

2. Further, imports/shipments under Letter of Credit already entered into before the date of this notification shall be exempted from the Minimum Import Price condition subject to Para 1.05 (b) of Foreign Trade Policy, 2015-20.

3. **Effect of this Notification :** Minimum Import Price (MIP) is introduced against 173 HS Codes under Chapter 72 of ITC (HS), 2012 – Schedule- 1 (Import Policy) as detailed in the **Annex**.

[F. No. 01/89/180/Moni-5852/AM-03/Vol.-VI/PC-2 (A)]

Anup Wadhawan, Director General of Foreign Trade"

4. Contention of the petitioners is that as per the mandate of Section 3 of the Foreign Trade (Development and Regulation) Act, 1992, ('FT Act' for short) the Notification would be effective from the date of publication in the Gazette of India and not from the date when public notice or trade notice was issued. The trade notice dated 5th February, 2016 on the website of the Second Respondent-Directorate General of Foreign Trade had stated that this notice was "to be published in the Gazette of India: Extraordinary [Part-II]". Petitioners' have challenged the stipulation at paragraph no.2 of the Notification to the effect that import/shipments under Letter of Credit ('LoC', for short) already entered into before the date of the notification i.e. 5th February, 2016 shall be exempted from MIP condition subject to paragraph 1.05 (b) of the Foreign Trade Policy, 2015-2020. As per the petitioners, the date of notification should read as 11th February, 2016, i.e. the date on which the Notification No.38/2015-2020 was published in the Official Gazette and not 5th February, 2016, i.e., the date on which the trade notice was published. In support of the said contention, it is submitted that the respondents could not have imposed duties and restrictions retrospectively by way of subordinate legislation. Further, the Directorate General of Foreign Trade ('DGFT', for short) is not authorized to issue any notification, as this power under the FT Act vests exclusively with the Central Government.

5. The petitioners proclaim that they had entered into contracts with exporters from China and South Korea prior to 5th February, 2016. These contracts for import of different items were as per the prevailing international rates. They have relied upon the data of London Metal Exchange ('LME') for the same. For the purpose of record, we have

extracted details of the contracts entered into by the petitioners for import of mild steel items in the table below:-

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Petitioner	Exporter's name	Country of Export	Date	Rate Mumbai Basis	Total Amount	Port of loading	Port of destination
Vinayaga Marine Petro Ltd.	GS Global Corp.	South Korea	04/02/2016	\$325/ MT	\$1,170,000/-	Any South Korean Port	Mumbai Port
Viraj Impex Pvt. Ltd.	Future Materials Industry (Hong Kong) Co. Ltd.	China	03/02/2006	\$451/ MT \$455/ MT	\$906,000/- (451,000/- + 455,000/-)	Tainjin/ Shanghai Port	Mumbai Port (Lot No. 1) and Kandla Port (Lot no. 2)
K. Amishkumar Trading Pvt. Ltd.	GS Global Corp.	South Korea	04/02/2016	\$345/ MT \$335/ MT \$325/ MT	\$948,000/-	Any South Korean Port	Mumbai Port
RKB Global Pvt Ltd	M/s. Hyundai Corporation Korea	South Korea	29/01/2016	\$ 300/ MT \$ 325/ MT	\$901,061.28/-	Any port in Korea	Mumbai Port
RKB Global Pvt Ltd	Win faith Trading Limited.	China	04/02/2016	\$290/ MT \$ 280/ MT	\$215,000/-	Any port in China	Mumbai Port

6. The respondents have stated that Notification No.38/2015-2020 was issued after carrying out due diligence in the interest of the domestic steel industry. The exercise was aimed at correcting the market trend and to stop deceptive practices. Increase in MIP was a restrictive short- term measure to support domestic industry from import of low value steel. Paragraph 2 of Notification No.38/2015-2020 exempts imports/shipments under irrevocable LoCs already entered into before 5th February, 2016 and not thereafter. Reference was made to paragraph 1.05 (b) of the Foreign Trade Policy, 2015-2020, paragraphs 2.17 and 9.11 of Handbook of Procedure, 2015-

2020. By Trade Notice No.17/2016 dated 10th February, 2016, the respondents had point-wise clarified six queries raised by the importers, including the requirement of registration of the irrevocable LoC with the jurisdictional regional authority against computerized receipt within fifteen days of imposition of restriction/regulation. However, by another Trade Notice No. 03/2016 dated 11th April, 2016 timeline for importers to register irrevocable LoCs with jurisdictional regional authority was extended till 30th April, 2016. However, it is not disputed that Notification No.38/2015-2020 though dated 5th February, 2016 and put up on the web-site on 5th February, 2016 was published in the Official Gazette on 11th February, 2016.

7. Sub-sections (1) and (2) of Section 3 of the FT Act 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.”

Sub-section (1) of Section 3 of the FT act states that the Central Government may by an order published in the Official Gazette make provisions for the development and regulation of foreign trade for the purpose of facilitating imports and increasing exports. Mandate of publication of the order made by the Central Government in the Official Gazette is a condition prescribed to operationalize and make the order effective. Sub-section (2) of Section 3 of the FT Act states that the Central Government can also publish an order in the Official Gazette for prohibiting, restricting or otherwise regulating the import and export of goods, services or technology in all or specified cases subject to exception as was specified. Sub-section (2) also requires publication of the order in the Official Gazette.

8. Counsel for the respondents had drawn our attention to the word “also” used in Sub-section (2) of Section 3 of the FT Act to faintly urge that publication in the Official Gazette was only an additional or another and not the only mode to operationalize and enforce an order issued by the Central Government. It is not possible to accept this contention for the word “also” as used in Sub-section (2) to Section 3 of the FT Act is with reference to Sub-section (1) of Section 3 of the FT Act. Sub-section (2) to Section 3 of the FT Act carves out category of cases, which would possibly be covered under sub-section (1) to Section 3 of the FT Act itself. An order under Sub-section (1) or (2) to Section 3 of the FT Act would be an order in exercise of statutory powers conferred under the FT Act and would be in the nature of subordinate legislation. In both situations publication in the Official Gazette is mandated and required by Section 3(1) and (2) of the FT Act.

9. Whenever a legislation is published or made, it has to be publicised as was emphasized by the Supreme Court in *B.K. Srinivasan and Others*

versus State of Karnataka and Others, (1987) 1 SCC 658 in the following words:-

“15. There can be no doubt about the proposition that where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the “conscientious good man” seeking to abide by the law or from the standpoint of Justice Holmes's “unconscientious bad man” seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by parliamentary legislation. But unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or

is confined to small local areas. In such cases publication or promulgation by other means may be sufficient [Narayana Reddy v. State of A.P., 1969 (1) Andh WR 77]

The aforesaid quotation stipulates the proposition that every legislation, be it parliamentary or subordinate legislation, must be notified and this act of notification must be by means of publication or promulgation in a suitable and reliable manner. It is only from the date of publication or promulgation that the statute becomes effective and to be followed. Where the parent statute is silent, the subordinate legislation itself may prescribe the manner of publication, which it considers as reasonable. In the absence of stipulation, both in the parent statute and in the subordinate legislation, it will be effective only when it is published through the customarily recognized official channel i.e. Official Gazette or some other reasonable mode of publication. However, in cases where subordinate legislation concerns with a few individuals and confined to small local areas, other means of publication may be sufficient. Reference was made to *Narayana Reddy versus State of A.P.*, 1969 (1) Andh WR 77.

10. Reference in this regard can be also made to the judgment of a Full Bench of Kerala High Court in *R.K.V. Motors & Timbers (P) Ltd. and Others versus Regional Transport Officer and Another*, AIR 1982 Ker 156 in which Sukumaran J. had highlighted the modes of publication after referring to the jurisprudence on the said subject and earlier decisions of the Supreme Court including decision in the case of *Harla versus State of Rajasthan*, AIR 1951 SC 467.

11. The Supreme Court in *Union of India & Anr. versus Ganesh Das Bhojraj*, (2000) 9 SCC 461, decided the reference to resolve conflict of

ratios in *Pankaj Jain Agencies versus Union of India and others*, 1994 (5) SCC 198 and *CCE versus New Tobacco Company*, (1998) 8 SCC 282 on the question whether publication in the Official Gazette also mandates notification being made known and available to the public. We are not concerned with the said controversy in the present case for the issue raised in the present writ petitions is not whether publication in the Official Gazette was sufficient or the notification should have been made available to the public. The issue in the present cases is somewhat different. The contention of the petitioners is that the Notification No.38/2015-2020 though made public on 5th February, 2016 was published in the Official Gazette only on 11th February, 2016, and therefore prior notice in the form of trade notice, was not material and relevant. Judgment in *Ganesh Das Bhojraj (supra)* does emphasis on the publication in the Official Gazette.

12. The Supreme Court in *Union of India versus Param Industries Limited*, (2016) 16 SCC 692 had dealt with and examined the issue of customs notification under Section 14(2) of the Customs Act, 1962 (the 'Customs Act', for short) and has held that the condition of publication of notification in the Official Gazette is mandatory.

13. Recently, the Supreme Court in *Director General of Foreign Trade and Another versus Kanak Exports and Another*, (2016) 2 SCC 226 had held that subordinate legislation could only be prospective and not retrospective unless the rule making authority was vested with the power to make retrospective subordinate legislation under the statute. Section 5 of the FT Act does not give such power to the Central Government to modify the policy retrospectively.

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14. Therefore, in terms of the decisions we have no difficulty in holding that the Notification No.38/2015-2020 though made public by way of trade notice on 5th February, 2016 fixing MIP against 173 HS Codes under Chapter-72 of the ITC (HS)-2012, Schedule-I (Import Policy) would be effective and applicable from 11th February, 2016. However, this does not imply that the writ petitions would succeed and have to be allowed for the 'imports' into India were made on or after 11th February, 2016, i.e., the date on which the Notification has been published in the Official Gazette. Notification is not being given retrospective effect to make it effective to 'imports' made from a date prior to publication in the Official Gazette. Notification was effective from the date when it was published in the Official Gazette and accordingly would apply to 'imports' made on or after 11th February, 2016.

15. The question is somewhat different, it is; whether 'import' made after 11th February, 2016 would be exempt if the import/shipment were under the LoCs which were opened prior to 11th February, 2016. Petitioners have challenged paragraph 2 of the Notification No.38/2015-20 on the ground that it restricts benefit to LoC opened prior to 5th February, 2016 on which date Notification No.38/2015-20 was published as a trade notice but had not been published in the Official Gazette. According to the petitioners the date of publication in the Official Gazette should also be the date in paragraph 2 which relates to LoCs.

16. Decision of the Supreme Court in *Union of India and Others versus Asian Food Industries*, (2006) 13 SCC 542 is illustrative and makes an interesting reading for it had decided two appeals, one preferred against the decision of the Delhi High Court in the case of *M/s Agri Trade India*

Services (P) Ltd. and the other against the decision of the High Court of Gujarat in the case of *M/s Asian Food Industries* with contradictory final results. Decision of the Delhi High Court was set aside but decision of the Gujarat High Court was upheld though subject matter of litigation was a legal effect of the decision taken by the Central Government to ban export of pulses on 22nd June, 2006, which decision was widely reported in print and electronic media, albeit the notification issued banning export of pulses for a period of six months in exercise of power under Section 5 of the FT Act was published in the Official Gazette on 27th June, 2006. By another Notification on 4th July, 2006 published under Section 5 of the FT Act the Central Government had permitted export of pulses against irrevocable LoCs opened prior to 22nd June, 2006. In the SLP arising out of the Delhi High Court judgment in the case of *M/s Agri Trade India Services (P) Limited*, irrevocable LoC for export of pulses in favour of the Indian exporter was opened on 24th June, 2006, i.e., between 22nd June, 2006 when the Central Government's decision to ban export of pulses was reported in electronic and print media and 27th June, 2006 the date when the Notification banning export of pulses was published in the Official Gazette under Section 5 of the FT Act. In the case of *M/s Asian Food Industries* arising from the judgment of the Gujarat High Court contracts for export of pulses were executed between 22nd April, 2006 and 2nd May, 2006 and advance of approximately 20% of the contract value was received by the Indian party from the importers on 9th May, 2006. 20 containers out of 107 containers were shipped during the period 22nd June, 2006 and 24th June, 2006. Remaining 87 containers were also cleared vide Let export orders dated 23rd June, 2006, 24th June, 2006 and 26th June, 2006. The judgment specifically records that the bill of lading were also issued.

17. The reason for allowing the appeal of the Revenue in the case of *M/s Agri Trade India Services (P) Limited* and dismissing the appeal in *Asian Food Industries* were the statutory provisions of the Customs Act which it observed was enacted to consolidate and amend the law relating to Customs. Section 11 of the Customs Act it was held empowered Central Government to prohibit importation and exportation of goods and Section 16 provides for the date for determination of rate of duty and tariff valuation of export goods. After reproducing Section 16 and referring to Sections 39, 50 and 51 of the Customs Act and Sections 3 and 5 of the FT Act it was held that the charge or due date for determination of rate of duty and tariff valuation for export of goods would be either the date of payment of duty or in case of goods entered for export under Section 50 of the Customs Act-the date on which the proper officer made an order permitting clearance and loading of goods for exportation under Section 51 of the Customs Act. The provisions of the Customs Act and the FT Act were read harmoniously for the latter statute stands enacted to provide for development and regulation of foreign trade by facilitating imports in India and augmenting exports from India and for matters connected therewith or incidental thereto. Former statute was the substantive enactment dealing with levy, incidence of charge and payment of customs duty. For the FT Act, the Central Government was empowered to publish their order vide notification in the Official Gazette for development and regulation of foreign trade and make provisions for prohibiting, restricting or otherwise regulating in all cases or specified classes of cases and subject to such exceptions as may be made by or under order of export and import of goods. Where an order has been made under sub-section (2) to Section 3 vide sub-section (3) to Section 3 of the FT Act, it would be deemed to be applicable to import and export of which has been

prohibited under Section 11 of the Customs Act. All provisions of the Customs Act would have effect accordingly. On analysis of Section 11 of the Customs Act and the Notification dated 27th June, 2006 in exercise of power under Section 3 of the FT Act and published in the manner provided under Section 5 of the FT Act it was held that export of pulses was permissible till 27th June, 2006 and not thereafter. For deciding the date of export, Section 11 read with Section 50 of the Customs Act enjoined a duty upon the exporter to make entry by presenting the shipping bill to the proper officer and thereupon the proper officer was to arrive at a satisfaction (i) that the export of good was not prohibited and (ii) that the exporters had paid the duty assessed thereon and the charges payable there under. Thereupon, the Customs Officers would make an order for clearance and loading of the goods for export. Reference was made to the foreign trade policy, that whenever policy provisions as amended were disadvantageous to the exporters or importers, the same would not be applicable to consignments already handed over to the Customs for examination and subsequent export upto the date of public notice. Reference was also made to paragraph 9.12 of the policy. On the factual matrix in the case of *M/s Agri Trade India Services (P) Limited*, it was observed that the requirements of Section 51 of the Customs Act had been complied with in the said case, *albeit* in the case of *M/s Agri Trade India Services (P) Limited* they were not complied with. Referring to the decision of the Delhi High Court in *M/s Agri Trade India Services (P) Limited*, it was observed:-

“48. The Delhi High Court, however, in our view correctly opined that the Notification dated 4-7-2006 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.”

18. The aforesaid reasoning and ratio states that the notification published on 27th June, 2006 banning ‘export’ of pulses did not have retrospective effect, and would apply to the ‘exports’ made on or after 27th June, 2006 in terms of Sections 16, 50 and 51 of the Customs Act. Date of ‘export’ would be determined by reference to the date of ‘export’ as per the Customs Act. Thus, notwithstanding that an irrevocable LoC was opened on 24th June, 2006 the decision of Delhi High Court was reversed the ‘export’ was post 26th June, 2006 i.e. after the Notification dated 22nd June, 2006 had been published in the Official Gazette. However, in the case of ***Asian Food Industries***, the appeal preferred by the Revenue was dismissed with costs as the ‘export’ had taken place in terms of Sections 16, 50 and 51 of the Customs Act before publication of the Gazette Notification on 27th June, 2006. Exemption granted on the basis of the date of issue or opening of the LoCs could be different and such exemption could be restricted to the LoCs opened prior to 22nd June, 2006.

19. We would now refer to decision of the Supreme Court in ***Mangalore Refinery and Petrochemicals Limited versus Commissioner of Customs, Mangalore***, (2016) 14 SCC 709, which had examined the expression ‘import’ in the Customs Act after making a reference to sub-sections 22, 23 and 25 of Section 2 of the Customs Act which defines ‘goods’, ‘import’, ‘imported goods’, Section 12 dealing with dutiable goods, Section 13

dealing with duty on pilfered goods, Section 23 dealing with remission of duty on lost, destroyed and abandoned goods, Section 47 dealing with clearance of goods for home consumption and Rules 2(1)(f) and 4(1) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, to observe as under:-

“9. On a reading of the aforesaid provisions, it is clear that the levy of customs duty under Section 12 is only on goods imported into India. Goods are said to be imported into India when they are brought into India from a place outside India. Unless such goods are brought into India, the act of importation which triggers the levy does not take place. If the goods are pilfered after they are unloaded or lost or destroyed at any time before clearance for home consumption or deposit in a warehouse, the importer is not liable to pay the duty leviable on such goods. This is for the reason that the import of goods does not take place until they become part of the land mass of India and until the act of importation is complete which under Sections 13 and 23 happens only after an order for clearance for home consumption is made and/or an order permitting the deposit of goods in a warehouse is made. Under Section 23(2) the owner of the imported goods may also at any time before such orders have been made relinquish his title to the goods and shall not be liable to pay any duty thereon. In short, he may abandon the said goods even after they have physically landed at any port in India but before any of the aforesaid orders have been made. This again is for the good reason that the act of importation is only complete when goods are in the hands of the importer after they have been cleared either for home consumption or for deposit in a warehouse. Further, as per Section 47 of the Customs Act, the importer has to pay import duty only on goods that are entered for home consumption. Obviously, the quantity of goods imported will be the quantity of goods at the time they are entered for home consumption.

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10. Even under Section 14 of the Customs Act, when goods are to be valued for the purpose of assessment, such valuation is only when the goods are ordinarily sold or offered for sale for delivery *at the time and place of importation* in the course of international trade. It is thus seen that under the Customs Act, the levy of import duty cannot take place until goods are imported, that is, brought into India. Obviously, therefore, it is the quantity of goods brought into India alone that attracts the levy of import duty.

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14. We are afraid that each one of the reasons given by the Tribunal is incorrect in law. The Tribunal has lost sight of the following first principles when it arrived at the aforesaid conclusion. First, it has lost sight of the fact that a levy in the context of import duty can only be on imported goods, that is, on goods brought into India from a place outside of India. Till that is done, there is no charge to tax. This Court in *Garden Silk Mills Ltd. v. Union of India* [*Garden Silk Mills Ltd. v. Union of India*, (1999) 8 SCC 744], stated that this takes place, as follows: (SCC p. 752, paras 17-18)

“17. It was further submitted that in *Apar (P) Ltd.* [*Union of India v. Apar (P) Ltd.*, (1999) 6 SCC 117] this Court was concerned with Sections 14 and 15 but here we have to construe the word “imported” occurring in Section 12 and this can only mean that the moment goods have entered the territorial waters the import is complete. We do not agree with the submission. This Court in its opinion in *Sea Customs Act, 1878, S. 20(2), In re* [*Sea Customs Act, 1878, S. 20(2), In re*, AIR 1963 SC 1760 : (1964) 3 SCR 787] SCR at p. 823 observed as follows: (AIR p. 1776, para 26)

‘26. ... Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers i.e. before they form part of the mass of goods within the country.’

18. It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed.”

15. Secondly, the taxable event in the case of imported goods, as has been stated earlier, is “import”. The taxable event in the case of a purchase tax is the purchase of goods. The quantity of goods stated in a bill of lading would perhaps reflect the quantity of goods in the purchase transaction between the parties, but would not reflect the quantity of goods at the time and place of importation. A bill of lading quantity therefore could only be validly looked at in the case of a purchase tax but not in the case of an import duty. Thirdly, Sections 13 and 23 of the Customs Act have been wholly lost sight of. Where goods which are imported are lost, pilfered or destroyed, no import duty is leviable thereon until they are out of customs and come into the hands of the importer. It is clear therefore that it is only at this stage that the quantity of the goods imported is to be looked at for the purposes of valuation. Fourthly, the basis of the judgment of the Tribunal is on a complete misreading of Section 14 of the Customs Act. First and foremost, the said section is a section which affords the measure for the levy of customs duty which is to be found in Section 12 of the said Act. Even when the measure talks of value of imported goods, it does so at the time and place of importation, which again is lost sight of by the Tribunal. And last but not the least, “transaction value” which occurs in the Customs Valuation Rules has to be read under Rules 4 and 9 as reflecting the aforesaid statutory position, namely, that valuation of imported goods is only at the time and place of importation.”

20. Paragraph 14 of *Mangalore Refinery and Petrochemicals limited*(supra) quoted above refers to an earlier judgment of the Supreme Court in *Garden Silk Mills Limited versus Union of India*, (1999) 8 SCC 744, which holds that the import of goods into India would commence from the date the goods cross into the territorial waters but continued till the duty was paid when the goods become part of the mass of goods within the country. The taxable event was reached when the goods reach the customs barriers and bill of entry of home consumption was filed. In the facts of *Mangalore Refinery and Petrochemicals Limited* (Supra), it was observed that no import duty was leviable when the goods shipped were lost, pilfered or destroyed before the 'import' i.e. before the goods were out of customs and came into the hands of the importer. The quantity of goods stated in the bill of lading would reflect the quantity of goods in the purchase transaction between the parties and not the quantity of goods at the time and place of 'import'.

21. The aforesaid ratio in both *M/s Asian Food Industries* and *M/s Mangalore Refinery and Petrochemicals Limited* (supra) is apt and would apply to the present writ petitions. Notification No.38/2015-2020 dated 5th February, 2016 published in the Official Gazette on 11th February, 2016 was in force on the date of 'import' of goods by the petitioners as the 'import' was post publication in the Official Gazette on 11th February, 2016. We would not be giving retrospective effect to Notification No.38/2015-2020, when we hold that it would apply to all 'import' on or after 11th February, 2016. In fact, we would be following the ratio and mandate in *Asian Food Industries* (supra) and *Mangalore Refinery and Petrochemicals Limited* (supra). Consequently, the argument that the respondents have given retrospective

effect to the Notification No.38/2015-2020, which can be only prospective, falters and is rejected.

22. On the said aspect, we would like to refer to paragraphs 2.17 and 9.11 of the Handbook of Procedure and Appendices & Aayat Niryat Forms of FTP 2015-2020, which read as under:-

“2.17 Date of reckoning of import is decided with reference to date of shipment/dispatch of goods from supplying country as given in Paragraph 9.11 of Handbook of Procedures and not the date of arrival of goods at an Indian port.”

“9.11 Date of shipment/dispatch for imports will be reckoned as under:-

S.No	Mode of Transportation	Date of Shipment/Dispatch
(i)	By Sea	The date affixed on the Bill of Lading
(ii)	By Air	Date of relevant Airway Bill provided this represents date on which goods left last airport in the country from which the import is effected.
(ii)	From land-Locked Countries	Date of dispatch of goods by rail, road or other recognized mode of transport to consignee in India through consignment basis.
(iv)	By Post Parcel	Date stamp of office of dispatch on the packet or dispatch note
(v)	By Registered Courier Service	Date affixed on Courier Receipt/Waybill
(vi)	Multimodal Transport	Date of handing over goods to first carrier in a combined transport Bill of Lading

“

23. We would now examine the argument of the petitioners relating to the paragraph 2 of the Notification No.38/2015-2020 granting exemption of imports/shipments made under the irrevocable LoCs opened prior to 5th

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February, 2016 relying upon paragraph 1.05(b) of the Foreign Trade Policy, 2015-2020, which reads as under:-

“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 any 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.”

24. Foreign Trade Policy, 2015-2020 is in the form of delegated or subordinate legislation. Object and purpose of the Foreign Trade Policy was examined in *Asian Food Industries* (supra). A careful reading of paragraph 1.05(b) shows that the clause states that where import or export was freely permitted is subjected to any restriction or regulation, such restriction would not be given retrospective effect unless otherwise stipulated. This general principle is subject to the condition that the shipment of export or import should be made within the original validity period of any irrevocable commercial LoC, that was established before the date of imposition of such restriction. Exemption shall be restricted to the balance value and quantity available and time period for operationalization of such irrevocable LoCs and the applicant shall have to register the LoC with the jurisdictional revisional authority. Respondents in the present case by trade notice No.

3/2016 dated 21st April, 2016 had extended the date of registration till 30th April, 2016. The petitioners state that they had applied for registration of the LoCs within the stipulated period, but the registration was not granted on the ground that the LoCs had not been issued prior to the date of public notice, i.e., 5th February, 2016, notwithstanding the fact that Notification No.38/2015-2020 was published in the Official Gazette on 11th February, 2016.

25. The aforesaid submission, according to us, does not have any merit for the Notification No. 38/2015-2020 published in the Official Gazette on 11th February, 2016 in paragraph 2 specifically states that import/shipment under the LoCs entered into before the date of notification shall be exempt from the MIP, subject to the satisfaction of the conditions stated in paragraph 1.05 of the Foreign Trade Policy 2015-2020. Notification No.38/2015-2020 even if it was published in the Official Gazette on 11th February, 2016 had specific exemption in restricting the same to import/shipments under LoCs opened prior to the date of Notification, i.e., 5th February, 2016. Paragraph 2 of the Notification No.38/2015-2020 refers to the 'date of the Notification' and not the date on which it was published in the Official Gazette. In the present case, the LoCs were opened between 5th February, 2016 till 11th February, 2016, when the Notification No. 38/2015-2020 was uploaded on the web-site of the Respondents on 5th February, 2016 and was published in the Official Gazette on 11th February, 2016. No doubt, paragraph 2 refers to paragraph 1.05 of the Foreign Trade Policy 2015-2020, but in the context that the importers would comply with the conditions stated therein, i.e., the condition for registration. Conditions regarding opening of LOCs before 5th February, 2016 would over-ride and prevail over paragraph 1.05(b) of the Foreign Trade Policy 2015-2020, as provided and stated in the

clause itself. Expression “ unless otherwise stipulated” in paragraph 1.05(b) would apply as paragraph 2 of the Notification No.38/2015-2020 stipulates to the contrary. The factual position in the present writ petitions is identical in facts in the case of *M/s Agri Trade India Services (P) Ltd.* decided by the Supreme Court in *M/s Asian Food Industries* (supra), in favour of the Revenue.

26. In light of the aforesaid discussion, our conclusions are as under:-

(i) That Notification No.38/2015-2020 dated 5th February, 2016 would be effective and applicable to ‘imports’ made on or after 11th February, 2016, i.e., the date on which it was published in the Official Gazette. It would not apply to any ‘imports’ as made on 10th February or before.

(ii) In terms of paragraph 2 of the Notification No.38/2015-2020 dated 5th February, 2016 effective from date of publication in the Official Gazette on 11th February, 2016, an exemption has been granted for import/shipments under the irrevocable LoCs entered into before the date of the Notification, i.e., 5th February, 2016. For the purpose of paragraph 2 of the Notification No.38/2015-2020 dated 5th February, 2016, the date of publication in the Official Gazette is not prescribed and is not relevant. The date 5th February, 2016 is a valid date in respect of shipments/imports made under the irrevocable LoCs for this was the date on which the decision of the Central Government to impose MIP was put on the web-site and made known to public, though it was not gazetted.

27. The contention that the Gazette Notification quoted above is invalid as it was not an order of the Central Government under Section 3 read with Section 5 of the FT Act is erroneous and should be rejected. Notification in the heading states; published by the Ministry of Commerce and Industry, Department of Commerce, Director General of Foreign Trade. The first paragraph of the Notification records:-

“the Central Government hereby amends the import policy conditions against 173 HS Codes under Chapter 72 and had imposed the conditions as per annexure”.

Clearly, this is a Notification by the Central Government and not an act of delegated legislation exercised by the Director General of Foreign Trade under sub-section (3) to Section 6 of the FT Act. Section 6 (3) of the Act states that the Central Government may by an order published in the Official Gazette authorise the Director General or such other officers subordinate to him to exercise any power under the Act, except powers under Sections 3, 5, 15, 16 and 19. Therefore, exercise of powers under Sections 3, 5, 15, 16 and 19 of the FT Act cannot be delegated. Notification No.38/2015-2020 has not been issued by the Director General of Foreign Trade under a power delegated to him by the Central Government.

28. The Notification in question is issued by the Central Government and would be in terms of Article 77 of the Constitution of India. We would elaborate this aspect a little further, but first notice that the Director General of Foreign Trade is appointed by the Central Government under sub-section (1) to Section 6 of the FT Act. Director General is to advise the Central Government in formulation of Foreign Trade Policy and is responsible for carrying out the policy. As noted above, on plain reading of Notification No.38/2015-2020, it is apparent that the Notification was issued by the

Central Government, for the Notification states that Central Government hereby amends the import policy. The decision taken to amend and issue the Notification was of the Central Government.

29. Referring to the constitutional provisions, the Supreme Court in *Delhi International Airport Limited versus International Lease Finance Corporation and Others*, (2015) 8 SCC 446 had referred to Articles 77 and 163 of the Constitution and held that in respect of former Article, the Constitution stipulates that whenever executive action is taken by way of an order or instrument it shall be expressed to be taken in the name of the President in whom the executive power of the Union is vested. Under subsection (3) to Article 77, the President is to make Rules for more convenient transaction of business and allocation of same amongst Ministers. The Article does not provide for delegation of any power. Under the Government of India (Transaction of Business) Rules, 1961, the Government business is divided amongst Ministers and specific functions are allocated to different Ministries. We would not dilate further on Article 77 except to note that clause (2) to Article 77 provides that validity of an order or instrument made or executed in the name of the President, authenticated in the manner specified in the Rules made by the President, shall not be called in question on the ground that it is not an order or an instrument made or executed by the President.

30. The website of the Ministry of Commerce and Industry, Department of Commerce, states that Director General of Foreign Trade is an agent of the Central Government and attached office to it.

31. The Notification No.38/2015-2020 is a Notification of the Central Government under Section 3 read with Section 5 of the FT Act as stated in

the Notification itself. It is not a Notification published by Director General of Foreign Trade as a delegatee of the Central Government performing any act traceable to delegation under sub-section (3) to Section 6 of the FT Act. Merely because Director General of Foreign Trade had published the order on behalf of the Central Government/Government of India would not affect its legality and make the Notification invalid. Such notifications have been issued since long and we have come across, in fact, an order issued as early as on 31st December, 1993. The respondents have also pointed out that the Director General of Foreign Trade is *ex officio* Additional Secretary in the Government of India. This being the position, the second contention of the petitioners is rejected.

32. For the aforesaid reasons, the writ petitions are dismissed. However, in the facts of the case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

DECEMBER 21st, 2018
VKR/ssn