IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10001 OF 2014

1. Riddhisiddhi Bullions Limited, a company duly registered under the Companies Act, 1956 and having its Registered Office at 109, Sheikh Memon Street, Office No.17, 2nd Floor, Zaveri Bazar, Mumbai – 400 002. (through its Vice President Shri Mahendra Bafna)	]
2. Prithviraj S. Kothari	]
3. Bhawarlal S. Kothari	]
4. Mukesh M. Kothari All having office at 109, Sheikh Memon Street, Office No.17, 2nd Floor, Zaveri Bazar, Mumbai – 400 002.	] ... Petitioners

Versus

1. Union of India, through Central Govt. Advocates, having office at Aaykar Bhavan Annexe, 2nd Floor, M.K. Road, Mumbai-20.	]
2. Reserve Bank of India, Foreign Exchange Department, Central Office, Shahid Bhagat Singh Marg, Mumbai – 400 001. (through the Chief General Manager)	]
3. Additional Director General of Foreign Trade, Nishtha Bhavan, 28, Vithaldas Thackersey Marg, Churchgate, Mumbai – 4000 020.	] ... Respondents

Mr. I.M. Chagla, senior counsel with Mr. Prakash Shah, Mr. Riyaz Chagla, Mr. H.K.Sudhakara, Mr. Sanjay Agarwal and Ms. Neha Ahuja i/b Prompt Loyal for the Petitioners.

Mr. Rafiq Dada, senior counsel with Mr. Pradeep S. Jetly and Mrs. S.V. Bharucha for the Respondent Nos.1 and 2.

Mr. Kinshuk Kislaya i/b Udwadia Udeshi & Argus Partners for the Respondent No.2 – Reserve Bank of India.

CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

RESERVED ON : 21ST OCTOBER, 2015

PRONOUNCED ON: 23RD DECEMBER, 2015

ORAL JUDGMENT : *[Per S.C. Dharmadhikari, J.]*

1. In view of the earlier orders, we proceed to admit this petition. Hence, Rule. The respondents waive service. Since all pleadings are complete, by consent of both sides, the Writ Petition is disposed of finally by this judgment.

2. This Writ Petition under Article 226 of the Constitution of India questions the legality and validity of the Circulars, namely, Circular No.15 dated 22nd July, 2013, Circular RBI/2013-14/187 // A.P. (DIR Series), Circular No.25 dated 14th August, 2013 and RBI/2013-14/600 // A.P. (DIR Series) and Circular No.

133 dated 21st May, 2014, issued by the second respondent and proceedings consequent thereto initiated vide show-cause notice dated 14th October, 2014 so also the order passed in furtherance thereof dated 14th January, 2015. It is prayed that these be quashed and set aside.

3. The facts lay in a narrow compass. The petitioners claim to be one of the largest bullion dealers and petitioner No.1 is an Associate Member of the London Bullion Market Association and a member of the Bombay Bullion Association. It claims to be recognized as a Premier Trading House by the Government of India, Ministry of Commerce and Industry through the Office of the Zonal Joint Director General of Foreign Trade, which is valid till 31st March, 2016. On the basis of this certificate of recognition, a certificate as 'Nominated Agency' is also granted every year to the petitioners by the authorities under the Foreign Trade (Development and Regulation) Act, 1992 (for short "Act of 1992"). All this enables the petitioners to import precious metals in terms of paragraph 4A.4 of the Foreign Trade Policy. The Nominated Agency certificate (for short "NAC") is also claimed to be valid and subsisting.

4. The petitioners, namely, the company, its Vice President and Directors have sued the Union of India, the Reserve Bank of India, Foreign Exchange Department, Central Office, Mumbai and the Additional Director General of Foreign Trade, Mumbai Zonal Unit, DGFT, Mumbai. The reliefs mentioned above are sought in the following background.

5. On or about 7th August, 1992, Foreign Trade (Development & Regulation) Act, 1992 was enacted to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for matters connected therewith or incidental thereto. The Act confers powers upon Central Government for the development and regulation of foreign trade, by, *inter alia*, making provisions for prohibiting, restricting or otherwise regulating the import or export of goods. Section 5 of the Act permits Central Government to formulate and notify Foreign Trade Policy, and also to amend the same by issuing notifications in the Official Gazette. Section 6(3) of the Act permits conditional delegation of powers conferred under Sections 3 and 5, upon the Director General or

any other Officer subordinate to the Director General. Section 9(4) empowers the Director General or an Officer authorised by him, to suspend or cancel any licence granted under the Act, for good and sufficient reason, to be recorded in writing, and subject to such conditions as may be prescribed. Section 11 (2) of the said Act provides for imposition of penalty where any person makes or abets or attempts to make any export or import in contravention of any provision of the Act or any rules or orders made thereunder. Annexure-C to the petition is copy of the relevant provisions of the Foreign Trade (Development & Regulation) Act, 1992.

6. On or about 30.12.1993, the Foreign Trade Regulation Rules, 1993 were notified vide GSR 791(E) and published in the Gazette of India. Rule 10 permits the Director General or the Licensing Authority, by an order in writing, to cancel any licence granted under these rules. Rule 13 (2) prohibits disposal of any goods imported by any person against a licence except in accordance with the terms and conditions of such licence. Annexure-D to the petition is a copy of the Foreign Trade Regulation Rules, 1993, notified vide GSR 791(E) and published

in the Gazette of India.

7. Policy Circular No.77 (RE-2008)/2004-2009 was issued by Director General of Foreign Trade (for short "DGFT") prescribing guidelines for import of precious metals by the Nominated Agencies which included Premier Trading Houses. The monitoring mechanism and the format of Certificate for the said purpose, were also provided in the said Policy Circular. Annexure-E to the petition is a copy of the said Policy Circular no. 77 (RE-2008)/2004-2009 issued by DGFT. Subsequently Policy Circular 24(RE-2009-2014) was issued. Annexure-F to the petition is copy of the said Circular. Both these circulars were withdrawn vide Policy Circular 14(RE-2010)/2009-14 dated 1.02.2011, thereby relaxing the norms and doing away, inter alia, with the requirement of sale of 15% quantity to exporters. Annexure-G to the petition is a copy of the said Policy Circular 14(RE-2010)/2009-14 dated 1st February, 2011.

8. On 8th August, 2011, the petitioner No.1-Company was awarded status of "Premier Trading House" by the Ministry of Commerce. Prior thereto, the petitioner was awarded Certificate

of Recognition as Star Trading House on 09.09.2009. Annexure-H to the petition is a copy of the said Premier Trading House Status Certificate awarded by the Ministry of Commerce.

9. On 18th May, 2010, a Certificate as 'Nominated Agency' was granted to the petitioner No.1 by the DGFT for direct import of Precious Metals in terms of Para 4A.4 of Foreign Trade Policy. Annexure-I to the petition is a copy of the said Certificate as 'Nominated Agency' granted to the petitioner No.1 by the DGFT authorities on 18th May, 2010.

10. The said certificate for import of Precious Metals by Nominated Agency was thereafter renewed every year on various dates i.e. 15th March, 2011, 17th April, 2012, 9th April, 2013 and 5th May, 2014 with validity from 1st April of the respective year to 31st March of the next year. Annexures-J, K, L and M to the petition are copies of the said certificates styled as 'Nominated Agency' dated 15th March, 2011, 17th April, 2012, 9th April, 2013 and 5th May, 2014, respectively. Certificate dated 5th May, 2014 was issued with validity from 1st April 2014 to 31st March 2015. The following quantities of gold were imported upon issuance of

the said certificates as Nominated Agency in the financial years 2010-11 to 2013-14.

F.Y.	Quantity (kgs.)
2010-11	810
2011-12	1692
2012-13	21628
2013-14	22231
TOTAL	46361

Out of this total quantity of 46,361 kg of gold imported as Nominated Agency prior to issuance of the Certificate dated 5th May, 2014, the dispute raised by the Respondent No.3 is only in regard to 2 consignments of 100 Kg each, both shipped from UAE on 22nd July, 2013, which were handed over by the foreign supplier for supply before issuance of the impugned RBI Circular dated 22nd July, 2013.

11. Under Invoice Nos.USV-5274 & 75, both dated 22.07.2013 for Ahmedabad and Hyderabad respectively, two consignments of gold were shipped from UAE for importation into India. Annexures-N and O to the petition are copies of the said Invoices, both dated 22nd July, 2013 for Ahmedabad and Hyderabad.

12. The price for the shipment was fixed at "LONDON-AM-FIX" of 22nd July, 2013 on London Bullion Market Association at around 3.00 p.m. (10.30 a.m. London time) at US$ 1313.75 (London AM fixing rate for gold on 22nd July, 2013) + USD 0.25 (Fixing charges) + USD 2.50 (Supplier charges) = USD 1316.5 per ounce. Annexure-P to the petition is a copy of the said document showing fixing of price on London Bullion Market.

13. On 22nd July, 2013, the foreign supplier handed over the shipment at 4.30 p.m. and 4:35 p.m. (UAE time) to Brinks' Global Services, the renowned International Logistic Company handling Precious Metals, for onward transport to destination, for which Collection Notes were also issued by the said Brinks' Global Services evidencing the delivery time. Annexures-Q and R to the petition are copies of the Collection Notes issued by the said Brinks' Global Services evidencing handing over shipment at 4.30 p.m. and 4.35 p.m. on 22nd July, 2013.

14. The Customs procedure was completed in respect of the two shipments at Dubai time 18.00 hrs. and 18.05 hrs. and consequently, two airway bills bearing numbers 17652586273

(for Ahmedabad shipment) and 17652586262 (for Hyderabad shipment) both dated 22nd July, 2013 were issued at 19:21 hrs and 21:13 hours (both UAE time). Annexures-S, T-1 and T-2 to the petition are copies of the certificate issued by Brinks' Global Services showing time for completion of customs procedure at Dubai, for Airway bills bearing Nos. 17652586273 (for Ahmedabad shipment) and 17652586262 (for Hyderabad shipment) both dated 22nd July, 2013.

15. Subsequently, on the same day, the impugned Circular bearing No.15 dated 22.07.2013 was issued by the Reserve Bank of India (Respondent No.2) ["RBI" for short] and was uploaded on the RBI website at 19.47 hrs. The Circular contained the directions issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999). Both these provisions under FEMA empower RBI to issue directions to Authorized Dealers (Banks in the instant case). The said Circular also informed that -

> *"5. Government of India will be issuing separate instructions, if any, to the customs authorities / DGFT to operationalize and monitor these import restrictions."*

16. Two Bills of Entry, both dated 23rd July, 2013, were filed for the consignments upon their reaching the respective destination ports in India. Annexures-U and V to the petition are copies of the said Bills of Entry.

17. EDI Data dated 24th July, 2013 shows a query raised at Ahmedabad Air Customs Cargo – "Put up compliance to the RBI Circular no. 15 dated 22nd July, 2013", and satisfaction thereon. Annexure-W to the petition is a copy of the said EDI Data dated 24th July, 2013.

18. The Authorized Dealer permitted outward remittance for these consignments imported by the Petitioner vide ref. Nos.001IMPOR13098756 & 001IMPOR13098455. Annexures-X and Y to the petition are copies of the said documents evidencing outward remittance vide ref. Nos.001IMPOR13098756 & 001IMPOR13098455.

19. Thereafter, the goods were released from the Customs Authorities. This release was after considering inapplicability of the RBI Circular dated 22nd July, 2013, in respect of these goods.

20. On or about 14th August, 2013, RBI issued another Circular no. 25, referring to the said Circular no. 15 dated 22nd July, 2013, for clarification / modification in supersession of the earlier instructions, and made it incumbent on all nominated agencies to make exclusively available at least one fifth i.e. 20% of every lot of gold imported to the country, for the purpose of exports and the balance for domestic use. Further conditions were also imposed for such import referred as import of gold on 20/80 principle. The said RBI Circular also stipulated that Premier Trading Houses irrespective of whether they are nominated agencies or not, are permitted to import gold exclusively for the purpose of exports only. Para 5 of the said RBI Circular reads as follows:

> *"5. Government of India will be issuing separate instructions, if any, to the customs authorities / DGFT to operationalize and monitor the above requirements for import of gold."*

21. Consequently, in order to operationalize the RBI Circular no. 25 dated 14th August, 2013, the Central Board of Excise and Customs issued Instructions on 04.09.2013, which were made applicable with the repeated usage of word "henceforth".

Annexure-Z to the petition is a copy of the said Instructions dated 4th September, 2013 issued by CBEC operationalizing the RBI Circular No. 25 dated 14th August, 2013.

22. No corresponding Instructions issued in this regard by the DGFT have been brought to the notice of the petitioner.

23. On or about 27th September, 2013, the Directorate General of Export Promotion, Department of Revenue, Ministry of Finance issued instructions inter alia clarifying that gold imported between 22nd July, 2013 and 14th August, 2013, if pending clearance, should be cleared under the amended and clarified position in terms of RBI Circular dated 14th August, 2013 and CBEC Circular dated 4th September, 2013. Annexure-AA to the petition is a copy of the said Instructions dated 27th September, 2013 issued by Directorate General of Export Promotion, Department of Revenue, Ministry of Finance.

24. On or about 9th May, 2014, on being orally summoned, representative of the petitioners appeared in the office of the Respondent No.3 with the original Nominated Agency Certificate, which was retained by the office of the Respondent No.3 allegedly

for the purpose of verification and returning back to the petitioner No.1. The petitioners, on being asked, submitted details of utilization of gold for the respective years. The petitioners also submitted details of sale of the entire consignments and statement containing details of such sales/export was also submitted.

25. On or about 21st May, 2014, RBI Circular No.133 was issued providing revised Guidelines permitting thereby 'Premier Trading Houses', registered as 'Nominated Agencies' to import gold under 20:80 Scheme, subject to certain conditions. There is no allegation of violation of any of the conditions imposed vide the said RBI Circular.

26. On or about 3rd June, 2014, the office of the Respondent No.3 requested petitioner No.1 to submit a statement showing details of imports and exports done by it for the licensing year 2013-14 in the format enclosed therewith, which was received on 9th June, 2014. Annexure-BB to the petition is a copy of the said letter dated 3rd June, 2014 issued by the office of the Respondent No.3.

27. On 11th June, 2014, vide letter dated 10th June, 2014, a statement showing details of imports and exports for the financial year 2013-14 was provided by the petitioner No.1. Annexure-CC to the petition is a copy of the said statement.

28. On or about 24th June, 2014, the office of the Respondent No.3 sought further details from the petitioner No.1. Annexure-DD to the petition is copy of the said letter dated 24th June, 2014 issued by the office of the Respondent No.3.

29. On or about 1st July, 2014, the petitioner No.1 provided the necessary details and clarifications, which, *inter alia*, included details of imports effected against the said two airway bills dated 22nd July, 2013. Annexure-EE to the petition is a copy of the said letter dated 1st July, 2014, issued by the Petitioner.

30. On or about 17th July, 2014, further details were sought by the office of the Respondent No.3, requiring details of gold disposal against the aforesaid two bills of entry numbers 2783704 & 2784490 both dated 23rd July, 2013 with reference

to directives of the RBI Circular dated 22nd July, 2013. Annexure-FF to the petition is a copy of the said letter dated 17th July, 2014 issued by the office of the Respondent No.3.

31. On or about 25.08.2014, the petitioner No.1 submitted a letter dated 20.08.2014 seeking time of a fortnight for submitting the reply, as the concerned person was out of town and was to resume the office in the first week of September 2014. Annexure-GG to the petition is a copy of the said letter dated 20th August, 2014, issued by the petitioner No.1.

32. On or about 1st September, 2014, the petitioners submitted various details to the office of the Respondent No.3 with documentary evidence of time and negotiation, and delivery of shipment for further transportation to India. It was placed on record that the consignments covered vide the subject two bills of entry, were cleared by the Customs Authorities after verification and being satisfied about the correctness of the declaration and claims of the petitioners, upon payment of applicable customs duties. It was also pointed out that the remittances for the two shipments effected on 22nd July, 2013, were made by the

authorized dealer after taking into account the RBI Circular No.15 dated 22nd July, 2013. The petitioners also informed that exports were made against the consignments which were subsequently imported. Annexure-HH to the petition is a copy of the said letter dated 1st September, 2014, issued by the Petitioner.

33. On or about 8th September, 2014, RBI informed under the Right to Information Act that the exact timing of uploading of the Circular No.15 dated 22nd July, 2013 on RBI website was 19:47 hrs. on 22nd July, 2013. Annexure-II to the petition is a copy of the said reply dated 8th September, 2014 issued by RBI under RTI Act.

34. On or about 26th September, 2014, the petitioner No.1 informed the office of the Respondent No.3 vide letter dated 25th September, 2014, that the RBI Circular was uploaded on the website after the handing over of shipment at Dubai for further transportation to India. Annexure-JJ to the petition is a copy of the said letter dated 25th September, 2014, issued by the Petitioner and submitted on 26th September, 2014.

35. The Respondent No.3, on 14th October, 2014 (received on 18th October, 2014) issued a show cause notice under Section 14 read with section 11(2) of the Act of 1992, informing thereby that request for renewal of the Nominated Agency certificate cannot be considered for non-compliance with the conditions and RBI Circular No.15 dated 22nd July, 2013. By alleging violation thereby of Rule 13(2) of the Foreign Trade Regulation Rules, 1993, the show cause notice proposed fiscal penalty upon the Petitioner and its Directors. The show cause notice also offered a hearing on 28th October, 2014.

36. On or about 21st October, 2014, a preliminary reply dated 21st October, 2014 was submitted denying the allegations and claiming that the RBI Circular dated 22nd July, 2013 was not applicable for imports covered by shipments already handed over for exports to the airline. In the said preliminary reply, it was also submitted that due to festival (Deepawali) the petitioner No.1 was unable to submit detailed reply and to seek legal advice, and requested for some time to furnish the detailed reply and a reasonable opportunity of hearing. Annexure-KK to the petition

is a copy of the said preliminary reply dated 21st October, 2014 to the SCN submitted by the Petitioner.

37. On or about 31st October, 2014, an addendum to the show cause notice dated 14th October, 2014, was received at 3.42 p.m. from the office of the Respondent No.3 by fax. The said addendum to show the cause notice proposed cancellation of the Nominated Agency certificate dated 5th May, 2014 in terms of Section 9(4) of Act of 1992 and Rule 10 of FTR Rules, 1993.

38. As per the said addendum the personal hearing was scheduled for 11th November, 2014 at 11.30 a.m.

39. In none of the imports made by the petitioner No.1 except the aforesaid two shipments of 22nd July, 2013, whether before or after 14th August, 2013, any objection has been raised by the Respondent No.3. Even in regard to these 2 shipments the Customs Authorities were satisfied that RBI Circular had no applicability and hence permitted clearance thereof without obtaining any bond otherwise required to be submitted. Similarly, even the Authorized Dealer had permitted foreign remittances

against the said two shipments on being satisfied that the restrictions placed if any vide Circular dated 22nd July, 2013 were inapplicable for the said two shipments. There is no proceeding issued against the petitioner in this regard by either RBI or by the Customs Authorities. Neither any violation of FEMA nor any duty evasion has been alleged in this matter. The Respondent No.3, in fact, is sitting in appeal over the decision of the respective competent authorities in RBI and Customs.

40. On 31st October, 2014, a Purchase Order (Confirmation of Indent) for supply of 2000 Kgs of Gold was issued and sent by email at 3:57 pm to JP Morgan Chase Bank, NA London. Annexure-LL to the petition is a copy of the said Purchase Order (Confirmation of Indent) dated 31st October, 2014.

41. Promptly a reply was received from JP Morgan Chase Bank, NA London at 4:05 pm promising for scheduling the shipment. Annexure-MM to the petition is a copy of the said reply dated 31st October, 2014, received by e-mail from JP Morgan Chase Bank, NA London by the Petitioner.

42. Immediately thereafter, on the same date at 4.45 p.m., to utter shock of the petitioner, a drastic ex parte unreasoned suspension order issued by the Respondent no.3 was received by fax, which exhibited a complete biased approach and high handedness of the Respondent No.3. Annexure-NN to the petition is a copy of the said suspension order dated 31st October, 2014.

43. Petitioner submits that between 28th October, 2014, to 31st October, 2014, the petitioner No.1 has already entered into contractual obligation to supply precious metal including gold and silver to various local buyers under the 20/80 principles. Annexure-OO to the petition is a copy of the list of such buyers. Moreover, a consignment of 10MT of Silver was confirmed by the petitioner No.1 vide Purchase Order dated 30th September, 2014 and the same was likely to reach Indian Port by sea route in the next week thereafter. The goods ordered vide Purchase Order dated 31st October, 2014, i.e 200 kg of gold had also been confirmed.

44. Aggrieved by the said Suspension Order dated 31st October, 2014, the petitioners challenged the same before this Hon'ble

Court by preferring Writ Petition No. 9873 of 2014, which was allowed by order dated 3rd November, 2014 whereby this Hon'ble Court was pleased to set aside the Suspension Order impugned therein finding the action as high handed. Annexures-PP and QQ to the petition are copies of the said Writ Petition No. 9873 of 2014 (sans annexures) and the Order dated 3rd November, 2014 passed by this Hon'ble Court in Writ Petition No. 9873 of 2014.

45. It is pursuant to the above show-cause notice and the allegations therein that the third respondent passed an order on 14th January, 2015 and which was communicated by fax on 15th January, 2015, to the petitioner. It is aggrieved by the above that the present Writ Petition has been filed. There are two affidavits-in-reply which have been filed by the contesting respondents. There is also an affidavit-in-reply filed by the respondent No.2 – Reserve Bank of India. The petitioners have filed their rejoinder affidavits.

46. The justification for the action in the affidavit-in-reply of the third respondent has been set out in detail, but prior thereto, the third respondent in the affidavit-in-reply filed in this Court on

12th March, 2015, has submitted that the issue of illegality of the Circulars can be raised by the petitioner before the Appellate Authority. Therefore, when the petitioners have an alternate and equally efficacious remedy of filing an appeal in terms of section 15 of the Foreign Trade (Development and Regulation) Act, 1992, then, this Writ Petition should not be entertained.

47. Thereafter it is urged that the condition for import of any item has to be seen with specific reference to the Indian Trade Classification (Harmonised System) for export and import items [for short ITC (HS)] Schedule I. In the instant case, the petitioners have imported gold under ITC (HS) Code 071081200 and the entry in ITC (HS) Schedule I has a specific condition that the import is permitted, subject to the Reserve Bank of India's Regulations. Moreover the Nominated Agency Certificate also had a specific endorsement that it has been issued subject to the Reserve Bank of India guidelines among various other conditions. Thus there is no merit in the objection that Reserve Bank of India has no authority to impose conditions to regulate import of gold.

48. It is contended that the petitioners are importing gold on

the strength of the Nominated Agency Certificate. This certificate is the only instrument which makes them eligible for import of gold. This privilege was available only to the Nominated Agency Certificate holder. The other importers are ineligible to import gold. Once the certificate issued in favour of the petitioners contain a specific condition of compliance with Customs and RBI Regulations, then, upon importing gold the petitioners cannot complain either with regard to the power of the RBI or the condition.

49. On facts, it is stated that the import of gold by the petitioners has taken place on 23rd July, 2013 and not on 22nd July, 2013. As per section 2(e) of the Foreign Trade (Development and Regulation) Act, 1992, and section 2(23) of the Customs Act, 1962, the import in relation to goods means goods brought to India by land, sea or air. The import takes place only when the goods are brought into India. The date and time of import of goods is, therefore, the date and time of filing of the bill of entry and not the date and time of shipment of goods. The petitioners have imported 200 Kgs. of gold on 23rd July, 2013 which is the date indicated in bill of entry No.2784490 and bill of

entry No.2783704. Both these bills of entry are dated 23rd July, 2013. Thus, the imports were made after the Reserve Bank of India's Circular No.15 dated 22nd July, 2013, came into effect. The contention of the petitioners that they have not violated the conditions of the RBI Circular No.15 dated 22nd July, 2013 is without merit. Thus, any contrary contention cannot be accepted in the face of these admitted documents and their conditions. If the date and time of despatch of shipment in this case is only after issuance of the above Circular and after it was uploaded on the website, then, this Circular has been clearly violated.

50. For renewal of the Nominated Agency Certificate for the period 2014-2015, it is stated that it came to the notice of the Additional Director General of Foreign Trade, Mumbai, on 9th May, 2014 that his office had inadvertently and by oversight renewed this certificate. That was without due diligence as required under the provisions of para 4A.35 of the Handbook of Procedures. The NAC was renewed on 5th May, 2014, by the office of the Director General of Foreign Trade without verifying the half yearly return for the period 1st March, 2013 to 31st March, 2014. Further, it was observed that 550 Kgs. of gold had

been imported by the petitioners between 22nd July, 2013 and 31st March, 2014. The Additional Director General of Foreign Trade on 9th May, 2014, sent a copy to the Director General of Foreign Trade Headquarters stating that it was necessary to check the shipping bills, bills of entry and domestic invoices for satisfying as to whether the petitioners exported the gold imported by them as required by the Reserve Bank of India Circulars issued from time to time. After ascertaining this factual position, the office of the Additional Director General of Foreign Trade was directed to immediately call back the renewed NAC from the petitioners so that they do not make any further import against the same. The petitioners returned back this renewed NAC on 9th May, 2014. The petitioners were conscious of the fact that in the absence of the original or renewed certificate, they would not be able to import gold. On the advise of the Panel counsel, this renewed certificate was returned to the petitioners on 11th November, 2014. It is, therefore, urged that though not possessing this certificate, between 9th May, 2014 and 10th November, 2014, the petitioners imported 16000 Kgs of gold, the value whereof would approximately be Rs.4.342 crores. This act was also contrary to law.

51. On account of all such serious omissions on the part of the petitioners and breach and violation of law that by the Order-in-Original dated 14th January, 2015, the renewed NAC bearing the date of 5th May, 2014 (valid for 2014-2015) was cancelled from inception.

52. It is in these circumstances that in the subsequent paragraphs of this affidavit, the deponent sets out the details and denies the position on facts and law contrary to what has been urged and referred by us hereinbefore.

53. The role of the Reserve Bank of India has been highlighted in paragraph 19 of the affidavit. Though this comes from an authority under the Foreign Trade Act, it would be advantageous to refer to it. The RBI manages foreign exchange. It is urged that the foreign exchange reserve level shows the country's economic strength. A continuous increase in the imports of gold was resulting in a continuous reduction in foreign exchange reserves and consequently an increase in the Current Account Deficit. To curb this adverse position, the Government of India took various

steps and the RBI issued Circular No. 15 dated 22nd July, 2013, requiring Premier Trading Houses to import gold only for exports. A careful reading of the Circular throws light on the intention of the Circular and it casts a responsibility on all nominated agencies to utilise 20% of imported gold for export purpose, but in case of Star Trading House, Premier Trading House, Export Oriented Unit (EOU) and SEZ Unit, the imports were permitted exclusively for export purpose. In other words, Premier Trading Houses were under an obligation to export the resultant product to the extent of 100% of imported gold. By issuance of this Circular a clear line was drawn among the Nominated Agencies with one set of Nominated Agencies being put under obligation to export resultant product to the extent of 20% while another set of Nominated Agencies were subject to export 100% of resultant product out of the imported gold. The Petitioners being Premier Trading House were under an obligation to export 100% quantity of imported gold, as such they were not allowed to divert the imported material into domestic market.

54. All allegations with regard to the alleged unfairness or bias

of the Adjudicating Authority have been denied in paragraph 20 of this affidavit. The details of the personal hearing are then set out and it is submitted that the Reserve Bank of India is authorised to regulate the trade of precious metals, including gold. Under the Foreign Exchange Management Act, 1999 (For short "FEMA"), the Reserve Bank or India has full authority to regulate remittances and this Act read with the provisions of the Foreign Trade Policy would enable the RBI to regulate import of gold. Once the bill of entry also refers to the condition that import is subject to the RBI Regulations and the petitioners being aware of the same, then, all the more the technical objections deserve to be rejected.

55. If the dispute is related to two consignments of gold of 100 kgs. each and in which the petitioners have not followed the guidelines of the Reserve Bank of India's Circular No.15 dated 22nd July, 2013, then, for the reasons aforeindicated, it is prayed that the petition be dismissed. All the more when the consignments were imported against a NAC having validity from 1st April, 2013, to 31st March, 2014 bearing a specific condition that it is subject to RBI guidelines. The issuance of this certificate

is also in terms of the prescribed format and that is referred to in paragraph 27. Then the role of the two Circulars vis-a-vis import of gold by Export Oriented Units, Special Economic Zone Units, Premier Trading Houses and Star Trading Houses has been referred.

56. It is not necessary to refer to any denials nor is it necessary to then refer to further paragraphs of this affidavit, particularly on some factual details.

57. Thereafter reference is made in paragraph 38 of this affidavit to section 3 of the Foreign Trade Act empowering the Government for making provisions relating to imports and exports. Section 3(2) of this Act is quoted and it is submitted that paragraph 2.1 of the Foreign Trade Policy allows export and import of items under the free category. These items can be imported / exported without any specific permission in the said regulation. However, even these items can be subject to the condition / regulations of paragraph 2.1 of the Foreign Trade Policy. These provisions are that export and import shall be free, except when regulated. Such regulation would be as per Foreign

Trade Policy and/or ITC (HS) and if ITC (HS) contains the item-wise export and import Policy regime.

58. It is, therefore, urged that if a specific item has to been seen with reference to the ITC (HS), then, in the instant case, the petitioners imported gold bars under ITC(HS) Code of 71081200 and that relevant import policy allows it subject to the RBI Regulations. Therefore, there is no substance in the argument that RBI had no authority or power to restrict import of gold bars. Consistent with the above stand eventually the affidavit prays for dismissal of the petition also on merits.

59. To this affidavit with annexures, we find a rejoinder of one Mahendra Bafna. It is a joint rejoinder to the affidavit-in-reply of 12th March, 2015 and the additional affidavit-in-reply of 8th June, 2015. Before we make reference to this rejoinder affidavit, it would be necessary to refer to the additional affidavit-in-reply. According to the Joint Director of Foreign Trade, the additional affidavit-in-reply filed on 8th June, 2015, was necessitated in view of the developments during the pendency of the petition. It was also necessitated because, according to this deponent, the

Director General of Foreign Trade was required to place before the Court, a further fact that the petitioners imported 550 Kgs. of gold 100% of which had to be exported after making value addition as per the provisions of the RBI Circular No.15 dated 22nd July, 2013. However, out of these 550 Kgs. of gold, the petitioners exported 350 Kgs. only. There were no exports from the balance 200 Kg. of gold and this also violates the circular. The circular was issued to address the problem of the Current Account Deficit (CAD) related to foreign exchange management under the provisions of Indian Trade Classification (Harmonised System) for export and import items, import policy for gold and the Foreign Exchange Management Act, 1999. It is important for any country to address this problem since that would allow it to manage its foreign exchange reserves. Unsustainable deficit of foreign exchange in any country will result in macro financial instability and sudden reversal of capital flows which may occur. The high current account deficit is one of the biggest risks to the Indian economy and the Reserve Bank of India stated in May, 2013 that any further deterioration of the CAD would result in its policy reversal stance. It is in these circums2016tances that reliance is placed on a news item appearing in the daily "The

Hindu" dated 3rd May, 2013. It is highlighted, therefore, that a violation results in systemic damage, especially since the petitioners are one of the largest importers of gold and their acts are being watched by other importers. The petitioners are alleged to be habitual offenders. They are accused of indulging in serious economic offences continually. Therefore, in the additional affidavit in paragraph 12 B reference has been made to the cases of violation noted by the Income-tax Department, the Enforcement Directorate (ED) and Directorate of Revenue Intelligence (DRI), Ahmedabad. The offences that are alleged to have been committed pertain to money laundering etc.

60. Then, there is a reference made to certain raids carried out on some 40 premises of the petitioners, mostly in Mumbai and the details of bogus imports and exports obtained thereat. The affidavit makes an extensive reference to the arrest of the nephew of the Managing Director of the petitioner No.1. It has also been found necessary to refer to an order of arrest in connection with the multi-crore havala scam and the charge-sheet drawn by the Enforcement Directorate. It is in these circumstances that the track record of the petitioners is termed

as unclean and lacking in credibility. Once the petitioners are accused of serious economic offences, then, the adjudication order passed is fully justified.

61. There is an affidavit-in-rejoinder, as stated above, and the petitioners state that there is no merit in the objection that the Writ Petition is not maintainable and should be dismissed for availability of alternate efficacious remedy. It is urged that the same is not an absolute bar for entertaining this petition. It is submitted that as a fundamental question of illegality and validity of the Circular applied by the Director General of Foreign Trade is concerned, then, the Writ Petition be entertained and this Court should give authoritative pronouncement in that regard. It is reiterated that there is no power, authority and jurisdiction conferred in the Reserve Bank of India by FEMA or its predecessor enactment, viz. The Foreign Exchange Regulation Act, 1973, (for short 'FERA") to issue the subject circular seeking to restrict import of gold / bullion by a nominated agency. The various provisions of the said Act and that of The Foreign Trade Act, 1992, are relied upon to support this contention. Then, it is urged that there is no reasonable explanation or justification for

passing the impugned order and imposing a penalty on the petitioner-company of Rs.100 crore when the petitioners had paid total customs duty of Rs.4,08,94,132/- for the consignments in question to the satisfaction of the proper officer of Customs at Ahmedabad for home consumption without any restriction on domestic sales thereof, which otherwise was not payable if the clearance would have been permitted under bond only for exports on the basis of the impugned Circular dated 22nd July, 2013. It is submitted that the goods in question were delivered by the foreign supplier for shipment to India even before the issuance of the impugned Circular dated 22nd July, 2013. The beneficial provision of the Transitional Arrangements provided under the Foreign Trade Policy were also applicable specifically when in the matter of *M/s. Stonemann Royale Ltd.*, Writ Petition No.2120 of 2009 decided on 6th April, 2010, this benefit was extended on the finding that there was no restriction on the importation of goods concerned when the contract was made. Therefore, the Director General of Foreign Trade is bound to act in accordance with its concession in the case of *Stonemann* (supra). It is then stated further that paragraph 5 of the impugned circular makes reference to the instructions. No separate instructions were issued by the Central Government to the Customs authority / Director General of Foreign Trade to operationalise and monitor the alleged import restrictions. If the Government of India was to issue separate instructions to the Customs authority / Director General of Foreign Trade, then, so long as such instructions are not issued, the subject penalty is unsustainable. Reliance is placed upon a communication dated 19th March, 2015, received from the Deputy Commissioner of Customs, Hyderabad and certain information derived and obtained under the RTI Act, 2005, copies of which are at Exhibits 1 and 2 of this affidavit-in-rejoinder.

62. Thus, the petitioners reiterate their contention that the penalty is unsustainable and must be set aside. We need not refer to other contentions because throughout it is maintained that no Circulars are issued by the Central Government restricting or regulating the import. However, it is admitted that the petitioners are importing gold on the strength of their recognition as a Nominated Agency by issuance of the Nominated Agency Certificate. The petitioners are a Premier Trading House and have never applied for or obtained the status of "Authorised

Person" under section 10(1) of FEMA. It is not the case of the respondents that the petitioners are "Authorised Person" within the meaning of section 2(c) of FEMA. In these circumstances, it is denied that the import would be governed by the impugned RBI Circular.

63. It is then urged that assuming without admitting that the bill of entry was filed post the uploading of the impugned Circular on the RBI's website, that Circular itself provided that till the instructions were not issued by the Government of India, the Customs/Director General of Foreign Trade cannot operationalise the import restriction. In the absence of separate instructions issued by the Government of India, no proceedings could have been initiated by the Director General of Foreign Trade/Customs. Then it is urged that the petitioners have never contended that the date and time of despatch of shipment as indicated in the Airway bills is the date of import. Thus, alternate and without prejudice contentions have been raised essentially to support the primary plea. The other part of the Rejoinder is nothing but denials of what is said to the contrary by the petitioners.

64. The respondent No.2 – Reserve Bank of India has also filed an affidavit-in-reply in which in paragraphs 5 and 6, it is stated as under :

> *"5. I say and submit that the Reserve Bank (herein after to be referred as "**Bank**") is a statutory corporation, established under the Reserve Bank of India Act, 1934, to regulate the issue of bank notes and keeping of reserves with a view to secure the monetary stability of the country generally to operate the currency and credit system of the country to its advantage. The Bank is the central bank and the principal monetary authority of the country. The Bank, has been, inter alia, entrusted with the statutory obligation of administering the provisions of the Foreign Exchange Management Act, 1999 (herein after to be referred as "**FEMA**") and also to issue directions/guidelines under the Acts as it deem necessary.*
>
> *6. I say and submit that as enshrined in the preamble of the RBI Act, 1934, the Bank is custodian of foreign exchange and regulates the sale, purchase of foreign exchange including receipt of payment for export etc. The foreign exchange is a scarce commodity and its acquisition and disposal is regulated by the RBI so that the foreign currency reserves of the country are utilized to the benefit and development of the country. In terms of Section 5 in the FEMA the Central Government may, in public interest and in consultation with Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed. The said circulars were issued under Section 10(4) and 11(1) of the FEMA in consultation with Government of India. To curb the increasing Current Account Deficit (CAD) and in consultation with the GoI, RBI issued AP(DIR Series) Circular No. 15 dated July 22, 2013 requiring premier or star trading houses to import gold only for export purposes. Subsequent AP DIR circulars on Import of Gold by nominated banks/agencies/entities were also issued in*

> *consultation with the GoI to curb the ever increasing Current Account Deficit."*

65. It is then stated that there is enough power in the Reserve Bank of India to issue the impugned Circular. Reference is made to section 5, section 4(1) and section 11(1) of FEMA in that behalf. It is stated that to curb the increasing Current Account Deficit, and in consultation with the Government of India, the RBI issued Circular No.15 dated 22nd July, 2013, requiring Premier or Star Trading Houses to import gold only for export purposes. Subsequent AP DIR Circulars on import of gold by nominated banks/agencies/entities were also issued in consultation with the Government of India to curb the above deficit.

66. It is urged that the Nominated Agency Certificate was issued to the petitioner on the condition that it will abide by the guidelines issued by the Reserve Bank of India. Thus, the certificate issued by the Director General of Foreign Trade to the petitioners from time to time designating it as a Nominated Agency under para 4A.4 of the Foreign Trade Policy for the purpose of direct import of precious metal was subject to the provisions of Foreign Trade Policy and the procedure laid

thereunder, the RBI guidelines and the Customs' Rules and Regulations. The affidavit states that paragraph 4 of the Policy Circular No.39 (RE-2010)/2009-14 dated 19th August, 2011, regarding Consolidated Guidelines for import of precious metal by the Nominated Agencies issued by DGFT provides that "*The Policy and Procedure for import of precious metal shall be as per the guidelines stated in Foreign Trade Policy (FTP) and the relevant RBI Guidelines*". This circular also states that the Nominated Agencies may refer the RBI Guidelines as stated in A.P. (DIR Series) Circular No.2 dated July 9, 2004, paragraph B 15 of part III of Master Circular of RBI, as amended from time to time. This circular pertains to Import of Gold by (i) Export Oriented Units (EOUs), (ii) Units in SEZ/EPZ, and (iii) Nominated Agencies. Further ITS(HS) Codes or better known as Indian Trade Classification based on Harmonized System of Coding was adopted in India for import-export operations. Indian customs uses an eight digit ITC(HS) Code to suit the national trade requirements. ITC(HS) Code 71081200 (for gold) of import policy are subject to RBI Regulations and Central Government has clearly allowed RBI to regulate the import of gold. Thus reading all these together proves that the RBI has power to issue the impugned Circular and these Circulars are applicable to the petitioners also. In these circumstances, all the contentions raised by the petitioners about lack of power in the RBI are denied. It is stated that allowing imports in no way permits the petitioners to violate the Regulations to export 100% of the imported gold subsequently after the value addition. Allowing remittance by the Authorised Dealer Banks for the import done is also logical and within the Regulations. The violation of FEMA was committed by the petitioners subsequently by its action in not exporting the requisite quantum from the lots as mandated. Compliance with the statutes, laws and regulations of one regulatory entity does not give a blanket clearance to violate the statutes, laws and regulations of another authority. Even a failure to detect a violation by a monitoring authority at one point of time does not give blanket protection to the petitioners for violations detected subsequently. In the circumstances, there is a definite violation of the Circular and provisions of FEMA.

67. The assertion throughout in this affidavit is that the RBI is empowered to issue Regulations and restrict the import/export of bullion in pursuance of its duty to preserve the country's precious

foreign exchange in consultation with the Government of India. The stand of the other respondent is then adopted in paragraph 20 of this affidavit.

68. It is on the above materials that we have heard the learned senior counsel appearing for the parties.

69. Mr. Chagla, learned senior counsel appearing on behalf of the petitioners submits that the impugned order imposing penalty is *ex facie* erroneous, illegal being contrary to law. Mr. Chagla would submit that the Reserve Bank of India has no jurisdiction to regulate import of bullion. Mr. Chagla has invited our attention to page 253 of the paper book which is Annexure-UU, namely, a copy of the Order-in-Original which is impugned in the petition. Mr. Chagla would submit that the Order-in-Original proceeds on the footing that the petitioners had supplied 200 Kgs of imported gold vide bill of entry dated 23rd July, 2013 to domestic units. Thus, they failed to comply with the conditions of RBI Circular No.15 dated 22nd July, 2013. They have also violated the conditions of the Nominated Agency Certificate dated 9th April, 2013, and, therefore, violated Rule 13(2) of the Foreign

Trade (Regulation) Rules, 1993, which attracts section 9(4) and 11(2) of the Foreign Trade (Development & Regulation) Act, 1992, as amended. Mr. Chagla submits that the petitioners were also held guilty for violation of the conditions of the NAC because in terms of paragraph 4A.35 of the Handbook of Procedures 2009-2014, they were not eligible for renewal of the NAC for the period 2014-2015. That certificate is declared to be *ab initio* void.

70. Mr. Chagla submits that the findings in the impugned order would show that there is total non application of mind on the part of the Additional Director General of Foreign Trade. The Additional Director General of Foreign Trade ought to have realised that the reliance on the Circular of the RBI is totally misplaced. That Circular of the RBI (Annexure A-1 pages 43-44 of the paper-book) is addressed to all agencies nominated for import of gold. Mr. Chagla would submit that two paras of the Circular would demonstrate the same. It has not been mentioned in the Circular that imported gold cannot be made available for domestic use. Once it is not an absolute bar then that Circular should not have been applied at all to the imports of the

petitioners. Apart therefrom, Mr. Chagla would submit that this Circular was not notified in the Official Gazette. Mr. Chagla would submit that neither the Reserve Bank of India Act, 1934, nor the Foreign Exchange Management Act, 1999, particularly section 10(4) thereof or sub-section (1) of section 11 thereof would have application to a Nominated Agency. Section 10 speaks of an Authorised Person whereas section 11 spells out RBIs powers to issue directions to Authorised Person. There is no reference in these provisions to the Nominated Agencies. Further, the Reserve Bank of India is not the authority empowered by law to issue any instructions or directions regulating import of gold or bullion. Mr. Chagla submits that the Reserve Bank of India has no power to enunciate a policy to channelize the import of gold into India and its utilisation for export only. Mr. Chagla would submit that the reliance placed by the Director General of Foreign Trade on the Schedule-I - Import Policy below ITC(HS) 2012 is entirely misplaced. That refers to gold (including gold plated with platinum) unwrought or in semi manufactured forms or in powder form. The item relied upon, namely, 71081200 shows that the import is free. Merely because that refers to Reserve Bank of India Regulations does not mean that the subject transaction would fall within the purview of the same. Once the Reserve Bank of India's power and nature of its jurisdiction are noted and the provisions in that regard are seen in proper perspective, it is evident that the impugned order so far it places reliance on the RBI Circular and the ITC(HS) Code is entirely erroneous. Mr. Chagla has then invited our attention to Annexure-E page 76 of the paper-book, which is a Policy Circular No.77/2004-2008 dated 31st March, 2009, directed to all Regional Authorities, all Commissioners of Customs and the Exporting Community. That is containing guidelines for import of precious metal by the Nominated Agencies. It is submitted by Mr. Chagla that the Premier Trading Houses are entitled for direct import of precious metal and the monitoring mechanism provided therein vide paragraph 3 would make it clear that the only obligation is that at least 10% of the imports of each entity shall be supplied to the exporters. The Policy and procedure for import of precious metal shall be as per the guidelines stated in the Foreign Trade Policy and the relevant RBI guidelines. However, there were no RBI guidelines either in the form of Circular or otherwise when the imports by the petitioners took place. The petitioners have entered into the transaction prior to the Circular dated 22nd July, 2013 being issued. In these circumstances, Mr. Chagla would submit that, the impugned order insofar as it relies upon the above material cannot be sustained and must be quashed and set aside. The Joint Director General of Foreign Trade has acted beyond the jurisdiction vested in it by law. It has taken cognizance and note of certain instructions issued by authorities not contemplated by the Foreign Trade (Development & Regulation) Act, 1992.

71. Mr. Chagla has relied upon not only The Foreign Exchange Management Act, 1999, but The Foreign Exchange Regulation Act, 1973. Mr. Chagla has invited our attention to sections 13 to 17 incorporated therein to submit that these provisions are conspicuous by their absence in FEMA. Section 13 of the FERA contained restrictions on import and export of certain currency and bullion and no person shall, except with the general and special permission of the RBI or written permission of the person authorised in this behalf by the RBI, take or send out of India any Indian currency or foreign exchange other than foreign exchange obtained by him from a dealer or money changer. However, this restriction is evidently in the nature of a prohibition and our

attention is also invited to section 18 of the FERA in that behalf. As far as FEMA is concerned, our attention is invited to section 5 of the said Act to contend that current account transactions are covered by section 5 thereof and any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction. The reasonable restriction in terms of proviso to section 5 could have been imposed only by the Central Government may be in consultation with the RBI. However, that power cannot be exercised by the RBI. Our attention is also invited to the fact that these Circulars are in public domain. The display thereof on the website of RBI would show that as far as the petitioners transactions are concerned, they would not be falling within the purview of the same.

72. In any view of the matter, if the essential function of the RBI is to maintain control over reserves interlinked to import and export of gold, then, even that power will not enable it to issue the Circulars as are relied upon. Once the RBI itself lacked jurisdiction, then the Director General of Foreign Trade's order placing reliance on the Circular of the RBI is wholly illegal.

Consequently, the impugned order must fall to the ground for absence of jurisdiction or lack of power in the RBI. Mr. Chagla has placed reliance on a judgment of the Hon'ble Supreme Court in the case of *Atul Commodities Pvt. Ltd. vs. Commissioner of Customs, Cochin 2009 (235) ELT 385 (SC)* which outlines the power of the Government to make amendments to Foreign Policy. It is the Central Government which can, according to Mr. Chagla, make any changes or amendment in the foreign policy. Mr. Chagla has then relied upon a Division Bench judgment delivered by this Court to which both of us have been parties in the case of *Alfa Laval (India) Ltd. vs. Union of India 2014 (309) ELT, 17 (Bom.)*. Mr. Chagla has also placed reliance upon the addendum to the show-cause notice dated 30th October, 2014, and to submit that the same tries to improve upon the original allegations and thus make out a new case for the department.

73. Mr. Chagla would submit that sections 13 to 17 of FERA came to be amended later on and in that regard he submits that the words marked by asterisk in sub-section (1) "*any gold or silver or*" were omitted by Act 29 of 1993 with effect from 8th January, 1993. Similarly, the words "*gold, jewellery or precious*

stones" were omitted from sub-section (2) of section 13 of FERA by the same Amendment Act and with effect from the same date. This is relevant and germane, according to Mr. Chagla, for understanding the controversy. Mr. Chagla has also placed before us the Transitional Arrangements in Chapter 1A of the Foreign Trade Policy 2009-2014 Part 1 clause 1.4 to submit that on account of the same, there was no violation of the provisions of any law and the impugned order, therefore, ought to be set aside. Mr. Chagla has also relied upon the Policy Circular No.39 (RE-2010) 2009-2014 dated 19th August, 2011, containing consolidated guidelines for import of precious metal by the Nominated Agencies.

74. On the other hand, Mr. Rafiq Dada, learned senior counsel appearing for the Director General of Foreign Trade and Union of India would submit that there is no substance in any of the contentions of Mr. Chagla. He would submit that Mr. Chagla's arguments can be divided into two parts. Mr. Dada submits that Mr. Chagla's first contention that the petitioners had no remedy, save and except approaching this Court in its jurisdiction under Article 226 of the Constitution of India is fallacious inasmuch as

it overlooks section 15 of the Foreign Trade (Development & Regulation) Act, 1992. That Act by section 15 provides for an appeal and Mr. Dada would submit that there is an appeal against any decision or order made by an officer subordinate to the Director General and which appeal lies to any officer superior to the Adjudicating Authority authorised by the Director General of Foreign Trade to hear the appeal. If the objection is that the Joint Director is not a distinct functionary or authority from the Director General, even then an appeal lies against the decision impugned in this petition to the Central Government. Bypassing section 15 and when all contentions can be raised in Appeal is, therefore, impermissible in law. There may not be an absolute bar for entertaining a Writ Petition even in the face of an alternate equally efficacious remedy, but if it is complete and all the points can be raised therein, then, this Court should not entertain the present petition for that would set a wrong precedent.

75. The arguments of Mr. Chagla on the second point are met by Mr. Dada by pointing out the RBI guidelines have been quoted in extenso and in that regard a reference is made by Mr. Dada to

page 76 of the paper-book. He would submit that these guidelines invite the attention of the concerned persons, including Commissioners of Customs and Exporting Community so also Regional Authorities to Notification No.88 dated 22nd February, 2009, wherein additional Nominated Agencies had been notified under para 4A.4 of the Foreign Trade Policy for the purpose of direct import of precious metal for making it available to all concerned, in particular the exporting community requiring the metal for manufacture of its product. The guidelines cover the export of precious metal by Premier Trading Houses. Reference is made to para 4A.4 of the Foreign Trade Policy and Mr. Dada would submit that in clause 4 of these guidelines it is stated that the policy and procedure for import of precious metal shall be as per guidelines set out in the Foreign Trade Policy and relevant RBI guidelines. It is submitted that by Annexure-2 which is appended to Policy Circular No.77 dated 31st March, 2009, there is a reference in Note 4 to Nominated Agencies. They are obliged to follow the RBI guidelines and particularly, Circular No.2 dated 9th July, 2004 as amended from time to time. Mr. Dada would submit that the guidelines for import and supply of precious metal by Nominated Agencies may have been withdrawn by the

Director General of Foreign Trade on 1st February, 2011, by Policy Circular No.14, copy of which is at page 80, yet there is nothing erroneous or illegal when the Director General of Foreign Trade relies upon the RBI Circular No.15 dated 22nd July, 2013. The attempt of Mr. Dada is to demonstrate that Mr. Chagla's contentions, on lack of power in the RBI or the impugned order is erroneous or illegal because it refers to extraneous material are inaccurate and unacceptable. Once there are guidelines of the RBI so as to guide the Nominated Agencies in the import of precious metal, then, reference to the same cannot be criticized or assailed by the petitioners.

76. On the other hand, Mr. Dada would submit that all RBI Circulars are part of the Foreign Trade Policy. In that regard, he relies upon para 4A of the same. Mr. Dada then submits that all the licences are subject to the condition of compliance with the RBI guidelines. In that regard, our attention is invited to the certificate of recognition, copy of which is at page 81 of the paper-book. It is submitted that the certificate is referring to the provisions of the Foreign Trade Policy 2009-2014 and the status of Premier Trading House is in accordance therewith. The

certificate itself, copy of which is at pages 83 and 84 states that it is subject to the provisions of the Foreign Trade Policy and procedure laid down thereunder, RBI guidelines and the Customs, Rules and Regulations. Mr. Dada, therefore, submits that if the RBI is the controller and manager of foreign exchange, it controls the foreign exchange movement through its supervisory powers with the aid of its supervisory and controlling powers over the authorised dealers, then, it must be understood that it is the authorised dealer who remits foreign exchange abroad on behalf of the constituents, namely, the importers such as the petitioners. A condition imposed on the authorised dealer that it would have to comply with the RBI circulars and guidelines, then, those would bind equally the constituent of the authorised dealer. Mr. Dada would submit that a reading of the provisions of FEMA by Mr. Chagla is not proper inasmuch as it is a comprehensive enactment. Our attention is invited to the preamble to FEMA by Mr. Dada in this behalf. He also invites our attention to certain definitions and particularly the definition of the term "Foreign Exchange" as appearing in section 2 clause (n). He would also rely upon the allegations in the show-cause notice and in that regard our attention is invited to page 53 of the paper-book by

Mr. Dada. He would submit that by the addendum to this show-cause notice, it is amplified as to what are the violations and breaches committed by the petitioners. Mr. Dada would submit that in answer to these allegations, the petitioners do not question the authority of the RBI, but state that there is no violation of the subject Circular No.15 dated 22nd July, 2013, as the import was complete prior to the uploading of the same. For these reasons Mr. Dada would submit that every argument to the contrary should not be countenanced and the petition be dismissed.

77. Mr. Dada has relied upon the Foreign Trade Policy and the guidelines monitoring the import of precious metal by Nominated Agencies. He has also relied upon the Master Circular No.13 / 2013-2014 dated 1st July, 2013. Mr. Dada has also relied upon the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and finally he would submit that the RBI Circular dated 28th January, 2014, would denote as to how the prior Circulars, particularly Circular No.25 dated 14th August, 2013, stand withdrawn with immediate effect. These would demonstrate, according to Mr. Dada as to how the Circular dated

22nd July, 2013, was in force when the subject import took place.

78. The counsel appearing for the RBI has brought to our notice the series of Circulars commencing from Circular No.103 dated 13th May, 2013, Circular No.107 dated 4th June, 2013, Circular No.122 dated 27th June, 2013 and the Master Circular No.13 / 2014-2015 dated 1st July,2014 as amended upto 18th June, 2015. He would also support the stand of the Reserve Bank of India as enunciated in the affidavit-in-reply.

79. We have carefully perused the petition, the annexures thereto and all affidavits placed before us. We have also perused the compilation of documents tendered by the parties. We have also perused the statutory provisions and the decisions relied upon with the assistance of the counsel.

80. For properly appreciating the rival contentions, a reference will have to be made to certain relevant provisions of the statutes involved and relied upon.

81. The Reserve Bank of India Act, 1934, is an Act to constitute

a Reserve Bank of India. Its Preamble makes it clear that this Bank is constituted to regulate the issue of bank notes and the keeping of reserves with a view to secure monetary stability in India and generally to operate the currency and credit system to the country's full advantage. We need not refer to each section, but suffice it to say that Chapter II contains the provisions relating to incorporation, capital management and business. Chapter III is titled Central Banking Functions. Chapter III-A deals with collection and furnishing of credit information and Chapter III-B contains provisions relating to non-banking institutions receiving deposits and financial institutions. Then, the newly added Chapters viz. Chapter III-A, III-B, III-C and III-D have enabled the Reserve Bank to evolve such measures so as to prohibit acceptance of deposits by unincorporated bodies and regulations of transactions in derivatives, money or instruments or securities etc. Chapter IV contains the general provisions.

82. It is pertinent to note that the RBI transacts the business specified in section 17 one of which is to act as an agent for the Central Government or the State Government or any local authority etc. in business set out in sub-section (11) of section 17.

One of the business is the purchase and sale of gold and silver or foreign exchange. By sub-section (12) which is substituted with effect from 21st July, 1978 by Act 24 of 1978, the Reserve Bank of India can transact the business of purchase and sale of gold or silver coins and gold and silver bullion and foreign exchange and the opening of gold account with the Principal Currency Authority of any foreign country or the Bank For International Settlements or any International or Regional Banks or Financial Institutions formed by such Principal Currency Authority or by authorities of the Government of any foreign country. Chapter III titled as Central Banking Function, apart from obliging the bank to transact Government business and vesting it a right in that behalf, the RBI has also a right to issue bank notes and for that purpose, by section 23 it has an Issue Department. The issue of bank notes shall be conducted by the bank in an Issue Department which shall be separated and kept wholly distinct from the Banking Department and the assets of the Issue Department shall not be subject to any liability other than the liabilities of the Issue Department in terms of section 34. By section 33, the assets of the Issue Department consist of gold coin and gold bullion. The bank by section 40 undertakes transactions in foreign exchange and this section 40 has been substituted by Act 26 of 2006. Section 40 reads as under :

> "***40. Transactions in foreign exchange***.- *The Bank shall sell to or buy from any authorised person who makes a demand in that behalf at its office in Bombay, Calcutta, Delhi or Madras or its branches as the Central Government may, by order determine foreign exchange at such rates of exchange and on such conditions as the Central Government may from time to time by general or special order determine, having regard so far as rates of exchange are concerned to its obligations to the International Monetary Fund.*
>
> *Provided that no person shall be entitled to demand to buy or sell foreign exchange of a value less than two lakhs of rupees.*
>
> *Explanation.- In the section "authorised person" means a person who is entitled by or under the Foreign Exchange Regulation Act, 1973 (46 of 1973) to buy, or as the case may be, sell the foreign exchange to which his demand relates."*

83. A perusal thereof would indicate that the bank shall sell to or buy from any authorised person who makes a demand in that behalf, foreign exchange at such rates of exchange and on such conditions as the Central Government may from time to time by general or special order determine having regard so far as rates of exchange are concerned to its obligation to the International Monetary Fund. The proviso thereto says that no person shall be entitled to demand to buy or sell foreign exchange of a value less

than two lacs rupees. The explanation to this section defines the words "Authorised Person" and that is important because that means a person who is entitled by or under the Foreign Exchange Regulations of 1973 to buy or, as the case may be, to sell the foreign exchange to which his demand relates.

84. A survey of the Reserve Bank of India Act, 1934, leaves us in no manner of doubt that there is substance in the contentions of the learned advocate appearing on behalf of the Reserve Bank of India that the bank is the Custodian of foreign exchange and regulates the sale, purchase of foreign exchange, including receipt of payment of exports etc.

85. Then, comes The Foreign Exchange Regulation Act, 1973, which was in force till it was replaced and repealed by The Foreign Exchange Management Act, 1999. That is an Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and security transactions indirectly affecting foreign exchange and the import of currency for the conservation of foreign exchange resources of the country and a proper utilisation thereof in the interest of the economic

development of the country. Mr. Chagla makes much capital of the omission of the words "and bullion" from the preamble and from sections 13(1) and 13(2). So far as section 13(1) is concerned, the omission is of the words "any gold or silver" and "gold, jewellery or precious stones". However, we do not think that such omission can have any impact or would affect the controversy raised before us. It is clear that so long as the dealings in foreign exchange and securities transactions indirectly affecting foreign exchange and the import and export of currency so also conservation of foreign exchange resources of the country and the proper utilisation thereof in the interest of the economic development of the country are the common objects in both FERA and FEMA, then, that element necessarily brings in the Reserve Bank of India and the Ministry of Commerce, Government of India as well as the Directorate General of Foreign Trade. The FEMA has its object not only to consolidate and amend the law relating to foreign exchange, but that is with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. The terms/words "authorised person", "capital account transaction", "current account transaction", "foreign currency" and "foreign exchange" are defined. We would only reproduce definition of the term "authorised person" as appearing in section 2 clause (c) of The Foreign Exchange Management Act, 1999 :

> *"**2. Definitions.**- In this Act, unless the context otherwise requires, -*
> *... ... ...*
> *(c) "authorised person" means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities."*

86. The title of Chapter III is Authorised Person and, therefore, this definition is vital. By section 8 which is falling in the earlier Chapter, there is an obligation to realise and repatriate foreign exchange. There is a common thread and throughout flowing, namely, that it is the Reserve Bank of India through whom every deal and particulars of all transactions by whatever mode but in foreign exchange are routed. Section 8 reads as under :

> *"**8. Realisation and repatriation of foreign exchange.**- Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank."*

87. Then come sections 10 and 11 which read as under :

> *"10. **Authorised person.** - (1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.*
>
> *(2) An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein.*
>
> *(3) An authorisation granted under sub-section (1) maybe revoked by the Reserve Bank at any time of the Reserve Bank is satisfied that -*
>
> *(a) it is in public interest so to do; or*
>
> *(b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction or order made thereunder:*
>
> *Provided that no such authorisation shall be revoked on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter.*
>
> *(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.*
>
> *(5) An authorised person shall, before undertaking any transaction in foreign exchange on*

behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank.

(6) Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does not use it or such purpose or does not surrender it to authorised person within the specified period or uses the foreign so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provisions of the Act for the purpose of this section.

11. Reserve Bank's powers to issue directions to authorised person.*- (1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions make thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign exchange.*

(2) The Reserve Bank may, for the purpose of ensuring the compliance with the provisions of this Act or of any rule, regulation, notification, direction or other made thereunder, direct any authorised

> *person to furnish such information, in such manner, as it deems fit.*
>
> *(3) Where any authorised person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being heard, impose on the authorised person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues."*

88. A perusal of these provisions and jointly with other sections of the Act would reveal as to how firstly the Reserve Bank of India on an application made to it can authorise any person to be known as Authorised Person to deal in foreign securities as an authorised dealer, money-changer or off-shore banking unit or in any other manner as it deems fit. Sub-sections (2), (3), (4) and (5) of section 10 would enable us to hold that the Reserve Bank of India can monitor, regulate and control the activities of such Authorised Person and the dealings that he undertakes in foreign exchange. It is also able to check the unauthorised dealings in foreign exchange. Secondly, for all the above purposes the Reserve Bank of India is empowered to issue directions to the Authorised Person. That direction is in regard to making of payment or the doing or desist from doing any act relating to

foreign exchange or foreign security. By section 12, the Reserve Bank of India is empowered to inspect an Authorised Person. The other argument that penalties and which are to be imposed vide section 13 in Chapter IV of the FEMA can be imposed by the Reserve Bank of India but the impugned order has been passed an authority under The Foreign Trade (Development & Regulation) Act, 1992, fails to impress us.

89. Before setting out our reasons for rejecting this argument of Mr.Chagla based on sections 10 to 13 of the FEMA, it would be advantageous to refer to The Foreign Trade (Development & Regulation) Act, 1992. The argument in short and substance is that the Reserve Bank of India may be empowered to regulate the dealings in foreign exchange and foreign securities, but in exercise of such powers it can only proceed against the Authorised Dealer. In the garb of exercising such powers, it cannot regulate or restrict the imports. Before referring to The Foreign Trade (Development & Regulation) Act, 1992, we would dispose of this argument. It need not detain us because once it is conceded that the powers of the Reserve Bank of India as a controller of foreign exchange so also in terms of the Reserve

Bank of India, 1934, enable it to issue the directions to Authorised Person, then, such directions would also bind those claiming through the Authorised Person. In other words, if the Reserve Bank of India directs the Authorised Person to insist on certain compliances before the foreign exchange is released by it, then, it can proceed not only against the Authorised Person but others in the event they are not made. That would be evident from sub-sections (6) to (10) and from section 11 of the Act. Therefore, once foreign exchange is sought and to fulfill the commitments such as import, then, appropriate conditions and restrictions can be placed while releasing foreign exchange. The Reserve Bank of India could very well impose a condition that before the foreign exchange is released, certain directives issued by it to Authorised Person should also form a part of any authorisation enabling import. In any event, the authority permitting import of goods can certainly impose a condition that the importer will have to fulfill or act in accordance with the Reserve Bank of India directives, else it would not be in a position to obtain the release of foreign exchange. It is in pursuance of the same that the authorities under the 1992 Act have proceeded.

90. The Foreign Trade (Development & Regulation) Act, 1992, is an Act to provide for the development and regulation of foreign trade by facilitating imports into and augmenting exports from India and for matters connected therewith or incidental thereto. After the definitions are set out in Chapter-I which include that of import and export, by Chapter II powers have been conferred in the Central Government to make order and announce foreign trade policy. Section 3 confers a specific power and the Central Government, therefore, can make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. Once this order in relation to foreign trade policy is published in the Official Gazette that indicates the policy. The Central Government by order published in the Official Gazette may also 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, import or export of goods or services or technology. By sub-section (3) of section 3 it is clarified that all goods to which any order under sub-section (2) applies shall be termed to be goods, the import or export of which has been prohibited under section 11 of the Customs Act, 1962 and all the

provisions of that Act shall have affect accordingly. Thus, the Act of 1992 compliments the Customs Act,1962. It goes hand-in-hand with that enactment and does not authorise doing of anything or dealing in anything which is prohibited by the Customs Act, 1962. Then by sub-section (4) of section 3 it is stated that no permit or licence shall be necessary for the import or export of any goods nor any goods shall be prohibited for import or export, except as may be required under the Act of 1992, or Rules or orders made thereunder. Section 5 says that the the foreign trade policy may from time to time be formulated and announced by Notification in the Official Gazette and its amendment is permitted to be made by the Central Government.

90. Chapter III contains section 7 which reads as under :

> "***7. Importer-Exporter Code Number.*** *- No person shall make any import or export except under an Importer-exporter Code Number granted by the Director General or the officer authorised by the Director General in this behalf, in accordance with the procedure specified in this behalf by the Director General :*
>
> *Provided that in case of import of export of services or technology, the Importer-exporter Code Number shall be necessary only when the service or technology provider is taking benefits under the foreign trade policy or is dealing with specified services or specified technologies.*"

91. A perusal thereof would enable us to hold that it is not permissible to make any import or export except under an Importer-Exporter Code number granted by the Director General or the officer authorised by the Director General in this behalf. This authorisation is to be made in accordance with the procedure specified in this behalf by the Director General. By sub-section (8), the Director General is empowered to suspend and cancel the Importer-Exporter Code number. Then comes section 9 and which enables issuance of licence, suspension and cancellation thereof and this could be either a licence, certificate, scrip or any instrument bestowing financial or fiscal benefits. By sub-sections (2), (3) and (4), a renewal of such a licence etc. is permissible and the format of the same is prescribed. Even this licence is capable of being cancelled and in terms of sub-section (4) of section 9 and against such a cancellation or suspension the appeal would lie under section 15. Thus, these are the provisions under which the Central Government through its Ministry of Commerce and Zonal Director General (Joint) of Foreign Trade acted. It was empowered to impose conditions while granting or issuing the Certificates. Pertinently, the conditions at page 83 and the power to impose them are not challenged.

92. By Chapter IIIA, quantitative restrictions can be imposed by the Central Government and by Chapter IV search, seizure, penalty and confiscation is contemplated. By section 11, contravention of provisions of the 1992 Act, rules, orders and foreign trade policy is made punishable and sub-sections (2) and (3) of section 11 read as under :

> *"**11. Contravention of provisions of this Act, rules orders and foreign trade policy**.-*
> *(1) ... ...*
>
> *(2) Where any person makes or abets or attempt to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy, he shall be liable to a penalty of not less than ten thousand rupees and not more than five times the value of the goods or services or technology in respect of which any contravention is made or attempted to be made, whichever is more.*
>
> *(3) Where any person signs or uses, or causes to be made, signed or used, any declaration, statement or document submitted to the Director-General or any officer authorised by him under this Act, knowing or having reason to believe that such declaration, statement or document is forged or tampered with or false in any material particular, he shall be liable to a penalty of not less than ten thousand rupees or more than five times the value of the goods or services or technology in respect of which such declaration, statement or document had been submitted, whichever is more."*

93. We are, therefore, unable to agree with Mr. Chagla that a

conjoint reading of these provisions in the 1992 Act together with the Customs Act, 1962, would not empower the Director General in this case to impose penalty. As we have already held, the Reserve Bank of India has enough powers and, therefore, there is no basis for the complaint that it lacks jurisdiction or authority to regulate the dealings in foreign exchange. In the instant case, the Reserve Bank of India is doing precisely this and, therefore, it neither interferes nor takes over the powers of the competent authority either under the Act of 1992 or the Customs Act, 1962.

94. There is enough material on record which would indicate as to how the petitioners have understood the entire matter. In the Memo of the Petition and after referring to the relevant provisions, the petitioners refer to the Foreign Trade Regulation Rules, 1993, and Rules 10 and 13(2) of these Rules. It refers to the Policy Circular No.77 issued by the Director General of Foreign Trade prescribing guidelines for import of precious metal by the Nominated Agencies which include Premier Trading Houses. The monitoring mechanism and the format of the certificate for the said purpose are also provided in the Policy Circular. The petitioners have themselves annexed as

Annexures, a copy of this Circular dated 31st March, 2009. These are on the subject of the guidelines for import of precious metal by the Nominated Agency. These refer to Notification No.88 dated 28th February, 2009, wherein additional Nominated Agencies had been notified under paragraph 4A.4 of the Foreign Trade Policy for the purpose of direct import of precious metals for making it available to all concerned and in particular Exporting Community requiring precious metal for manufacture of its product. It is in terms of this paragraph that the agencies and entities mentioned in this Circular are entitled for direct import o precious metal. One of them is a Premier Trading House. Mr. Dada, therefore, is right in relying upon this Circular and to urge the the monitoring mechanism therein would permit and enable the Director General of Foreign Trade to direct that the policy and procedure for import of precious metal shall be as per the guidelines stated in the Foreign Trade Policy and the relevant Reserve Bank of India guidelines.

95. Upon a reference to these Circulars what the petitioners state that both these Circulars were withdrawn by a further Circular bearing No. 14 dated 1st February, 2011. That relaxes

the norms for doing away, *inter-alia*, with requirement of sale of 15% quantity to exporters. Annexure F is a copy of this Circular. It is evident that this relaxes the rigour of serial number 3(c) of the Circular No.1 dated 27th August, 2009 and to a certain extent of the Circular dated 31st March, 2009 (77 of 2009). However, the petitioners refer to the status of Premier Trading House granted by the Ministry of Commerce. It also refers to the certificate of recognition as Star Trading House dated 9th February, 2009. Though the petitioners rely upon the withdrawal of the Policy Circular No.77 of 2009 with effect from 1st February,2011 what the petitioners state is that they applied for issuance of a certificate as Nominated Agency. That certificate was granted and copy of which is at Annexure-I. That certificate itself states that the petitioners have been nominated as a Nominated Agency under paragraph 4A.4 of the Foreign Trade Policy as amended from time to time for the purpose of direct import of precious metal. This certificate is subject to provisions of the Foreign Trade Policy and the procedure laid down under the Reserve Bank of India guidelines and the Customs Rules and Regulations. This certificate as Nominated Agency has been renewed and even the renewals incorporate the same condition. It is, therefore, futile to urge that there was no obligation or duty to comply with the Reserve Bank of India guidelines. The petitioners have raised self-defeating and self-destructive pleas. On the one hand, they question the Reserve Bank of India's authority and jurisdiction to prescribe any guidelines by urging that the Reserve Bank of India is indirectly regulating and restricting import, but on the other hand by relying on their status as a Nominated Agency, the petitioners admit the applicability of Reserve Bank of India guidelines. They then urge that though the Reserve Bank of India guidelines would govern their dealings and that would include a Circular or directive issued by the Reserve Bank of India from time to time, but such imports do not violate the Policy Circular dated 22nd July, 2013. Such pleas being raised itself enables us to conclude that the petitioners are blowing hot and cold. They cannot approbate and reprobate as is rightly complained by Mr. Dada. We find much substance in the contentions of Mr. Dada that the petitioners have understood the matter as above. They have understood that the Reserve Bank of India guidelines have been quoted in the Foreign Trade Policy paragraph 4.4A and the Reserve Bank of India Circulars are part of the Foreign Trade

Policy. They have also understood that the licence issued is subject to the term of compliance with the Reserve Bank of India's guidelines. The status and position of the Reserve Bank of India is also known to the petitioners, namely, controller and manager of foreign exchange and that control and exercise by the Reserve Bank of India is through the Authorised Dealer. The petitioners being importers, the Authorised Dealer remits foreign exchange abroad on behalf of its constituents, namely, the importer. It is in these circumstances that the petitioners are aware of what provisions of law they were required to comply and in terms of the Nominated Agency Certificate. All terms and conditions as imposed by the NAC would have to be fulfilled by them. Any breach thereof, therefore, would empower issuance of a show-cause notice and demanding penalty.

96. The petitioners are aware that there was a Circular issued by the Reserve Bank of India on 22nd July, 2013.

97. With the assistance of the advocate appearing for the Reserve Bank of India we have perused the Circular issued on 13th May, 2013 by the Reserve Bank of India on the subject of

import of gold by Nominated Banks / Agencies. These circulars read as under :

"RESERVE BANK OF INDIA
Foreign Exchange Department
Central Office
Mumbai – 400 001

RBI/2012-13/499
A.P. (DIR Series) Circular No.103 May 13, 2013

To,
All Scheduled Commercial Banks which are
Authorised Dealers in Foreign Exchange

Madam / Sirs

Import of Gold y Nominated Banks/Agencies

Attention of Authorised Persons is invited to paragraph 97 of the Monetary Policy Statement 20123-14 dated May 3, 2013 regarding import of gold. In terms of AD(G.P. Series) circular No.7 dated March 6, 1998 (copy enclosed for ready reference), nominated banks/agencies were permitted to import gold on loan basis. Suppliers Credit/Buyers Credit basis, consignment basis as also on unfixed price basis.

2. The Working Group on Gold (Chairman : Shri K.U.B. Rao) had recommended aligning gold import regulations with rest of the imports for creating a level playing field between gold imports and other imports. Bulk of the gold imported by nominated banks is on consignment basis whereby nominated banks do not have to fund these stocks. To moderate the demand for gold for domestic use, it has been decided to restrict the import of gold on consignment basis by banks, only to meet the genuine needs of exporters of gold jewellery.

3. The above instructions will come into force with immediate effect. ADs may bring the contents of *this circular to the notice of their constituents and customers concerned.*

4. All other instructions relating to import of gold issued from time to time shall remain unchanged.

5. The directions contained in this circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law.

Yours faithfully,

(Rashmi Fauzdar)
Chief General Manager

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"RESERVE BANK OF INDIA
Foreign Exchange Department
Central Office
Mumbai – 400 001

RBI/2012-13/520
A.P. (DIR Series) Circular No.107 June 4, 2013

To,
All Scheduled Commercial Banks which are Authorised Dealers in Foreign Exchange

Madam / Sirs

Import of Gold y Nominated Banks/Agencies

Attention of Authorised Persons is invited to our A.P. (DIR Series) Circular No.103 dated May 13, 2013 on the captioned subject in terms of which, it was decided to restrict the import of gold on consignment basis by banks, only to meet the genuine needs of the exporters of gold jewellery. It has now been decided to extend the provisions of this circular to all nominated agencies/ premier / star trading houses who have been permitted by Government of India to import gold. Accordingly, any import of gold on *consignment basis by both nominated agencies and banks shall now be permissible only to meet the needs of exporters of gold jewellery.*

2. It has further been decided that all Letters of Credit (LC) to be opened by Nominated Banks / Agencies for import of gold under all categories will be only on 100 per cent cash margin basis. Further, all imports of gold will necessarily have to be on Documents against Payment (DP) basis. Accordingly, gold imports on Documents against Acceptance (DA) basis will not be permitted. These restrictions will however not apply to import of gold to meet the needs of exporters of gold jewellery.

3. The above instructions will come into force with immediate effect. ADs may bring the contents of this circular to the notice of their constituents and customers concerned. They are also advised to strictly ensure that foreign exchange transactions effected by / for their constituents are compliant with these instructions in letter and spirit.

4. All other instructions relating to import of gold issued from time to time shall remain unchanged.

5. The directions contained in this circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law.

Yours faithfully,

(C D Srinivasan)
Chief General Manager

- -

"RESERVE BANK OF INDIA
Foreign Exchange Department
Central Office
Mumbai – 400 001

RBI/2012-13/520

A.P. (DIR Series) Circular No.122 June 27, 2013

To,
All Scheduled Commercial Banks which are Authorised Dealers in Foreign Exchange

Madam / Sirs

Import of Gold by Nominated Banks/Agencies

Attention of Authorised Persons is invited to our A.P. (DIR Series) Circular No.103 dated May 13, 2013 & A.P. (DIR Series) Circular No.107 dated June 04, 2013 on the captioned subject in terms of which, it was decided to restrict the import of gold on consignment basis by banks, nominated agencies / premier / star trading houses who have been permitted by Government of India, to import gold only to meet the genuine needs of the exporters of gold jewellery. Further, it was advised that all Letters of Credit (LC) to be opened by Nominated Banks / Agencies for import of gold under all categories will be only on 100 per cent cash margin basis and imports of gold will necessarily have to be on Documents against Payment (DP) basis. Accordingly, gold imports on Documents against Acceptance (DA) basis will not be permitted.

2. It is clarified that consequent upon the issue of above instructions, import of gold on unfixed price basis has to necessarily observe the discipline stipulated relating to cash margins and Documents against Payment (DP) basis. In other words, AD Category I Banks are required to ensure that credit in any form or name is not enabled for import of any form of gold. Import o gold on loan basis may, however, continue to be allowed since the scheme envisages that the nominated banks/nominated agencies can import gold on loan basis for on-lending only to the exporters of jewellery in sync with the non-applicability of the above restrictions to exporters of gold jewellery.

3. AD Category I Banks are advised to strictly *ensure that foreign exchange transactions effected by / for their constituents are compliant with these instructions.*

4. All other instructions relating to import of gold issued from time to time shall remain unchanged.

5. The above instructions will come into force with immediate effect. Ads may bring the contents of this circular to the notice of their constituents and customers concerned.

6. The directions contained in this circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law.

Yours faithfully,

(Rudra Narayan Kar)
Chief General Manager"

97A. In the series of Circulars would appear the subject Circular, namely, Circular dated 22nd July, 2013, which reads as under :

" ***RESERVE BANK OF INDIA***

Date*: Jul 22, 2013*

Import of Gold by Nominated Banks / Agencies/ Entities

RBI/2013-14/148
A.P. (DIR Series) Circular No.15 July 22, 2013

To

All Scheduled Commercial Banks which are Authorised Dealers (Ads) in Foreign n Exchange/All Agencies nominated for import of gold.

Madam /Sir,

Import of Gold by Nominated Banks/Agencies /Entities

Attention of Authorised Persons is drawn to the Reserve Bank's A.P. (DIR Series) Circulars No.103, 107 and 122 dated May 13, June 04 and June 27, 2013 respectively on the captioned subject; As per these instructions, certain restrictions were imposed on the import of various forms of gold by nominated banks /nominated agencies/premier or star trading houses/SEZ UITS/ EoUs which have been permitted to import gold for use in the domestic sector. None of these restrictions was applicable to import of gold for the purpose of exports or to import of gold by units in SEZ, exclusively for the purposes of exports.

2. Based on a review of the above instructions and in consultation with the Government of India, it has been decided to rationalize the import of gold in any form/purity including import of gold coins/dore into the country. Accordingly, the following instructions are issued:

a) It shall be incumbent on all nominated banks/nominated agencies to ensure that at least one fifth of every lot of import of gold (in any form/purity including import of gold coins/dore) is exclusively made available for the purpose of export. Such imports shall be linked to financing of exporters by the nominated agencies (i.e. average of last three years or any one year whichever is higher). Further, they shall make available gold in any form for domestic use only to entities engaged in jewellery, business/bullion dealers supplying gold to jewellers.

b) They will be required to retain 20 per cent of the imported quantity in the customs bonded warehouses.

c) They are permitted to undertake fresh imports of gold only after the exports have taken place to the extent of at least 75 per cent of gold *remaining in the customs bonded warehouse.*

d) Any import of gold under any type of scheme, shall follow the 20/50 principle set out at (a) and (b) above. The extant instructions, as regards import of gold on consignment basis, LC restrictions etc. stand withdrawn.

e) A working example of the operation the scheme envisaged in terms the present instructions is given in the Annex.

3. Entities/units in the SEZ and EoUs, Premier and Star trading houses are permitted to import gold exclusively for the purpose of exports only.

4. AD Category I Banks are advised to strictly ensure that foreign transactions effected by / for their constituents are compliant with the above instructions. Head offices of nominated agencies/International Banking Divisions of banks would be responsible for monitoring operations of the revised scheme taking into account transactions put through different centres.

5. Government of India will be issuing separate instructions, if any, to the customs authorities / DGFT to operationalize put through different centres.

6. The above instructions will come into force with immediate effect. Authorised dealers may please bring the contents of this circular to the notice of the notice of their constituents and customers concerned.

7. Instructions contained in this circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act (FEMA), 1992 (42 of 1999), and are without prejudice to permissions / approvals, if required under any other law.

Yours faithfully

(Rudra Narayan Kar)

Chief General Manager-in-Charge

Annex

An example of the working of the scheme.

1. Nominated agency ABC imports say 100 kg of gold in any form/purity.

2. Out of the above import of 100 kg 20 kg gold held in the bonded warehouse can be got released in part or full to be sold to exporters of gold against undertaking to customs authorities as is the practice now.

3. Any further import of gold by ABC shall be permitted to the customs authorities only to the extent of actual export out of 20 kg gold held in bonded warehouse. This can happen only after at least 15 kg of gold out of 20 kg is actually exported from the previous lot.

4. If ABC wants to place order for the second lot of import, only 75 kg of import (including 15 kg for exports) will be permitted which will again follow the procedure outlined above. At this stage, total gold with the bonded warehouse meant for the exporter will be (5 + 15) i.e. 20 kg. Out of this at least 15 kg (i.e. 75% of the above 20 kgs) will have to be actually exported to enable ABC to import again. This procedures will be followed for every lot of import.

5. If for any reason, ABC is not able to channelize the gold held in bonded warehouse for exports, no further imports can be undertaken by ABC who will also arrange for re export of the gold in the bonded warehouse.

Related Press Release
Jul 22, 2013 Revised Scheme for Import of Gold"

98. Thus Circular No.103 dated 13th May, 2013, Circular No.107 dated 4th June, 2013 and Circular No.122 dated 22nd June

2013 are all referred and a bare perusal of the above reproduced Circulars would indicate as to how the Scheduled Commercial Banks which are Authorised Dealers in foreign exchange / all agencies nominated for import of gold shall have to abide by the stipulations or clauses thereof. It is too late today to question either the authority of the Reserve Bank of India or the contents of these Circulars. Advisedly therefore, the petitioners try and urge that their import is prior to the issuance of this Circular and hence this Circular would not apply.

99. There is absolutely no substance in this contention. First of all, the affidavit-in-reply filed on behalf of the Director General of Foreign Trade makes it clear that there is no difference between the Reserve Bank of India's Circular No.15 dated 22nd July, 2013 and No.25 dated 14th August, 2013, with regard to import of gold by export oriented units / SEZ units, Premier Trading Houses and Star Trading Houses. Both these Circulars are containing a clause for import of gold exclusively for export. The petitioners being a Nominated Agency and on account of being Premier Trading House were subject to 100% export condition. The petitioners imported 550 kgs of gold during the period 22nd July,

2013 to 31st March, 2014. In paragraph 32 of the affidavit-in-reply, the import of four consignments with the details of the bills of entries have been referred. The petitioners and as a matter record, imported 200 kgs of gold evidenced by the bill of entry dated 23rd July, 2013 and they were not exported by the petitioners. Therefore, the show-cause notice. It was also alleged in the show-cause notice that there is a violation of the Circular dated 22nd July, 2013. This Circular was also, on the petitioners own showing, uploaded on the website on 22nd July, 2013, at 19:47 IST. We are not entering into the controversy whether because this Circular came into force with immediate effect and, therefore, corresponded with the time at Dubai, namely, 18:47 Hrs. The affidavit-in-reply points out the reference to the Airway bills and claims that these were handed over to the Airlines only after uploading of the Reserve Bank of India's Circular. The affidavit extensively refers to the endorsements on the Airway bills, particularly of date and time. We do not wish to enter into this controversy as it is factual. Apart from the same being factual, in the impugned order, it has been found and after detailed reference to the documents relied upon by the petitioners themselves that this Circular was very much in force and applied to the imports by the petitioners.

100. We should not disbelieve this factual finding and which is in consonance with the overwhelming record. The speaking order passed by the respondents, copy of which is Annexure-UU at page 253 of the paper-book makes detailed reference to the facts. It makes reference to the imports of precious metals and supply made to domestic units and supply made to exporters during the period 1st April, 2013 to 31st March, 2014. Once the certificates in favour of the petitioners were subject to the provisions of the Foreign Trade Policy and the procedure laid down thereunder, the Reserve Bank of India guidelines and Customs Rules and Regulations, then the import of 550 kgs of gold was governed by the same. The show-cause notice alleged that from the import of 550 kgs of gold only 350 kgs of gold was exported and as per the export details 200 kgs of gold was supplied to the domestic unit. This is a violation of the Reserve Bank of India's Circular. Each of the terms and conditions, either in the certificates relied upon by the petitioners or the Reserve Bank of India guidelines are in consonance with the policy of the Government that precious metals having been brought in they ought to be exported so that

the cost of imports could be mitigated by the earnings from export. That would save valuable foreign exchange as well. That is how the diversion in the domestic market was termed as a violation of Reserve Bank of India guidelines. For the violation to be established and proved, the show-cause notice made specific reference to bills of entries, related papers including previous orders etc. It also made reference in details to the denials in the petitioners reply and the stand therein that the Circular does not govern the subject import or in other words, it is inapplicable to the imports in question. The extensive arguments were noted and the observations therein are that the records available in the file would prove and establish import of gold and diversion of 200 kgs therefrom in the domestic market / sector. We have no reason, therefore, to reject this finding of fact. It is based on appreciation and appraisal of all relevant and germane materials placed on record. This is not a case of an order based on no evidence. It is an order based on appreciation and appraisal of the relevant and material documents before the Adjudicating Authority. The findings of fact cannot be termed as perverse or vitiated by any error of law apparent on the face of the record either. The petitioners are aware that the relevant date and time is that of filing of bill of entry and not the date and time of shipment of goods. The import into India and the above act of filing of Bills of entry are, therefore, rightly relied upon to enter a factual finding against the petitioner on the point of applicability of RBI Circular dated 22nd July, 2013.

101. We have, therefore, no hesitation in concluding that none of the contentions as raised before us by the petitioners have any merit.

102. Mr. Chagla's reliance on the judgments rendered by the Hon'ble Supreme Court is of no assistance. In the first decision in the case of *Atul Commodities Pvt. Ltd. vs. Commissioner of Customs, Cochin 2009 (235) E.L.T. 385 (SC)*, it is apparent that the issue raised was distinct, namely, that the restriction placed on the import of second hand capital goods was not to be found in the Foreign Trade Policy. Once the categorization of items meant for import was free, then, the Director General of Foreign Trade could not have changed it and by issuing Circulars. Its attempt to change the categorization from free to restricted was frowned upon for the Hon'ble Supreme Court found that in the garb of

interpretation of the policy and its implementation, the Director General of Foreign Trade has amended the Foreign Trade Policy itself. That power to amend vests exclusively in the Central Government. The Circulars of DGFT, therefore, were not upheld. No Circulars by which the Foreign Trade Policy is sought to be amended can, therefore, assist the Director General. This is a finding rendered in the peculiar factual background.

103. The attempt to rely upon a Division Bench judgment, namely, in Writ Petition No. 2120 of 2009 decided on 6th April, 2010 *M/s. Stonemann Royale Ltd.* cannot carry the case of the petitioners further. That was also permitting the adjustment and in the peculiar factual backdrop. The factual scenario therein and in the present case is entirely distinct. From the narration of facts in the Division Bench judgment, it would be apparent that *M/s. Stonemann Royale Ltd.* were challenging the communication informing them that in the absence of any letters of credit they were not entitled for the benefit of the transitional arrangements under paragraph 1.5 of the Foreign Trade Policy. The Division Bench found that after execution of a contract and its registration with the Customs, a Notification was issued during the course of

its execution and half way, making certain amendments in the Export-Import Policy 2004-09 in respect of goods involved which were freely importable, the condition of free importability is confined to processed tiles / slabs agglomerated / artificial stone whose CIF value is above particular limit. The remaining goods were restricted for import. It is in this backdrop that the Division Bench found that the contract was already entered into. More than 50% imports were already made. The contract was registered with the Customs House – JNPT. It is in these circumstances and having been satisfied that there is no attempt to create anti dated bills of lading or contract documents that the Division Bench on the strength of the genuine material available on record directed that the Director General of Foreign Trade must consider the matter afresh. It must consider whether it was justified in refusing permission to complete the contract within the stipulated period. Pertinently, each of the factual materials were found to be genuine and *bona fide*. There was no attempt as before us to demonstrate that the Circular would not apply to the imports and that it is prior thereto. The present petitioners raise conflicting pleas and versions only to avoid compliance with the conditions and which are invited by them on their own. The conditions as imposed on them in the Nominated Agency Certificate and which is issued in their favour right from 2010 have never been questioned. In these circumstances, they cannot place any reliance on the Division Bench judgment.

104. In the view that we have taken, it is not necessary to deal with the argument of Mr. Dada that there is a remedy of an appeal and which alternate remedy is equally efficacious and hence this Writ Petition need not be entertained. Since the voluminous record of the petition enabled us to deal with the matter on merits and we permitting amendments to the petition to challenge the adjudication order on several grounds that this objection of Mr. Dada does not merit any consideration.

105. As a result of the above discussion, the Writ Petition fails. Rule is discharged. There will be no order as to costs.

106. At this stage, Mr. Shah appearing for the petitioners makes a request that the ad-interim relief granted on 10^{th} November, 2014, be continued for a period of two months so as to enable the petitioners to challenge this order in a higher court. This request

is opposed by Mr. Jetly appearing for the respondents.

107. Having considered his request and hearing the parties on this point we are of the view that interest of justice would be served if the order passed on 10th November, 2014, is continued for a period of eight weeks from today, but without prejudice to the rights and contentions of the parties.

B.P. COLABAWALLA, J. ***S.C. DHARMADHIKARI, J.***