

AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1750 OF 2015

1. JSW STEEL LIMITED,

A company registered under the Companies Act, 1956 having its registered office at, JSW Centre, Bandra Kurla Complex, Bandra East, Mumbai – 400 051

2. SHRI RAJIV BAKSHI,

Indian citizen and Sr. Vice President-Legal, & Group General Counsel, with JSW Steel Limited having its registered office at, JSW Centre, Bandra Kurla Complex, Bandra East, Mumbai – 400 051

... Petitioners

versus

1. UNION OF INDIA, through the Secretary, Department of Commerce, Ministry of Commerce & Industry, Udyog Bhawan, New Delhi 110 107

2. THE DIRECTOR GENERAL OF FOREIGN TRADE, Udyog Bhavan, H-Wing, Gate No. 02, Maulana Azad Road, New Delhi 110 011

3. THE ADDITIONAL DIRECTOR GENERAL OF FOREIGN TRADE, Nishtha Bhavan, 48 Sir Vithaldas Thackersey Marg, Churchgate, Mumbai 400 020

4. **FOREIGN TRADE DEVELOPMENT OFFICER**, Nishtha Bhavan, 48 Sir Vithaldas Thackersey Marg, Churchgate, Mumbai 400 020 ... Respondents

WITH

WRIT PETITION NO. 2122 OF 2015

1. **WELSPUN TRADINGS LIMITED**, A company registered under the Companies Act, 1956 having its corporate office at Welspun House, 5thFloor, Kamala City Senapati Bapat Marg, Lower Parel (West), Mumbai – 400 013
2. **SHRI SURESH DARAK**, Indian citizen and shareholder in Welspun Corporation Limited (shareholder of Welspun Tradings Ltd.) having his place of work at Welspun House, 5th Floor, Kamala City, Senapati Bapat Marg, Lower Parel (West), Mumbai – 400 013
3. **SHRI SOURAV DAS**, Indian Citizen and an employee for Welspun Tradings Ltd, having his place of work at Welspun House, 5th Floor, Kamala City, Senapati Bapat Marg, Lower Parel (West), Mumbai – 400 013 ... Petitioners

versus

1. **UNION OF INDIA**, through the Secretary, Department of Commerce, Ministry of Commerce & Industry, Udyog Bhawan, New Delhi 110 107
2. **THE DIRECTOR GENERAL OF**

FOREIGN TRADE, Udyog Bhavan, H-Wing, Gate No. 02, Maulana Azad Road, New Delhi 110 011

3. THE ADDITIONAL DIRECTOR GENERAL OF FOREIGN TRADE, Nishtha Bhavan, 48 Sir Vithaldas Thackersey Marg, Churchgate, Mumbai 400 020

4. FOREIGN TRADE DEVELOPMENT OFFICER, Nishtha Bhavan, 48 Sir Vithaldas Thackersey Marg, Churchgate, Mumbai 400 020

... Respondents

APPEARANCES

FOR THE PETITIONERS	Mr. Vikram Nankani, Senior Advocate , <i>with Mr. Vipul Jain & Mr. p.K. Shetty.</i>
FOR THE RESPONDENTS	Mr. A.J. Rana, Senior Advocate/Special Counsel , <i>with Mr. Pradeep S. Jetly & Mrs. Neeta Masurkar in WP/1750/2015.</i> Mr. Beni Chatterji, Senior Advocate , <i>with Mrs. S.V. Bharucha in WP/2122/2015.</i>

WITH

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10437 OF 2015

UPL LIMITED, A Company incorporated under the Companies Act, 1956, and having its registered office at 3-11, G.I.D.C. Vapi – 396 195, Gujarat and Corporate Office at Uniplus House, Madhu Park, 11th Road, Khar (West), Mumbai – 400 052

... Petitioner

versus

1. **UNION OF INDIA**, through the Secretary,
Ministry of Commerce, Department of
Commerce, Udyog Bhawan, North Block,
New Delhi 110 101
2. **THE DIRECTOR GENERAL OF
FOREIGN TRADE**, Ministry of
Commerce & Industry, Department of
Commerce, having his office at Directorate
of Foreign Trade, Udyog Bhavan, New Delhi
3. **THE JOINT DIRECTOR GENERAL
OF FOREIGN TRADE**, having his office
office at New C.G.O. Building, New Marine
Lines, Churchgate, Mumbai 400 020
4. **THE ADDITIONAL DIRECTOR
GENERAL OF FOREIGN TRADE**,
having his office office at New C.G.O.
Building, New Marine Lines, Churchgate, ... Respondents
Mumbai 400 020

APPEARANCES

FOR THE PETITIONER	Mr. Prakash Shah , <i>with Mr. Jas Sanghavi,</i> <i>i/b PDS Legal.</i>
FOR THE RESPONDENTS	Mr. B.M. Chatterjee , Senior Advocate , <i>with Mr. M.S. Bhardwaj & Mr. Anjani</i> <i>Kumar Singh.</i>

WITH
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12196 OF 2015

EVEREST FLAVOURS LIMITED, a company
incorporated under the Companies Act, 1956,
and having its office at 46 Wadia Building, 2nd
Floor 9B Cawasji Patel Street, Fort,
Mumbai – 400 001, Maharashtra

... Petitioner

versus

1. **UNION OF INDIA**, through the Secretary,
Ministry of Commerce, Department of
Commerce, Udyog Bhawan, North Block,
New Delhi 110 101
2. **THE DIRECTOR GENERAL OF
FOREIGN TRADE**, Ministry of
Commerce & Industry, Department of
Commerce, having his office at Directorate
of Foreign Trade, Udyog Bhavan, New Delhi
3. **THE JOINT DIRECTOR GENERAL
OF FOREIGN TRADE**, having his office
office at New C.G.O. Building, New Marine
Lines, Churchgate, Mumbai 400 020
4. **THE ADDITIONAL DIRECTOR
GENERAL OF FOREIGN TRADE**,
having his office office at New C.G.O.
Building, New Marine Lines, Churchgate,
Mumbai 400 020

... Respondents

APPEARANCES

FOR THE PETITIONER	Mr. Prakash Shah , <i>with Mr. Jas Sanghavi,</i> <i>i/b PDS Legal.</i>
FOR RESPONDENT NO. 1	Mr. Pradeep S. Jetly , <i>with Mr. Akshay</i> <i>Kapadia.</i>
FOR RESPONDENT NOS. 2 TO 5	Mr. B.M. Chatterjee , Senior Advocate, <i>with Mr. M.S. Bhardwaj & Mr.</i> <i>Anjanikumar Singh.</i>

CORAM : **S.C. Dharmadhikari, &
G.S. Patel, JJ.**

DATED : **25th January 2016**

JUDGMENT: (Per G.S. Patel, J.)

1. In all four Writ Petitions, a common issue is raised as regards Notification No. 27(RE-12)/2009-2014 dated 28th December 2012, a subsequent Notification No. 44(RE-2013)/2009-2014 dated 25th September 2013, and a so-called Clarification dated 23rd September 2014 dated 23rd September 2014. Although the facts in each of these four Writ Petitions filed under Article 226 of the Constitution of India are somewhat different, since they raise a common issue we have taken up them together.

2. In all four Writ Petitions, Rule. Respondents waive service. By consent, Rule made returnable forthwith and the Petitions taken up for hearing and final disposal.

3. We have heard learned Counsel for both sides. We propose to refer to the facts and the documents in Writ Petition Nos. 2122 of 2015, and, where necessary those in Writ Petition No. 1750 of 2015.

4. Briefly stated, the Petitioners' case is that in order to give a fillip to exports, the Government introduced an Incremental Export Incentivisation Scheme ("IEIS") by Notification No. 27(RE-12)/2009-2014 dated 28th December 2012¹ ("the 2012

¹ Exhibit "B", pp. 49-54 to WP No. 2122 of 2015

Notification”). This Notification inserted paragraph 3.14.4 in the Foreign Trade Policy (“**FTP**”) 2009-2014. This Notification, while prescribing a number of restrictions, all of which the Petitioners accept, including a limitation as to the eligibility period or time, allowed a duty credit of 2% on the incremental growth in export achieved by those who held an Import Export Code (“**IEC**”) for the quarter in question. If the prescribed criteria were met, the IEC holder was entitled to a duty credit scrip at this rate. It is the case of the Petitioners that the 2012 Notification did not in and of itself prescribe any cap or ceiling limit on the quantum of the duty credit scrip. It only prescribed a percentage of the incremental growth and contained various other qualifying restrictions.

5. Subsequently, by Notification No. 44(RE-2013)/2009-2014 dated 25th September 2013,² (“**the 2013 Notification**”), according to the Petitioners, two paragraphs were added to the 2012 Notification. The first of these said that the benefit of the IEIS would be 25% growth or incremental growth of Rs. 10 crores, whichever was less. The second paragraph of the 2013 Notification, however, said in terms that ‘claims in excess of this value would be subject to greater scrutiny by the Regional Authority’ (“**RA**”). According to the Petitioners, therefore, correctly read, the 2013 Notification did not in fact prescribe a limit or a cap at all. It was only by virtue of a Clarification dated 23rd September 2014 dated 23rd September 2014³ (“**the 2014 Clarification**”) that the Respondents purported, and in the Petitioners’ submission unlawfully, to impose a complete and overall cap on the value of the

² Exhibit “F”, p. 61 to WP No. 2122 of 2015

³ Exhibit “S”, p. 91-92 to WP No. 2122 of 2015

duty credit scrip irrespective of the actual incremental growth in exports for the period in question.

6. Having heard learned Advocates on both sides at some length and having considered, with their assistance, the material on record, including the two Notifications in question as also the Clarification, we are not persuaded that the interpretation of the Respondents is correct. It does not seem to us to be plausible to suggest that by the 2014 Clarification a cap or limit could have been introduced to the 2012 Notification, or to suggest as the Respondents do that the 2013 Notification imposes an absolute limit of Rs. 20 lakhs on the value of the export duty scrip. We will turn to each of these Notifications and Clarification in detail as also the other relevant documents.

7. It is not in dispute that the Petitioners are all exporters of various types of products. It seems that as a promotional measure, and in order to provide a boost or incentive to exports, the Central Government in 2012 decided to introduce the Incremental Exports Incentivisation Scheme. On 26th December 2012, it released a Press Note to this effect.⁴ It is stated that the Union Minister for Commerce, Industries and Textile had announced a decision to grant incentive on incremental exports. This was period specific: the incentive would be available in respect of incremental exports made for the quarter January to March 2013 relative to the corresponding previous quarter of January to March 2012. The actual Scheme was introduced by the 2012 Notification. Paragraph 3.14.4 was added to the Foreign Trade Policy (“FTP”) 2009-2014. It reads:

⁴ Exhibit “A”, p. 48 to WP No. 2212 of 2015

"3. A new paragraph is added at the end of Para 3.14.4 of FTP 2009-14 as 3.14.4:

**3.14.4 Incremental Exports
Incentivisation Scheme**

Objective (a) The objective of the Scheme is to incentivize incremental exports.

Entitlement (b) An IEC holder would be entitled for a duty credit scrip @ 2% on the incremental growth (achieved by the IEC holder) during the period 01.01.2013 to 31.3.2013 compared to the period from 01.01.2012 to 31.3.2012 on the FOB value of exports. Incremental growth shall be in respect of each exporter (IEC holder) without any scope for combining the exports for Group Company.

(c) Incentive will be admissible only if the IEC holder has achieved growth in the financial year 2012-2013 vis a vis financial year 2011-2012. Quantum of benefit will be calculated on the incremental growth achieved subject to eligibility criteria given in para 3.14.4(d) of FTP 2009-14.

Eligibility Criteria (d) For the purpose of the scheme, export performance shall not be allowed to be transferred from any other IEC holder. Benefit under this scheme will not be allowed to an exporter who had made no export between 01/01/12 to 31/03/12. The following exporters shall not be taken

into account for calculation of export performance or for computation of entitlement under the Scheme.

- (i) Export of imported goods or exports made through transshipment.
- (ii) Export from SEZ/EOU/EHTP/STPI/BTP/F TWZ
- (iii) Deemed Exports.
- (iv) Service Exports
- (v) Third Party exports
- (vi) Diamond, Gold, Silver, Platinum, other precious metal in any form including plain and studded jewellery and other precious and semi-precious stones.
- (vii) Ores and concentrates of all types and in all formations.
- (viii) cereals of all types.
- (ix) Sugar of all types and all forms.
- (x) Crude/ petroleum oil and crude / primary and base products of all types and all formulations.
- (xi) Export of milk and milk

products.

- (xii) Export performance made by one exporter on behalf of other exporter.
- (xiii) Supplies made to SEZ units.
- (xiv) Items, export of which requires an export authorisation (except SCOMET), will not be considered.
- (xv) Export of Meat and Meat Products.
- (xvi) Exports to Singapore, UAE and Hong Kong.

**Special
Provision**

- (e) The scheme is region specific and will cover exports to USA, Europe and Asian countries only. Disclaimer provisions of para 3.17.10(b) of FTP shall not be admissible. This benefit will be over and above any benefit being claimed by the exporter under any of the Chapter 3 Schemes, therefore, provisions of para 3.17.8 of FTP 2009-14 will not be invoked for such benefit.

**Utilisation
of Scrip**

- (f) The duty credit scrip will be freely transferable. Such scrips shall also be eligible for domestic sourcing as per para 3.17.5 of FTP 2009-14.

8. The Scheme also sets out Eligibility Criteria in sub-clause (d). This sub-clause has as many as 16 sub-clauses or exclusions. Sub-clause (d) disentitles an exporter who had made no exports for the past period quarter in question 1st January 2012 to 31st March 2012. The export performance was not transferable and certain exports were also specifically noted as being inadmissible for entitlement. These included, for example, export from SEZs, Service Exports, Third Party Exports, exports of Meat and Meat products, exports to Singapore, UAE and Hong Kong and so on. Sub-clause (e) contained a special provision which said that the Scheme was region-specific and only covered exports to USA, Europe and Asian countries. Sub-clause (f) said that the duty credit scrip was freely transferable and was eligible for domestic sourcing.

9. The Petitioners do not question or challenge any of these restrictions in clauses (d) and (e) of paragraph 3.14.4 introduced by the 2012 Notification as being arbitrary and unreasonable. What the Petitioners emphasize is clauses (a) and (b). According to them, clause (b) clearly states that an IEC holder is entitled to a duty credit scrip of 2% on the incremental growth achieved by it for the quarter in question, i.e., 1st January 2013 to 31st March 2013 when compared to the immediate preceding corresponding quarter of 1st January 2012 to 31st March 2012, on the FOB export value. No combining of exports for a Group Company was permitted. Further, clause (c) provide that the incentive was admissible only if the IEC holder achieved growth in the FY 2012-2013 *vis-à-vis* FY 2011-2012. As Mr. Nankani points out, this was evidently mean to eliminate anybody trying to take undue advantage of a sudden, one-off or seasonal growth in exports. The intention was to provide a boost or

an incentive to those who were steadily increasing their export business.

10. It is important to note that clause (b) contains no cap and clause (c) says that the quantum of benefit was to be calculated on the increased growth achieved subject to the eligibility criteria mentioned in sub-clause (d).

11. Corresponding changes were then reflected in the Handbook of Procedures. This was amended on 28th December 2012 by a Public Notice No. 41/2009-2014 (RE-2012),⁵ which contains substantially the same text as the 2012 Notification. The Handbook stated that an application for the grant of such a benefit was to be made in Form ANF-3F to be subsequently notified. That application was to be filed within a prescribed time period, i.e., within twelve months from the date of the export, or within six months from the date of realization, or within three months from the date of providing or release of shipping bills, whichever was later. By a later Public Notice No. 13/2009-14 (RE-2013) dated 17th May 2013,⁶ the necessary Form ANF 3F with a detailed worksheet for calculation was notified. This form set out a working tabulation to compute the entitlement at the rate of 2% of the incremental export. Even this public notice and form did not in any manner restrict the quantum of the export duty credit.

12. It seems that in order to ensure that no person claimed undue or unintended benefit under the Scheme, the Joint Director General

⁵ Exhibit "C", p.55 to WP No. 2122/2015

⁶ Exhibit "D", pp. 56-59 to WP No. 2122/2015

of Foreign Trade (“**DGFT**”), by his Trade Notice No. 6 dated 31st July 2013⁷ invited suggestions and feedback relating to the scrutiny required where growth in exports was claimed to be more than 25% or where the total incremental exports was Rs. 10 crores or more. In Writ Petition No. 2122 of 2015, the Petitioners made an application on 3rd February 2014.⁸ In this, it showed that it had been consistently increasing its exports and, in fact, had no domestic sales. It also demonstrated an export performance percentage growth of 200% for the relevant period. We may only note here that there were certain deficiencies that were noted in this application. These related to calls for additional documents such as bills of lading, excise returns and so on; These deficiencies were in fact rectified. There is no dispute about this.

13. The Petitioners claim that all applications for export duty credit scrip exceeding Rs. 20 lakhs were rejected by the Respondents. This was on the basis of the 2013 Notification. The 2013 Notification adds two sub-paragraphs (i) and (ii) to paragraph 3.14.4(c). Paragraph 2 of this Notification reads:

“2. The following sub-paragraphs (i) and (ii) are added below paragraph 3.14.4.(c) as under:

(i) *Benefit of Incremental Export Incentivisation Scheme for the last quarter of 2012-13 will be limited to 25% growth or Incremental growth of Rs. 10*

⁷ Exhibit “E”, p. 60 to WP No. 2122/2015

⁸ Exhibit “H”, pp. 66-72 to WP No. 2122/2015

crores in value, whichever is less.

(ii) Claims in excess of this value will be subjected to greater scrutiny by Regional Authority."

14. Mr. Nankani's submission is that he has no quarrel with this Notification as it stands, because on the face of it it does not, read as a whole, place any cap on the value of the scrip. Sub-clause (i) does say that the benefit is limited to 25% growth or incremental growth of Rs. 10 crores in value, i.e., that the credit scrip will be only 2% of the 25% of the growth or 2% of the incremental growth of Rs. 10 crores whichever is less, i.e., a maximum of Rs. 20 lakhs. At the same time, however, clause (ii) clearly contemplates claims larger than Rs. 20 lakhs but only says that these will be subject to greater scrutiny by the Regional Authority. This, according to Mr. Nankani, is completely sound, because where a large incremental export is claimed and a very large credit is claimed on that basis, it is of course necessary for the Revenue to exercise greater caution and care. But the same degree of care, caution and scrutiny may not necessarily be required for each and every single application. Those that are more modest in their claims might require a far less fine-grained an examination than large claims. Indeed, says Mr. Nankani, had the Respondents accepted this and proceeded accordingly, none of the Petitioners would have had any quarrel. They would have subjected themselves quite rightly to the rigours of any additional scrutiny that the Regional Authority may have wanted.

15. Corresponding to the 2013 Notification was an amendment to the Handbook of Procedures made on 25th September 2013 by Public Notice No. 28 (RE-2013) (2009-14).⁹ This amendment to the Handbook in terms specified the documents likely to be called for by the Regional Authority while carrying on the “greater scrutiny” contemplated in sub-clause (ii) of the 2013 Notification. These documents included calling for evidence for manufacture/purchase of export goods, i.e., excise returns, sales tax returns or other evidence; checking exports of company from whom goods have been purchased; calling for other evidence to justify export growth; etc. Even the Handbook as amended did not specify any cap and this is *inter alia* evident from the format of Form ANF 3F and its annexures in the Handbook.¹⁰

16. On 13th January 2015, the Petitioners in Writ Petition No. 2122 of 2015 wrote to the Additional DGFT stating that it had made an application for entitlement of an export duty credit scrip in the amount of Rs. 8.75 crores, but had been granted only an export scrip in the amount of Rs. 20 lakhs.¹¹ The Petitioners set out their submissions in this regard and requested that the application at the rate of 2% on the entire incremental growth be considered. The Assistant DGFT replied by his letter dated 11th February 2015.¹² This is one of the documents impugned in Writ Petition No. 2122 of 2015. The Assistant DGFT stated that the value claimed of the IEIS scrip was limited to 25% growth in exports or incremental growth of

⁹ Exhibit “G”, pp. 62-65 to WP No. 2122/2015

¹⁰ WP No. 2122/2015, p. 65

¹¹ Exhibit “Q”, pp. 87-89 to WP No. 2122/2015

¹² Exhibit “R”, p. 90 to WP No. 2122/2015

Rs. 10 crores in value whichever is less, in terms of Notification No. 44 dated 25th September 2013 and, hence, the *maximum* value of the IEIS scrip that could be claimed was restricted to Rs. 20 lakhs.

17. Mr. Nankani submits that the basis of this communication is actually to be found in the 2014 Clarification dated 23rd September 2014.¹³ Paragraphs 2, 3 and 4 of this Clarification read.

"2. DGFT had issued two notifications in this regard.

(a) Vide Notification No. 44 dated 25.09/2013 the following sub-paragraphs (i) and (ii) were added below paragraph 3.14.4 of FTP as under:

(i) *Benefit of Incremental Export Incentivisation Scheme for the last quarter of 2012-13 will be limited to 25% growth or Incremental growth of Rs. 10 crores in value, whichever is less.*

(ii) *Claims in excess of this value will be subjected to greater scrutiny by Regional Authority*

(b) Vide Notification No. 43 dated 25.09.2013 the following sub-paragraphs were added below paragraph 3.14.5(c) of FTP as under:

¹³ Exhibit "S", pp. 91-92

(i) *Benefit of Incremental Export Incentivisation Scheme for the year 2013-14 will be limited to a scrip of a value not exceeding Rs. 1 Crore per IEC.*

(ii) *Claims in excess of this value will be subjected to greater scrutiny by Regional Authority.*

3. It is informed that sub-paragraphs (i) and (ii) of each notification are independent paras in both the Notifications Nos. 44 and 43 dated 25.09.2013. The limiting of claim is clearly mentioned in the first sub-para of both notifications which fixes the upper limit of grant of benefit. The second sub-para in both the notifications only directs RAs to exercise caution while dealing with cases of incremental growth of exports under the scheme. It does not entitle any Applicant to higher levels of benefits under the scheme.

4. Accordingly RAs may compute entitlement under the scheme as under:

IEIS for the last quarter of 2012-13:
Benefit of Incremental Export Incentivisation Scheme for the last quarter of 2012-13 will be limited to 25% growth or Incremental growth of Rs. 10 crores in value, whichever is less. RAs should recover excess claim over Rs. 20 lakhs, if sanctioned by them."

18. This is also impugned in the present Petition. It is common ground that we are not, in this group of writ petitions, concerned with Notification No.43.

19. By its letter of 2nd April 2015,¹⁴ the Petitioners once again made a representation to the Additional DGFT. This received a response on 19th May 2015¹⁵ in which the Assistant DGFT reiterated the stand that the IEIS scrip was limited to Rs. 20 lakhs and that the 2012 Notification read with the 2013 Notification did not by itself confer any additional benefits.

20. Mr. Nankani's submissions, supported by learned Counsel for the Petitioners in the other Writ Petitions, are straightforward. They say that the 2012 Notification contained no such restriction as is now sought to be imposed. There were indeed restrictions in 2012 when the Incentive Policy was first announced. These are to be found in the Eligibility Criteria, clause (d), and in the special provisions, clause (e), of the 2012 Notification. The Petitioners have no quarrel with these restrictions, such as they are. They also accept the additional condition that the only relevant period is the quarter 1st January 2013 to 31st March 2013 and that this has to be compared to the corresponding previous quarter of 1st January 2012 to 31st March 2012. Indeed, they also accept that where there is exceptionally high incremental export for the period under consideration, additional scrutiny may indeed be required. But neither the 2012 Notification nor the 2013 Notification in any way restrict or cap the total entitlement of Rs. 20 lakhs. Mr. Nankani's

¹⁴ Exhibit "T", pp. 93-96 to WP No. 2122/2015

¹⁵ Exhibit "U", p. 97 to WP No. 2122/2015

submission is that if such a cap was intended, then, clause (ii) of the 2013 Notification was unnecessary:

“(ii) Claims in excess of this value will be subjected to greater scrutiny by Regional Authority.”

The very wording of this clause, he submits, contemplates an application being made for IEIS scrip in excess of Rs. 20 lakhs. The only harmonious construction of clauses (i) and (ii) is, he submits, to hold that claims for IEIS scrips over Rs. 20 lakhs require a more minute scrutiny with greater evidence and documentation. The purpose of this, he submits, is to prevent, as the Government itself says, unintended benefits being taken by certain exporters. This can only mean, Mr. Nankani submits, that a temporary, seasonal or one-off increase in exports, something that is merely an aberration and does not display or evidence a consistent growth in export business and turnover, should not be held eligible for such an incentive. For genuine exporters who do qualify and show an incremental growth in export, this incentive, he says, is rendered illusory if it is capped at Rs. 20 lakhs when, on a plain calculation of 2% of the incremental growth the value could be, as it is in his clients' case in Writ Petition No. 2122 of 2015, in excess of Rs. 8 crores.

21. Mr. Nankani also submits that the 2013 Notification if interpreted as the Respondents suggests, would amount to a retrospective curtailment or limit on the original 2012 Notification. This is impermissible, according to him. He also submits that the Clarification cannot travel beyond the limits of the Notification itself.

22. In response Mr. Rana for the Respondents submits firstly that the 2013 Notification is not under challenge at all. All that the Petitioners challenge is the Clarification. The Respondents are not relying on the Clarification. The plain meaning of the 2013 Notification is that it imposes a cap and this cap is necessary to prevent unintended benefits. He emphasizes that the 2013 Notification expressly states that it comes into force *with immediate effect* and, further, that it applies to the relevant period only, i.e., the last quarter of 2012-2013. This is not, therefore, in his submission, a retrospective insertion of a cap when none existed.

23. Mr. Rana's submission is that clause (ii) of the 2013 Notification is merely advisory to prevent unintended benefit. All that it says, in his submission, is that where a claim is made for an IEIS scrip of Rs. 20 lakhs or less, there will not be the same degree of scrutiny as would be necessary if the claim is for an IEIS scrip of over Rs. 20 lakhs. This does not mean, in his submission, that there is no cap or limit on the total value of the IEIS scrip.

24. Relying on the Supreme Court decision in *M/s New India Sugar Works v State of Uttar Pradesh & Ors.*,¹⁶ which in turn cited with approval the earlier decision of the Supreme Court in *Trimbak Damodar Raipurkar v Assaram Hiranman Patil & Ors.*,¹⁷ Mr. Rana submitted that there is a difference between an existing right and a vested right. Where a statute operates in future, it is not 'retrospective' because it includes within its sweep all existing rights. This, he submits, is precisely the situation here: there can be

¹⁶ (1981) 2 SCC 293

¹⁷ AIR 1966 SC 1758 : 1962 Supp (1) SCR 700

no retrospectivity, because the 2013 Notification came into effect not from some previous date, or from the date of the 2012 Notification, but only 'with immediate effect', i.e., from the date of the 2013 Notification. It would, therefore, operate as against all applications for IEIS scrips made after that.

25. This is, of course, well-settled. But Mr. Nankani's submission is slightly different: all that he says is that this kind of 'clarification' or 'amendment' is not one that can reasonably be said to apply only *in praesenti* or *in futuro*, irrespective of the wording of the 2013 Notification. Of necessity, it relates back to the 2012 Notification and seeks to impose a limit on it where none existed. Matters might have been different, he says, and we agree, if there was material to show that previous applications were allowed without limit, and the 2013 Notification only operates against those that are made after its date. But even this, he says, is surely immaterial. He reiterates that, on a plain reading, the 2013 Notification places no cap at all. He stresses the second clause (ii) of the 2013 Notification. This was entirely unnecessary, whether retrospective or prospective, had any cap been imposed, and the 2013 Notification would have stopped at clause (i).

26. Mr. Jetly for the Respondents also tendered written submissions. These show that in his speech, the Union Minister spoke of an incentive at the rate of 2% on incremental growth. He mentioned certain exclusions but did not specify any cap.

27. Mr. Shah for the Petitioners in Writ Petition No. 10437 of 2015 drew our attention to the new Policy that has been announced,

by which this Incentive Scheme has been extended. A fresh Circular is issued. This is in terms of the 2012 Notification but without the so-called cap or limit said by the Respondents to have been specified by the 2013 Notification. The contents of the 2013 Notification are not to be found in the extended notification. The difference now is that the extended Notification¹⁸ is no longer restricted the last quarter but uses a year-to-year mark for computing the incremental growth claimed.

28. We have considered the rival submissions with great care. It seems to us that Mr. Nankani's submissions deserve to be accepted. We find it difficult to accept the proposition that where there was no cap or limit in the 2012 Notification or in any of its surrounding or contemporaneous documents such as public speeches, policy documents, changes in the Handbook of Procedures and so on, such a restriction could be said to have been brought in by the 2013 Notification. We are mindful of the purpose and intent of the 2013 Notification. It is entirely salutary. None should receive unintended benefit from the 2012 Notification. Certain checks and measures are undoubtedly essential and the Department quite wisely has chosen the course of specifying a greater scrutiny for high value claims. There is nothing objectionable about any of this. Indeed, the Petitioners do not object to this. But this a far cry from an insistence that irrespective of the value of the incremental exports, those incentives must be restricted to a paltry Rs. 20 lakhs. There is no such restriction to be found in the 2012 Notification or in the 2013 Notification. We certainly cannot read it into 2013 Notification. To do so would be to render, as Mr. Nankani says, clause (ii) entirely

¹⁸ Exhibit "B", *pp.* 22-24 to WP No. 10437/2015, at page 24

redundant. If the cap was Rs. 20 lakhs, no exporter, no matter what is his incremental exports for the period in question, would ever submit an application or make a claim in excess of Rs. 20 lakhs. There would then be no question of “greater scrutiny” by the Regional Authority. That clause would be entirely meaningless. Evidently, therefore, what clause (ii) says is that while claims up to the value of Rs. 20 lakhs will require one degree of scrutiny, those in cases of more than that amount will require much greater study, examination and scrutiny.

29. We are mindful of the principles of interpretation that Mr. Rana presses into service. None can claim any benefit or incentive as an absolute right. However, a definite policy is enunciated in the present case. That policy extends an incentive for a demonstrated increase in exports. Its purpose is also clear, viz., to encourage more exports. The policy’s terms must, therefore, receive an interpretation as would advance its stated purpose, viz., to promote and encourage exports. That this is also one of the avowed objects of the Foreign Trade (Development and Regulation) Act, 1992 is also not doubted. Where the policy did not itself place any such cap – and plainly it did not, for we find no words of limitation in it, other than those in the eligibility criteria, and these are accepted – any interpretation of the 2013 Notification, therefore, that restricts the incentives in their entirety would therefore be arbitrary, violating the policy’s objective and the mandate of Article 14 of the Constitution of India.

30. It is well-settled that even in matters of policy, this Constitutional mandate of fairness, reasonableness, non-

arbitrariness and non-discrimination binds the Respondents. Once we approach these matters in this manner, then none of the judgments relied upon by Mr. Rana are applicable. This is a case of a policy interpretation by those in charge of its implementation by which, ostensibly to prevent undue benefit to some, undue and unjustified hurdles and obstacles are created disabling *bona fide* beneficiaries from availing of the policy's incentives and benefits. It is this aspect, highlighted throughout, that persuades us to agree with the Petitioners-Exporters.

31. The other important and equally salutary principle of interpretation is that in a beneficent piece of legislation or a policy such as the one involved in the present case, the Court will not or cannot read into that policy or legislation anything not already there, the introduction of which would result in the imposition of an unwarranted restriction upon the rights of the beneficiaries or a class of beneficiaries.¹⁹

32. This in turn means that apart from adopting a plain meaning approach to the interpretation of the 2013 Notification, we must also adopt a purposive approach to its interpretation and construction. Mr. Rana's submissions do not tell us how a cap or limit or specifying the maximum benefit would advance the purpose of the incentive scheme. All that these submissions tell us is that there was a concern that none should receive undue or unintended benefit. There can be no cavilling with that. But it surely cannot be suggested that any incentive above Rs.20 lakhs is axiomatically and

¹⁹ *Jnan Ranjan Sen Gupta v Arun Kumar Bose*, (1975) 2 SCC 526, paragraph 9, at p. 530.

ipso facto an “unintended benefit”. This is where an acceptance of Mr. Rana’s submission takes us. But this was never the purpose nor the object of the 2012 Notification. The 2013 Notification did not (and could not) suggest it.

33. Further, Mr. Nankani’s submission that the 2012 Notification and 2013 Notification must receive a harmonious construction commends itself to us. Surely no person would subject himself to ‘greater scrutiny’ under clause (ii) of the 2013 Notification if all he was entitled to get was a maximum of Rs.20 lakhs possible under clause (i) with less stringent a scrutiny. The fact that clause (ii) of the 2013 Notification speaks of ‘claim in excess of this value’ and ‘greater scrutiny’ can only mean that the 2013 Notification itself contemplated the issuance of incentive scrips above Rs.20 lakhs.

34. The so-called Clarification impugned in these Petitions, dated 23rd September 2014, is clearly incorrect. There is no basis for it whatsoever. It is quashed and set aside.

35. All four Petitions succeed in part. We hold that the 2013 Notification places no cap or restriction on the value of the IEIS scrip. The Authorities concerned will consider the Petitioners’ applications on merits bearing in mind our findings and this order, and without any regard to the impugned Clarification of 23rd September 2014.

36. The Petitions are disposed of in these terms, with no order as to costs.

37. At the request of Mr. Jetly, we grant eight weeks' time to the Respondents to comply with the above directions.

(G. S. Patel, J.)

(S. C. Dharmadhikari, J.)