IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13101 OF 2016

Namco Industries Private Limited	}	**Petitioner**
versus		
Union of India and Ors.	}	**Respondents**

Mr. D. B. Shroff – Senior Advocate with Mr. Sujay Kantawala and Mr. Brijesh Pathak for the petitioner.

Mr. B. B. Sharma for respondent nos. 1 and 4.

Mr. Pradeep S. Jetly for respondent nos. 2 and 3.

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

DATED :- DECEMBER 5, 2016

P.C. :-

1. By this petition under Article 226 of the Constitution of India, the petitioner is challenging the show cause notice issued by the Additional Director General of Foreign Trade, invoking the powers under the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "the FTDR Act").

2. The petitioner claims that the entire show cause notice is issued at the behest and instance of the Director General, Directorate of Revenue Intelligence. In that regard, our attention

is invited to paras 4 to 7 of the show cause notice, copy of which is at page 138 of the paper book. These paras appear at page 139 thereof. It is submitted that the show cause notice would not have been issued, but for a very detailed communication from the Directorate of Revenue Intelligence. That is issued sometime in June, 2016. Our attention is invited to paras 7.3 and 7.4 of that communication to submit that eventually the Principal Additional Director General holds the transaction as fictitious one. The conclusion that is reached by the Principal Additional Director General is that there is mis-declaration of value coupled with the fact of non-fulfilment of stipulated export obligation specified for the first block which stands expired. The authorisation deserves to be cancelled. The understanding of the Additional Director General that he will not be in a position to issue show cause cum demand notice for recovery of Customs duty and imposition of penalty until an order for cancellation of the EPCG authorisation is issued is fundamental flawed. It is stated that the EPCG licences, which have been issued by the Mumbai Zonal office of the Director General of Foreign Trade, in terms of Chapter V of the Foreign Trade Policy and Customs Notification dated 11th September, 2009 as amended with a condition to fulfill export obligation does not envisage the cancellation so long as the terms and conditions of that licence are complied with. Therefore, the

Additional Director General of Revenue Intelligence cannot insist on a cancellation. The show cause notice from the Additional Director General of Foreign Trade is not based on an independent satisfaction but purely on the communication from the Additional Director General of Revenue Intelligence. Hence, the present case is firstly of exceeding the jurisdiction vested in the Director General of Foreign Trade and secondly, the Director General of Foreign Trade exercising its powers at the behest of the Additional Director General of Revenue Intelligence. Therefor, no useful purpose will be served by the petitioner submitting to the jurisdiction of the Additional Director General of Foreign Trade.

3. Mr. Shroff, learned senior counsel appearing for the petitioner, while reiterating the above contentions, points out that a sister concern of the petitioner entered into an agreement with a Swedish company and for purchase of certain goods. Relying upon the terms and conditions of the sale, it is submitted that the agreement to purchase the goods never fructified. It was not implemented. The petitioner's Director, who was also the Managing Director of Namco Corporation Limited discussed the issue with his cousin in Dubai having a company, namely, M/s. Escorp Commodities LLC, UAE. On 20th November, 2009, the petitioner company entered into an agreement with M/s. Escorp

Commodities LLC. for procurement of the complete, refurbished, restored to working condition and revamped to manufacture, the requisite final product, namely, plates of width up to 2500 mm and minimum thickness upto about 4mm with various assurances mentioned in the said agreement. On 20th April, 2010, the petitioner company entered into a further agreement with M/s. Escorp Commodities LLC. for supply of various rolls made of special alloy steel, suitable for rolling plates, out of mild steel/alloy steel slabs. In July, 2010, the complete refurbished and revamped machinery in working condition, as agreed under the agreement dated 20th November, 2009 was shipped by the Dubai supplier to India from the port of loading at Gavle, Sweden to the port of discharge in India at Kandla. On the basis of two EPCG licences, the bills of entry were filed for clearance of the capital goods sometime in February, 2011. The goods were examined. The certificates issued by the Chartered Engineer were also perused, but the proper officer held that the goods were undervalued and the value of containers should be added. That is how the order was passed by the Commissioner of Customs on 10th March, 2011. The goods under the two bills of entry were confiscated and penalties were imposed. The appeal is pending before the CESTAT. Then, the show cause notice issued by the Department was eventually dropped. After all this, the petitioner suffered heavy losses, but could not recover and had to move an application before the BIFR. The reference before the BIFR also could not proceed in accordance with law. Several summonses were issued by the Directorate of Revenue Intelligence. Mr.Shroff then refers to the alleged hardship that was caused to the petitioner. It is submitted that in the above circumstances, intervention of the Hon'ble Supreme Court was sought in Writ Petitioin (Cri.) No. 66 of 2016 filed under Article 32 of the Constitution of India. It is submitted that out of sheer vengeance, the Directorate of Revenue Intelligence caused a communication to be issued to the Additional Director General of Foreign Trade forcing her to commence the proceedings under the FTDR Act. It is submitted that there is no merit in the *prima facie* finding of the Directorate of Revenue Intelligence that it cannot take the proceedings under the Customs Act, 1962 to their logical end on account of the EPCG licences still being in force. Secondly, it is submitted that an authorised official under a distinct statute cannot force the authority like the Director General of Foreign Trade to commence any legal proceedings. The Director General of Foreign Trade acts under the FTDR Act and therefore, could not allow its powers to be abdicated or taken over by the Directorate of Revenue Intelligence. After all these submissions, it is submitted that this court should quash the show cause notice.

4. On the other hand, it is submitted that the writ petition is premature. It is directed against a show cause notice. The show cause notice would be adjudicated after which, there are adequate remedies under the FTDR Act and to challenge any adverse order. In such circumstances, any opinion on merits would influence the outcome of the investigation as also the proceedings in furtherance of the show cause notice. For all these reasons, it is submitted that the writ petition be dismissed.

5. We have perused carefully the show cause notice, copy of which is at page 138 of the paper book. That is issued by the Government of India, Ministry of Commerce, office of the Additional Director General of Foreign Trade. That is dated 26th July, 2016. That is issued under section 14 of the FTDR Act. It is stated that the petitioner has obtained the authorisations under Zero Duty EPCG Scheme of the Foreign Trade Policy 2009-2014. At serial no. 2 of the condition sheets attached to these authorisations and amendments issued subsequently, the petitioner was under an obligation to export certain goods against these authorisations within a period of six years from the date of issue of these authorisations. The first authorisation is dated 9th December, 2010 and the second is dated 18th January, 2011. By referring to para 5.8 of the Handbook of Procedures Volume of

2009-2014, it is alleged that the petitioner was required to fulfill 50% of the export obligation during the first block period i.e. within four years from the date of issue of the authorisation and submit documents. The first block period in respect of both these authorisations is over but no such documents have been received in the office so far. Then, there is a reference made to the communication from the Directorate of Revenue Intelligence, Mumbai Zonal Unit. There is a *prima facie* opinion recorded on the basis of these documents. It is, therefore, alleged that the arrangements referred to in paras 5, 6 and 7 of the notice are mere paper transactions. The goods were imported. However, there are various rules and regulations, namely, the FTDR Act, Foreign Trade (Regulation) Rules and Regulations. There is a specific allegation that the Additional Director has *prima facie* reasons to believe that there is a violation of Rule 11 and Rule 14(1) of the Foreign Trade (Regulation) Rules, 1993, which attracts provisions of section 11(2) of the FTDR Act as amended and Rule 10 of the Rules of 1993.

6. It is common ground that the FTDR Act 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. The power of the

Central Government to make order and announce foreign trade policy flows from Chapter II of this Act. It is clear from a perusal of section 3(1) that the Central Government may, by order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. Vide Sub-Section (2) of section 3, 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. All goods to which any order under Sub-Section (2) applies, shall be deemed to be goods the import or export of which has been prohibited under Section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly. Then, by Sub-Section (4) of section 3 and 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. Therefore, there is a power to make order and announce a Foreign Trade Policy. There is power to make order for development and regulation of foreign trade. That order can seek compliance with the provisions of the Customs Act, 1962 as well. Then, there are provisions enabling the Central Government to appoint any person to be the Director General of Foreign Trade and this official has to advise the Central Government in the formulation of the Foreign Trade Policy and he shall be responsible for carrying out that policy. There are also provisions for appointing a Director General and his assisting officers and subordinates. It is in exercise of such powers and particularly under section 11 that the imposition of penalty thereunder is contemplated. The penalty could be imposed under various sub-sections of Section 11. The adjudicating authority, while imposing a penalty or exercising powers of adjudication or confiscation has to comply with the principles of natural justice. That is how a show cause notice is contemplated under section 14 and thereafter an opportunity is provided to mean a representation in writing and of hearing.

7. With all such safeguards in place, we do not think that we should interfere at this stage. All the more when there are powers of appeal conferred in the Central Government.

8. We have no doubt in our mind that if the contention raised as before us by Mr. Shroff are indeed raised and substantiated with material, which would be allowed to be produced on record of

the adjudicating authority, then, the same would be duly noted and considered. The show cause notice has to be disposed of by a speaking order. Against such an order, there is a remedy of Aappeal and equally a review (see Sections 15 and 16). The petitioner can highlight that such a notice as impugned in the petition has been issued at the behest and instance of the Directorate of Revenue Intelligence and it is he who is dictating the decision thereon. At his instance, the Director General of Foreign Trade should not be acting nor surrendering his authority and power. If such contentions are raised, then, they would be necessarily dealt with. In the event they are not dealt with or dealt with but not satisfactorily, then, it will be open for the petitioner to take recourse to the appellate remedy and while challenging an adverse order. For the present and when there is no challenge to the statutory power, then, merely because the impugned show cause notice refers to the communication from the Directorate of Revenue Intelligence, it will not be possible for us to agree, on the strength of this alone, with Mr. Shroff that it is the Directorate of Revenue Intelligence which is dictating to the Director General of Foreign Trade as to how the powers under the FTDR Act should be exercised. We do not think that on the present material it can be concluded that the show cause notice is issued only at the behest of the Directorate of Revenue

Intelligence. It would not be proper to record any conclusive findings. We are also not impressed at this stage by the argument that the EPCG licences and their terms and conditions are not violated and still a show cause notice is issued only to please the Directorate of Revenue Intelligence. If indeed the EPCG terms and conditions are not violated, then, it will be open for the petitioner to produce such material as is permissible in law. Merely because the show cause notice is issued does not mean that it would result in imposition of penalty. Once all the opportunities are available, then, we do not think that we should interfere with the show cause notice. Therefore, we are not inclined to entertain the writ petition. It is dismissed. There would be no order as to costs.

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