

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 11.06.2015

CORAM

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

W.P. No. 29317 of 2014,
W.P.Nos.5822 & 5823 of 2012
and
M.P. No.1 of 2014,
MP.Nos.1 & 1 of 2012

M/s.HRB Boarding & Lodging Pvt. Ltd.
Represented by its Director,
Mr.C.R.Bhaalakrishna Bhat
No.307, Valluvar Kottam High Road,
Nungambakkam,
Chennai - 600 034. ... Petitioner in WP.No.29317 of 2014

2.M/s.Nischal Granites and Minerals
Represented by its Partner,
S.Anand Kumar
35/1, & 42, Bileshivale, Doddagubbi,
PO Bangalore East,
Bangalore - 562 149 ... Petitioner in WP.Nos.5822 & 5823 of 2012

Versus

1.The Union of India
Represented by its Secretary
Ministry of Commerce & Industry,
Department of Commerce,
Udyog Bhawan,
New Delhi - 110 011.

2.The Director General of Foreign Trade
Udyog Bhawan,
Maulana Azad Road,
New Delhi - 110 001.

3.Joint Commissioner of Customs (Group 3&4)
Customs House,
No.60, Rajaji Salai
Chennai - 600 001.

... Respondents in all WPs

Writ petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the (i)impugned Notification No.65(RE-2010)/2009-2014 dated 04.08.2011 issued in F.No.01/89/180/Misc-06/AM-08/PC-2(A) by the second respondent (in W.P.No.29317 of 2014 & W.P.No.5822 of 2012) and (ii)impugned order-in-original No.17899/2011 dated 19.12.2011 in F.No.S.Misc 403/2011-Gr. 3&4 passed by the third respondent (in W.P. No.5823 of 2012) and quash the same.

For Petitioner : Mr.Hari Radhakrishnan(in all WPs)

For Respondents : Mr.D.Vijayakumar, ACGSC [R1 & R2]
Mr.K.Mohanamurali, SPC [R3] in all WPs

COMMON ORDER

These Writ Petitions have been filed, praying for the issuance of Writ of Certiorari, to call for the records of the impugned notification No.65(RE-2010)/2009-2014 dated 04.08.2011 issued in F.No.01/89/ 180/Misc-06/AM-08/PC-2(A) by the Director General of Foreign Trade (DGFT), the second respondent herein and quash the same and also quash the consequential orders passed by the third respondent.

2. The petitioner companies are engaged in the business of import and trading in marbles, granites and other stones. It appears that the petitioner companies had imported the marbles, polished slabs at the declared unit price of below US\$ 60 per sq.mtr. However, the third respondent, Joint Commissioner of Customs (Group 3&4) has not permitted to clear the said goods, on the ground that DGFT Notification No. 65(RE-2010)/2009-2014 dated 04.08.2011, impugned in these Writ Petitions, provides that the goods falling under Customs Tariff Headings 68022110, 68022120 and 68029990 are freely importable, subject to the condition that CIF value should be US\$ 60 and above per sq.mtr and thereby demanded duty on the enhanced value and confiscated the goods with an option to redeem on payment of duty.

3. Consequently, the third respondent initiated proceedings under Section 124 of the Customs Act 1962 (in short "The Act") and passed the impugned orders dated 19.12.2011, 19.12.2011 and 28.08.2014 respectively, by imposing penalties as mentioned therein. Aggrieved by the same, the petitioners have come forward with the

present Writ Petitions, challenging the DGFT Notification No.65(RE-2010)/2009-2014 dated 04.08.2011.

4. A counter affidavit has been filed on behalf of the respondents 1 and 2, wherein it is stated that during August '2005, Government introduced a floor price on processed marble products classified under Chapter 68. A floor price of US\$ 2700 per cubic meter was imposed on processed marble products such as tiles, monumental blocks, slabs etc., vide Notification No.23 dated 31.08.2005 and Notification No.26 dated 02.11.2005. Thereafter, a Notification No.18 dated 30.06.2008, floor price of US\$ 50 and above per sq.mtr. was imposed on import of items falling under Chapter 68. While announcing the importable policy for the year 2011-2012, the floor price under Chapter 68 was reviewed and increased from US\$ 50 per sq.mtr. to US\$ 60 per sq.mtr. vide Notification No.65 dated 04.08.2012, after a period of three years. The second respondent, on behalf of the Central Government, is fully empowered to frame and amend the Foreign Trade Policy under Section 3 and 5 of the Foreign Trade (Development and Regulation Act 1992) (in short, 'FTDR Act').

5. The Foreign Trade Policy notified u/s 5 of the Act, specify the importability or exportability of a class of goods. Import policy of marble is notified u/s 5 of the FTDR Act, and para 2.1 of 19(2)(c) are enabling provisions for issuance, denial or renewal of the licence required in terms of the policy on importability or exportability of a class or classes of goods. The import policy announced vide Notification Nos. 64 & 65 dated 4.8.2011 issued u/s 5 of the Act and para 2.1 is to be read with para 1.3 of Foreign Trade Policy with detailed conditions prescribed for import of rough marble, for the purpose of section 9(2) of the Act.

6. It is also stated that as against the order passed by the third respondent, the petitioners are having appeal remedy and without exhausting of the same, the petitioners have come forward with these Writ Petitions, which are not maintainable. Hence the respondents 1 and 2 sought for dismissal of the Writ Petitions.

7. A counter affidavit has been filed on behalf of the third respondent, wherein it is stated that as per DGFT Notification No.65 (RE-2010)/2009-2014 dated 04.08.2011, the goods falling under Customs Tariff Headings 68022110, 68022120 and 68029990 are freely importable, subject to the policy condition that "import permitted freely provided CIF value is USD 60 & above per sqm." In the present case, the value declared by the importer is below the floor price of US\$ 60 per sq.mtr (CIF), it amounts to contravention of import policy and thus the imported goods become liable for confiscation under

Section 111(d) of Customs Act, 1962 read with Section 3(3) of the FTDR Act, for importing the same in violation of the above said Notification No.65(RE-2010)/2009-2014 dated 04.08.2011. The importers have also become liable for penal action under Section 112(a) of the Customs Act, 1962 for having rendered the goods liable for confiscation.

8. In view of the violation of the above said provisions, the goods were confiscated with an option to redeem the same on payment of redemption, find under Section 125 of the Act and the importers were also imposed penalty under Section 112(A) of the Act. Since the goods were confiscated as per the provisions of the act under section 111(d) r/w Section 3(3) of the FTDR, the petitioners are liable to pay the redemption fee for release of the goods. With these averments, the third respondent sought for dismissal of the writ petitions.

9. Challenging the notification No.65(RE-2010)/2009-2014 dated 04.08.2011 as well as the impugned orders of confiscation and penalty, passed by the third respondent, Mr.Hari Radhakrishnan, the learned counsel appearing for the petitioners would contend that the impugned notification has been issued by the Director General of Foreign Trade who has no jurisdiction to issue the notification, since Section 5 of the FTDR Act only empowers the Central Government to formulate and announce the export and import policy and also to amend the policy, Section 6(3) of the FTDR Act, expressly states that the power conferred on the Central Government under Section 5 cannot be delegated to the Director General of Foreign Trade, the second respondent herein. In support of his contentions, he relied upon the decisions reported in "M/s. S.Mira Commodities Pvt.Ltd, Mumbai Vs. Union of India" reported in 2009 (235) ELT 423 (Mad.) and "M/s.Global Industries Vs. Union of India" [2011 (263) ELT 517 (Kera.)]. He has also contended that the power of prohibition, restriction or regulation of the imports and exports is conferred on the Central Government by virtue of Section 3 of the FTDR Act and Section 3(2) states that the power has to be exercised by a way of an order published in the official gazette and while so, by virtue of impugned notification, the Central Government has sought to restrict the import of the marbles, which can only be done by way of issuing an order under Section 3 and not by way of notification under Section (5). In this regard, he relied upon the decision of the High Court of Calcutta in "M/s.Bimal Kumar Modi Vs.Union of India" reported in 2014 (306) ELT 97 (Cal.) He also contended that if at all the Central Government wants to fix minimum import price for marble, they could have done so by fixing a tariff value under Section 14(2) of the Customs Act 1962 and not by way of issuing a notification under

Section (5) of the FTDR Act. According to the learned counsel, fixing the value of goods can be done only under the Customs Act and Customs Tariff Act. Therefore, the learned Counsel sought for setting aside the impugned notification and orders passed by the third respondent.

10. Heard the learned counsel on either side and perused the documents available on record.

11. In exercise of its powers under Section 5 of the said Act, the Central Government has been announcing and publishing EXIM Policy from time to time and for the period 2009-2014, the EXIM Policy announced by the Central Government, which came into force with effect from 5-6-2012 and is valid upto 31-3-2014. The said EXIM policy clearly provides that the right to amend the policy by a notification in the Gazette is vested with the Central Government only. Chapter 2 of the EXIM policy 2009-2014 contains general provisions regarding imports and exports. Para 2.1 of Chapter 2 provides that 'Exports and Imports' shall be free except in cases where they are regulated by the provisions of the policy. Para 2.4 of Chapter 2 empowers the DGFT to specify the procedure to be followed by an exporter or importer or by any licensing/regional authority in implementing provisions of FTDR Act and the Orders made thereunder and FTP and that, such procedures or amendments if any, shall be published by means of a public notice. Under the said para, DGFT is empowered to amend the procedure and publish the same by way of public notice.

12. The FTDR Act is enacted to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from India. Under Section 3, the Central Government is empowered by order published in the Official Gazette to make provision for the development and regulation of foreign trade. Under sub-section (2) of Section 3 the Central Government may by order published in the Official Gazette prohibit, restrict or otherwise regulate import/export of goods subject to such exceptions as it may deem fit. Under Section 5, the Central Government is empowered from time to time to formulate and announce by a notification in the Official Gazette the EXIM Policy and it may also amend that policy from time to time. Under Section 6, DGFT is empowered to advise the Central Government in the formulation of EXIM Policy and shall be responsible for carrying out that policy. Under Section 6(3) of the Act, 1992 only the Central Government is empowered to amend Foreign Trade Policy.

13. As already stated, under Para 2.3 of FTP (2004-2009) DGFT is empowered to interpret the Policy. If any doubt or question arises in

respect of interpretation of any provision in FTP or in the matter of classification of any item in the ITC (HS) or in the Handbook, the said question or doubt shall be referred to DGFT, whose decision thereon shall be final and binding.

14. The provisions of the FTDR Act and Para 2.3 of FTP have been referred to above, would demonstrate the difference between amendment and clarification. The power to amend FTP is exclusively vested in the Central Government whereas the power to clarify is vested in DGFT.

15. Section 5 of the FTDR Act contemplates amendment to FTP. It empowers only the Central Government to amend the policy. This power is not given to DGFT. In "Atul Commodities (P) Ltd., versus Commissioner of Customs", having noted the fact that the circulars issued by the DGFT, by which, the import policy itself was given effect to by changing the categorisation of items from the category of "free" to the category of "restricted", the Hon'ble Supreme Court, while referring to the provisions of the FTDR Act vis-a-vis Foreign Trade Policy, has categorically held that by virtue of Section 5 of the Act, 1992, the Central Government alone is empowered to amend the policy and it is not open to DGFT vide circulars to change categorization of items from the category of "free" to the category of "restricted" imports.

16. The functions of the DGFT can be deciphered from Section 6 of the FTDR Act which is primarily to advise the Central Government in formulation of the Foreign Trade Policy with further responsibility to carry out the same. Sub-section 3 of Section 6 of the FTDR Act put a fetter on the Central Government to delegate any power on the DGFT exercisable under Section 3, 5, 15, 16 & 19 of the FTDR Act. It is relevant to quote Section 6 which reads thus:

"6. Appointment of Director General and his functions.-

(1) The Central Government may appoint any person to be the Director-General of Foreign Trade for the purposes of this Act. (2) The Director-General shall advise the Central Government in the formulation of the foreign trade policy and shall be responsible for carrying out that policy. (3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under Sections 3, 5, 15, 16 & 19) may also be exercised, in such cases and subject to such conditions, by the Director-General or such other officer subordinate to the Director General, as may be specified in the Order."

17. A conjoint reading of the aforesaid provisions would indicate that the power to formulate and announce the Foreign Trade Policy vests in the Central Government and the functions of the DGFT is to advise the Central Government at the time of formulation of the Foreign Trade Policy and responsibility for carrying out the same. The power of prohibition, restriction and/or regulation is further conferred upon the Central Government by publishing the Order in the Official Gazette. The said power can be traced from Section 3 of the FTDR Act which is aptly quoted hereunder:

"3. Powers to make provisions relating to imports and exports.-

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

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

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

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

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

18. Reverting to the case on hand, during August, 2005, the Central Government has introduced a floor price on processed marble products classified under Chapter 68 and a floor price of US\$ 2700 per cubic meter was imposed on processed marble products such as tiles, monumental blocks, slabs etc., vide Notification No.23 dated 31.08.2005 and Notification No.26 dated 02.11.2005. Later, it was decided that the floor price should be notified in terms of square

meter and not in cubic meter to check the mis-declaration. Accordingly, a Notification No.18 dated 30.06.2008 was issued imposing floor price of US\$ 50 and above per sq.mtr. on import of items falling under Chapter 68. While announcing the importable policy for the year 2011-2012, the floor price under Chapter 68 was reviewed and increased from US\$ 50 per sq.mtr. to US\$ 60 per sq.mtr. vide Notification No.65 dated 04.08.2012, after a period of three years.

19. It is to be noted that the petitioners have come forward with the present Writ Petitions challenging only the Notification No.65, dated 4.8.2012 by which, it seems that the petitioners are aggrieved by imposition of floor price at US \$60 per sq.mt. and they had no grievance in respect of earlier Notifications, which imposed US \$50 per sq.mt. As discussed above, it is no doubt true that the DGFT has no power to amend the policy. However, it is to be noted that the Central Government made the amendments in the Schedule 1 (Imports) of the ITC (HS) Classifications of Export and Import Items, by publishing in the Gazette of India Extraordinary Part II in terms of above referred to Section 3(2) of FTDR Act, in and by which, the Import under the Exim Codes 6802 10 00, 6802 21 10, 6802 21 20, 6802 21 90, 6802 91 00 and 6802 92 00 were permitted freely provided CIF value is US \$ 60 and above per square metre. This was given effect to by the DGFT by the Notification No.65 (RE-2010)/2009-2014, which has been impugned in these writ petitions. In fact, the Notification announcing the Foreign Trade Policy, 2009-2014 was published under the aegis of the DGFT who is also an Ex-Officer Additional Secretary to the Government of India. Therefore, the DGFT not only assumes the power as a delegatee of the Central Government under Section 6 of the FTDR Act, but also competent as an authorized officer on behalf of the Central Government. The DGFT discharges the official functions allotted to him as a limb of the Central Government but also as a delegatee under Section 6 of the FTDR Act.

20. In the present case, the DGFT has not resorted to change of categorization of items, i.e. from the category of 'free export' to category of 'restricted export', but as a sequel to earlier notification No.18, which fixed the floor price of US \$ 50 per square meter, the present impugned Notification has been issued. Therefore, I do not find any illegality or irregularity in the impugned notification in order to interfere with the same. The reliance placed upon "M/s.Mira Commodities case and "M/s.Bimal Kumar Modi case" by the learned counsel for the petitioner, cannot be made applicable to the present case inasmuch as in the said decisions, it has been held that the DGFT has resorted to amend the import & export policy, which is not permissible under the provisions of FTDR Act, but in exercise

of Section 5 of the FTDR Act, the Central Government is only empowered to formulate and announce the export and import policy.

21. Therefore, when the DGFT Notification dated 04.08.2011 allowed free import of marble blocks/tiles provided the CIF value is US \$ 60 and above per sq. mt., the petitioners were expected to declare the same, however, contrary to the same, they have declared below the US \$ 60 and thereby, the authority has rightly confiscated the same and therefore, confiscation of the goods is justified.

For the foregoing discussion, these Writ Petitions fail and they are dismissed. No costs. However, it is made clear that as against the impugned order of confiscation, the petitioner can work out appeal remedy in the manner known to law. On such approach, the authority concerned, is directed to entertain the appeal preferred by the petitioners and dispose of the same in accordance with law. No costs. Consequently, connected MPs are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Suk
To

Sub Assistant Registrar

- 1.The Secretary
Union of India
Ministry of Commerce & Industry,
Department of Commerce,
Udyog Bhawan, New Delhi - 110 011.
- 2.The Director General of Foreign Trade
Udyog Bhawan, Maulana Azad Road,
New Delhi - 110 001.
- 3.The Joint Commissioner of Customs (Group 3&4)
Customs House,
No.60, Rajaji Salai
Chennai - 600 001.

+1cc to Mr.D.VijayaKumar, Advocate, S.R.No.28436

W.P. No. 29317 of 2014,
W.P.Nos.5822 & 5823 of 2012

CNR(CO)
CA(01/07/2015)