IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 12647 of 2016
DATE OF DECISION :- July 01, 2016

Pushpanjali Floriculture Pvt. Ltd. ...Petitioner

Versus

Union of India and others ...Respondents

CORAM: HON'BLE MR.JUSTICE M.JEYAPAUL

HON'BLE MR. JUSTICE A.B. CHAUDHARI

Present:- Mr. Hari Shankar, Senior Advocate
with Mr. Pawan Kumar, Advocate for the petitioner.

Mr. Sharan Sethi, Sr. Standing Counsel for respondent no.4.

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M.JEYAPAUL, J.

1. Written statements on behalf of all the respondents were filed and the same were taken on record.

2. Heard the elaborate submissions made by learned counsel appearing for the writ petitioner and the learned counsel appearing for respondent no.4.

3. The present writ petition, filed by the petitioner M/s Pushpanjali Floriculture Ltd, seeks quashing of (i) Notification No. 31 (RE:2013)/2009-14, dated 01.08.2013, (ii) Circular No. 3 (RE: 2013)/2009-14, dated 02.08.2013, (iii) Public Notice No. 35 (RE: 2013)/2009-14, dated 30.10.2013, and (iv) Notification No. 90 (RE: 30)/2009-14, dated

21.08.2014, issued by the Ministry of Commerce, Government of India, or for reading down of the said Notifications/Public Notice/Circular, as to be applicable to licences issued under the Duty Free Import Authorization (DFIA) Scheme contained in Para 4 of the Foreign Trade Policy (FTP) 2009-14, after 01.08.2013. Consequent prayers, in the form of revalidation of the DFIAs No. 0310688209, dated 28.03.2012 and 0310690633 dated 13.04.2012, issued and subsequently transferred to the petitioner, and for re-assessing the ex-bond Bill of Entry (hereinafter referred to as "B/E") filed by the petitioner, under the said DFIAs, in respect of soda ash imported by it thereunder, have also been made.

4. In view of the fact that the goods imported under the above mentioned B/E are pending clearance at ICD Ludhiana, with the petitioner unwilling to clear the goods without being extended the benefit of the DFIA scheme and the Customs authorities and the authorities under the Directorate General of Foreign Trade (DGFT) (Respondents 1 to 3 in the writ petition) unwilling to extend, to the petitioner, the benefit of the said Scheme, the writ petition has been treated as urgent and heard finally, with the consent of all parties.

5. The DFIA scheme is one of the export promotion schemes contained in Chapter 4 of the Foreign Trade Policy, 2009-2014, and provides for duty free imports, by the holder of a licence issued under the said Scheme, of inputs specified thereunder. Licences issued under the DFIA Scheme are transferable, after export obligation cast by the licences is fulfilled, and subject to transferability being endorsed on the licences by the DGFT. The following clauses of the said Scheme, as contained in the FTP and as they existed at the time of issuance of the DFIA licences in the

present case, merit reproduction:

> "***2.2*** *Every exporter or importer shall comply with the provisions of FT (D & R) Act, the Rules and Orders made thereunder, FTP and terms and conditions of any Authorisation granted. All imported goods shall also be subject to domestic Laws, Rules, Orders, Regulations, technical specifications, environmental and safety norms as applicable to domestically produced goods. No import or export of rough diamonds shall be permitted unless accompanied by Kimberly Process (KP) Certificate as specified by Gem and Jewellery EPC (GJEPC).*
>
> ***2.8*** *Every Authorisation shall be valid for prescribed period of validity and shall contain such terms and conditions as may be specified by RA which may include:*
>
> *(a) Quantity, description and value of goods;*
> *(b) Actual User condition;*
> *(c) Export obligation;*
> *(d) Value addition to be achieved; and*
> *(e) Minimum export/import price.*
>
> ***4.1*** *Duty exemption schemes enable duty-free import of inputs required for export production. Duty Exemption Schemes consist of (a) Advance Authorisation scheme and (b) Duty Free Import Authorisation (DFIA) scheme. Our Duty Remission Scheme enables post export replenishment/remission of*

duty on imports used in export product. Duty Remission Schemes consist of (a) Duty Entitlement Pass book (DEPB) Scheme and (b) Duty Drawback (DBK) Scheme.

4.1.11 *Holder of Advance Authorisation, Advance Authorisation for Annual Requirement and Duty Free Import Authorisation intending to source inputs from indigenous sources/State Trading Enterprises, in lieu of direct import, as option to source them either against Advance Release Order (ARO) or Invalidation letter, the nominated in free foreign exchange/Indian rupee's. However, supplies may be obtained against Authorisation from EOU/EHTP/BTP/STP/SEZ units, without conversion into ARO INVALIDATION letter.*

Transferee of DFIA shall also be eligible for ARO/invalidation letter facility.

Validity period of ARO shall be as prescribed in HBP v1.

4.1.12 *Holder of Advance Authorisation, Advance Authorisation for Annual Requirement and DFIA may, instead of applying for an ARO or Invalidation letter, availed of the facility of Back-to-Back Inland Letter of Credit in accordance with the procedure specified in HBP v1.*

4.1.13 *Prohibited items of imports mentioned in ITC (HS) shall not be imported under Advance Authorisation/DFIA. Further items reserved for imports* *by STEs cannot be imported against Advance Authorisation/DFIA. However those items can be procured from STEs against ARO or Invalidation letter.*

STEs are also allowed to sell goods on High Sea Sale basis to holders of Advance Authorisation/DFIA holder.

In addition, STEs are permitted to issue "No Objection Certificate (NOC)" for import by advance Authorisation/DFIA holder. Authorisation Holder would be required to file Quarterly Returns of imports effected against such NOC to concerned STE and STE would submit half-yearly import figures of such imports to concerned administrative Department for monitoring with a copy endorsed to DGFT.

Similarly prohibited items of imports mentioned in ITC (HS) shall not be exported under Advance Authorisation/DFIA scheme. Export of restricted items shall be subject to all conditionality is requirements of Export Authorisation or permission, as may be required, under Schedule II of ITC (HS).

4.1.14 *In case of an Advance Authorisation, drawback shall be available of any duty paid material, whether imported or indigenous, used in goods exported, as per drawback rate fixed by DoR, Ministry of Finance (Directorate of Drawback). Drawback allowed shall be mentioned in Authorisation.*

> ***4.2.2*** *Provisions of para 4.1.3 shall be applicable in case of DFIA. However, these Authorisations shall be issued only for products for which Standard Input and Output Norms (SION) have been notified.*
>
> ***4.2.3*** *Provisions of paras 4.1 .11, 4.1 .12, 4.1 .13 and 4.1 .14 of the FTP shall be applicable for DFIA holder.*
>
> ***4.2.6*** *Once export obligation has been fulfilled, request for transferability of Authorisation or inputs imported against it may be made before concerned RA. Once, transferability is endorsed, Authorisation Holder may transfer DFIA or duty-free inputs, except fuel and any other item (s) notified by DGFT. However, for fuel, import entitlement may be transferred only to companies which have been granted authorisation to market fuel by Ministry of Petroleum and natural gas."*

6. As mentioned in para4.2.6 of the FTP, already extracted herein above, para 4.36A of the Handbook of Procedures (HOP), issued under the FTP and containing the procedures for implementing the provisions thereof, stipulated that-

> "*Once export obligation is fulfilled and required documents as stipulated in Paragraph 4.36 above have been furnished, RA shall make authorisation transferable subject to conditions stipulated for this scheme including an endorsement on the authorisation itself as to liability of additional customs duty / excise duty in respect of imported / indigenously procured*

> *inputs, as the case may be, which have already been imported under Actual User DFIA and are sought to be transferred after fulfillment of E.O."*

Clearly, therefore, transferability of the DFIA would be endorsed, by the DGFT, only after Export Obligation was fulfilled. It is an admitted position, in the present case, that the DGFT endorsed both the DFIAs transferable, in the case of DFIA dated 28.03.2011 on 10.07.2013 and in the case of DFIA dated 13.04.2012 on 28.09.2015.

7. The two DFIA Licenses,dated 28.03.2012 and 13.04.2012, involved in the present case, were originally issued to the Exporter. The DFIAs were duly transferable in terms of para 7.2 of Handbook of Procedure [HoP] issued under the Foreign Trade Policy, 2009-14 [FTP].<u>The said DFIAs were issued on post-export basis, i.e. exports, in fulfilment of the Export Obligation cast by the said DFIAs, were made in advance of issuance thereof. Details of the said exports and Export Obligation Discharge Certificates (EODCs) issued by the DGFT in acknowledgment of the said exports having been made and of export obligation having been completed thereby, are not disputed either in the counter-affidavit filed by the respondents, or during the course of oral submissions made before this Court.</u>

8. The list of items permitted to be imported, duty free, under the said DFIAs, included Soda Ash, as per the amendment sheets, attached to the said licence. There is also no dispute on the fact that the Standard Input and Output Norms (SION) issued by the Central Government under the FTP also permit such import of Soda Ash against the subject exports.

9. Policy Circular No 72 (RE-08)/2004-2009, dated 24.03.2009

issued by the DGFT, clarified that, as the objective of the Standard Input and Output Norms (SION) issued under the FTP was to allow duty free import of inputs actually used or capable of being used in the export product, an exporter, holding a DFIA licence, had the flexibility to import alternative inputs or products mentioned in the SION.

10. The SION also stipulated Soda Ash to be a permissible input in respect of the export items covered by the DFIA issued to the petitioner.

11. Condition 4 of the Terms and Conditions attached to the DFIAs required the export obligation to be fulfilled by the DFIA holder, as per the terms and conditions specified in the FTP, 2009-14 and the HOP 2009-14 and guidelines issued by the DGFT from time to time.

12. Condition 12 of the DFIAs stipulated that all conditions of FTP and HOP and ITC (HS) Classification, as amended, would be applicable unless specifically dispensed with by the DFIA.

13. Consequent to the DGFT endorsing both the DFIAs transferable, in the case of DFIA dated 28.03.2011 on 10.07.2013 and in the case of DFIA dated 13.04.2012 on 28.09.2015, the said DFIAs were transferred by the original holder to the petitioner during the period of their validity, which was 24 months from the date of issue.

14. The petitioner imported Soda Ash under into-Bond B/E dated 13.06.2014 and subsequently sought duty free clearance thereof, against DFIA, by filing ex-bond B/E dated 16.08.2014.

15. *Vide* letter dated 21.01.2016,Respondent No 4 directed the petitioner to pay full duty on the goods, thereby denying to it, the benefit of duty free clearance under DFIA. This was, apparently and avowedly, because of the following Notifications/Circular/Public Notice, issued by the

Ministry of Commerce, through the DGFT:

(i) Notification No 31 (RE-2013)/2009-2014, dated 01.08.2013,

(ii) Policy Circular No 03 (RE-2013)/2009-2014, dated 02.08.2013

(iii) Public Notice No 35 (RE-2013)/2009-2014, dated 30.10.2013 and

(iv) Notification No 90 (RE-2013)/2009-2014, dated 21.08.2014.

16. The petitioner claims to be aggrieved by the above-mentioned Notifications/Circulars/Public Notices issued by the DGFT which have substantially altered the benefits available to the petitioner, as transferee for value, of the DFIA and seeks, by the present writ petition, quashing thereof and, consequently extension to the petitioner of the benefit of the DFIA scheme.

17. Whereas para 4.2.3 of FTP made paras 4.1.11, 4.1.12, 4.1.13 and 4.1.14 of the FTP applicable to DFIA holders, the impugned Notification dated 01.08.2013 *supra* amended para 4.2.3, by making DFIAs also subject to para 4.1.15 of the FTP, which itself was inserted only by the said Notification dated 01.08.2013. The said para 4.1.15 stipulated that, wherever the SION permitted use of generic input or alternative inputs, unless the name of the specific inputs got indicated/endorsed in the relevant Shipping Bills [S/Bs], and these inputs, so endorsed, matched the description in the relevant S/Bs, the DFIA would not be redeemed. The said clause further stipulated that, at the time of EODC or redemption thereof, the DGFT would allow only those inputs which have been specifically indicated in the S/Bs. Para 4 of the said Notification was even more injurious to the petitioner, inasmuch as it stipulated that "inputs actually used in manufacture of the export products should only be imported under

the authorization" and that "inputs actually imported must be used in the export products", further clarifying that this has to be established in respect of every DFIA.

18. The impugned DGFT Circular dated 02.08.2013 stipulated that, in view of Notification No 31 dated 01.08.2013 *supra*, "the earlier policy Circular No 30 dated 10.10.2005 becomes *infructuous* and hence stands withdrawn" and reiterated that duty free import of inputs, under the schemes in Chapter 4 of the FTP, would be guided by Notification 31 dated 01.08.2013, and that any clarification issued by the DGFT to the said Notification would be deemed to have been superseded to the extent of such repugnancy.

19. The impugned Public Notice dated 30.10.2013 stipulated that, while the impugned Notification dated 01.08.2013 (*supra*) would not cover the goods, if both export and import had been completed prior to 01.08.2013, irrespective of whether the DFIAs had been redeemed or not, or to cases where the DFIAs had been endorsed as transferable before 01.08.2013, in all other cases, even where the export was fully or partially completed before 01.08.2013, corresponding imports would be allowed subject to an undertaking from the DFIA holder that only inputs which had been actually used in the product already exported would be imported.

20. The impugned Notification, dated 21.08.2014 amended para 4.1.15 of the FTP, as inserted by Notification dated 01.08.2013 *supra*, by stipulating that the quantities or inputs permitted for import would be in proportion to the quantities which would be consumed in production, which itself would be clearly indicated in the S/Bs.

21. Shri C. Hari Shankar, learned Senior Counsel appearing for the

petitioner before us, urges that there was no justification for making the benefits available under the subject two DFIAs, as originally issued, to the various conditionalities and limitations subsequently introduced by the impugned Notifications, Circular and Public Notice, which were never in existence on the date of issuance of the DFIAs themselves. Additionally, he has emphasised the impossibility of compliance with the conditions stipulated in the impugned Notifications, Circular and Public Notice, which require specifications to be inserted in the Shipping Bills whereunder the exports, in fulfilment of Export Obligation, are made and, further, imports, only of such items, to be effected, as were used in the manufacture of the export product, irrespective of the SION norms. He submits that, where the exports were made prior to issuance of the DFIAs themselves, it is obviously impossible for the importer, importing goods thereafter, to limit the imports to the goods used in the product already exported, or to use the same in export goods, and stresses the absurdity of such a stipulation. In fine, the learned Senior Counsel re-emphasises that the DFIAs originally issued to the Exporter and subsequently transferred to the petitioner, could only be subjected to the conditions existing in the FTP, HOP and in the instructions issued by the DGFT in this regard, on or before the date of issuance of the DFIAs. DFIAs issued prior to 01/08/2013, in other words, could not, according to the learned Senior Counsel, be subjected to conditions and limitations which came into being thereafter, in the impugned Notifications/Circular/Public Notice. The doctrine of promissory estoppel is also pressed into service, in this regard.

22. While learned Counsel appearing for Respondent No 4 does not seriously contest the writ petition, and states that his client is only a pro

forma respondent, Ld. Counsel appearing for the DGFT (Respondents 1 to 3) contests the stand of the petitioner. In this connection, our attention was specifically invited to Clause 12 of the Terms and Conditions accompanying the DFIAs issued to the petitioner. He emphasizes that the various limitations, introduced by the impugned Notifications/Public Notice/Circular work in public interest, as considerable misuse of DFIAs, by importing inputs which had nothing to do with the export product, had been going on, which, according to him, was contrary to the very ethos of the DFIA Scheme. He has also sought to place reliance, in this regard, on the judgement of the High Court of Bombay in **Writ Petition No 9955 of 2013 (Sevantilal& Sons v U.O.I.)** which, according to them on the substantially similar issue.

23. We have bestowed our anxious consideration to the submissions made by the petitioner and by Respondents 1 to 3 as well as to the material on record and the various decisions relied upon by both sides.

24. Para-2 of the impugned Notification No 31 (RE-2013)/2009-2014, dated 01/08/2013, inserted in the FTP, new para-4.1.15 after para-4.1 .14, which reads thus:

> "**4.1.15** Wherever SION permits use of either (a) a genetic input or (b) alternative inputs, *unless the name of the specific input(s) [which has (have) been used in manufacturing the export product] gets indicated/endorsed in the relevant shipping Bill* and these inputs, so endorsed, matched the description in the relevant Bill of entry, the concerned Authorisation will not be redeemed. In other words, the name/description of the input used (or to be used) in the Authorisation must match exactly the name/description endorsed in the

> shipping Bill. *At the time of discharge of export obligation (EODC) or at the time of redemption, RA shall allow only those imported which have been specifically indicated in the shipping Bill."* (Emphasis supplied)

As a matter of course, para-4.2.3 of the FTP was also amended, by para-3 of the said Notification dated 01/08/2013 by making the DFIA scheme also subject to the above newly added para-4.1.15 thereof, in addition to already applicable para-4.1 .11, 4.1.12, 4.1.13 and 4.1.14.

25. The DFIAs, in the present case were issued on post-export basis. In other words, the exports in fulfilment of the Export Obligation thereunder were effected by the Exporter / Licence holder prior to issuance of the said DFIAs. It would be impossible, therefore, for any additional indication/endorsement to be entered in the Shipping Bills whereunder the exports had already been effected. Clearly, therefore, requiring the holder or the transferee of the DFIA, which was issued on post-export bases, to comply with para-4.1.15 as inserted by the above-mentioned impugned Notification dated 01/08/2013, would amount to insisting on an impossibility. On the face of it, therefore, insistence on the said requirement would be hit by the well-established principle that no person could be required, by the law, to perform the impossible (*lex non cogit ad impossibilia*). [Refer ***State of Rajasthan v Shamsher Singh, 1985 Supp SCC 416***]

26. Para-4 of the impugned Notification dated 01/08/2013 reads as under:

> "**4. <u>Effect of this Notification</u>:** *Inputs actually used in manufacture of the export product only be imported*

> *under the authorisation. Similarly inputs actually imported must be used in the export product. This has to be established in respect of every Advance Authorisation/DFIA."* (Emphasis supplied)

27. It has been emphasized, by the learned Senior Counsel appearing before us on behalf of the petitioner – and, we feel, rightly – that the italicized words, in para-4 of the impugned Notification dated 01/08/2013, are absurd, and reflective of total non-application of mind in issuance of the said Notification. Significantly, we find the same absurdity reflected in para-2 of the consequent impugned Public Notice No 35 (RE-2013)/2009-2014, dated 30/10/2013, which reads thus:

> "2 If only export has been fully completed/partly completed before 01/08/2013, then the corresponding import would be allowed subject to an undertaking from the authorisation holder, *that the inputs which have been actually used in the product already exported shall only be imported."*(Emphasis supplied)

Further, Clause 3 of the impugned Notification no. 90 (Re-2013)/ 2009-14 dated 21.8.2014 reads as under-

> "3**.** **<u>Effect of this Notification</u>:** Quantity of input to be allowed under Advance Authorisation / DFIA shall be in proportion to the quantity of input actually used / consumed in production."

28. How an importer could be required only to import inputs *which have actually been used in products which already stand exported.* SION norms are notified to prescribe permissible inputs against any export product. The DFIA is issued on such standard basis. It cannot be argued that

what is contemplated by these clauses is only replenishment, as replenishment is an entirely independent concept, in respect of which the FTP and the HOP contains separate clauses. We can only understand these clauses, i.e. para-4 of the impugned Notification dated 01/08/2013, and para-2 of the impugned Public Notice dated 30/10/2013, as stipulating that, from the product which already stands exported, the inputs used in the manufacture of thereof should somehow be extracted, and only such inputs be allowed to be subsequently imported into India. To say the least, such requirement is manifestly absurd, and it's very incorporation, in the impugned Notification and Public Notice, reflective, as the learned Senior Counsel has correctly emphasized, of total non-application of mind, on the part of the authorities issuing the said Notification/Public Notice.

29. Indeed, on the face of it, it appears that these covenants, by their very nature were never intended to cover the cases of post-export DFIA or transferees of such DFIAs. Else, the DFIAs would be rendered worthless for all such holders/transferees of the DFIAs. This, in our view, could never have been the intention of a beneficial schemes such as the DFIA Scheme. It is trite that beneficial schemes had to be so interpreted as to extend the availability of the benefit thereof, rather than accorded any restrictive interpretation, which would render the schemes worthless to the persons who seek to avail the promised benefit.

30. Even on first principles, we find that neither Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, nor para 1.2 of the FTP, whereunder the impugned Notifications dated 01/08/2013 and 21.08.2014 purport to have been issued, allow retrospective divesting, by any newly added provision, of the rights already available to the Licence

holder /subsequent transferee, of the DFIA. It is well settled that the power to legislate retrospectively is not inherent, and has to be specifically conferred by statute no such power seems to emanate, either from Section 5 of the Foreign Trade (Development and regulation) Act, 1992, or from para-1.2 of the FTP. The following decisions, on which reliance has been placed in the writ petition, also underscored this settled legal position:

(a) ***Shri Hari Exports v DGFT, 1994 (73) ELT 794 (Del),***

(b) ***Hoewitzer Organic Chemicals Co. v DGFT, 2013 (294) ELT 7 (Mad)***, and

(c) ***DGFT v Kanak Exports, 2015 (326) ELT 26 (SC)***.

31. Clause 12 of the Terms and Conditions attached to the DFIA licences issued to the petitioner also stated they would be governed by the extent FTP, HOP and guidelines issued by the DGFT. Significantly, the words used in the said clause are "as amended" and not "as amended from time to time." In any event, the provisions of the FTP, HOP, Notifications, Public Notices and guidelines issued by DGFT as amended *till the date of issuance of the DFIA*, would govern the DFIAs during their entire life.

32. The same position stands reflected in para 4.2.2. (b) of FTP, as amended w.e.f. June 2012, which reads as under:

> "DFIA shall be issued *in accordance with Policy and procedure* *<u>in force on the date of issue of Authorisation.</u>*"
>
> (Emphasis supplied)

Though, undoubtedly, the specific stipulation to that effect was not contained in the FTP on the dates of issuance of DFIA to the petitioner i.e. 28.03.2012 and 13.04.2012, introduction of the said stipulation, just 3 months thereafter, has to be regarded as clarificatory, especially in view of the fact that such stipulation did exist in the case of Advance Authorizations, in para 4.1.7 of the FTP, which read thus:

> "Advance Authorisation shall be issued in accordance with Policy and procedure in force on Authorisation issue date."

There is no reason to believe that the framers of the FTP intended the FTP to apply differently, in the case of the DFIA Scheme, as compared to the Advance Authorisation Scheme, especially in view of para-4.1 of the FTP, which already stands extracted herein above, and which parenthesize the Advance Authorisation scheme and the DFIA Scheme into one bracket.

33. DGFT Circular No 72 dated 24.03.2009 which was also in existence on the date of issuance of the subject DFIAs, further clarified specifically in the context of the DFIA Scheme that since the objective of the SION was to allow duty free import of the inputs which are actually used or were capable of being used in the export product, the exporter had the flexibility to import the alternative inputs / products mentioned in the SION. This guideline, therefore, would govern the availability of import benefits under the subject DFIA during their lifetime.

34. Details of exports made in respect of subject DFIAs make it clear that even prior to issuance of the DFIAs exports had already taken place. Export Obligation Discharge Certificates (EODCs) in respect of the said DFIAs were also issued by the DGFT. This fact of discharge of Export Obligation also stands acknowledged by the DGFT by making endorsement of transferability on the body of the subject DFIAs which, as per para-4.2.6 of the FTP and para-4.3.6 of the HOP, could only be after fulfilment of Export Obligation.

35. For all the above reasons we are convinced that the various restrictions introduced by the impugned Notification No 31 dated 01.08.2013, DGFT Circular dated 02.08.2013, Public Notice No 35 dated 30.10.2013 and DGFT Notification dated 21.08.2014, could not be made applicable to imports effected under the subject DFIAs.

36. This would also flow from the principle of promissory estoppel, inasmuch as, at the time of issuance of the DFIAs, it was held out by the respondent to the DFIA holders as well as, consequently, to the transferees thereof, that all benefits accruing under the said DFIAs read with the then existing FTP, HOP and DGFT Circulars etc would be available thereunder. It was on the basis of this promise, as held out by the respondent, that the petitioner invested considerable amounts in purchasing the said DFIAs from the original holders thereof in the belief that import benefits available to the said DFIAs at the time of issuance thereof would not be denied to it merely by erroneously applying the restrictions which were introduced thereafter.

37. To the said extent, therefore, the impugned Notifications, Public Notice and Circulars, insofar as they make the restrictive conditions incorporated therein applicable to all imports made thereafter, even under DFIAs issued prior thereto, cannot sustain. The impugned DGFT Circular dated 02.08.2013 is also, consequently, illegal, insofar as it makes the Notification dated 01.08.2013 (*supra*) applicable to all imports effected under the DFIA scheme thereafter.

38. Insofar as Notification dated 21.08.2014 is concerned, again, the stipulation in the newly introduced clause (b) in para 4.1.15 of the FTP, to the effect that proportion of inputs actually used or consumed in the production of export products, shall be clearly indicated in the S/Bs cannot

be made applicable to cases where DFIA is already issued prior to such stipulation, or exports have already taken place prior to issuance of the DFIAs or prior to the date of such stipulation and much less to any transferee of the DFIAs.

39. That apart, as already indicated herein above, said clause (b) of para 4.1.15 cannot be used to restrict or limit the entitlement under DFIA, which existed on the date of issuance of DFIA under the FTP, HOP, DGFT Circular dated 02.08.2013 and the provisions of the SION.

40. Any other interpretation would also render the statutory SION norms a dead letter. DFIA is issued in terms of the SION norms. Duty free import benefits on all items referred to in the said licences as per the SION as on date of its issuance have, therefore, to be guaranteed to the licence holder as well as to all bonafide transferees thereof. Such benefit cannot be whittled down and truncated on the basis of any notification or executive instructions that may be subsequently issued after issuance of the DFIA. All such notifications or instructions would, therefore, be inapplicable or liable to be struck down.

41. The judgement of the Bombay High Court in***Sevantilal (supra)***, on which the respondents place pointed reliance, is clearly distinguishable. That was a case in which the issue involved related to exemption from anti-dumping duty, and the amendment in this regard by Notification 24/2013 dated 18.04.2013, which limited the exemption earlier available under Notification 98/2009-Cus, dated 11.09.2009. These were, in turn, provoked by the amendment of the FTP, by introducing a provision to the effect that exemption from anti-dumping duty would be available on actual user basis only, before endorsement of transferability. It was in this context that the

petitioner, in that case, contested its right to avail the benefit of exemption from anti-dumping duty. It specifically recorded in para 38 as follows-

> "38. Equally, we are not required to consider whether any subordinate legislation is being amended retrospectively."

Unlike ***Sevantilal (supra)***, we are in the present case not only concerned with retrospective amendment of the FTP, and issuance of Notifications, Public notice and Circular which retrospectively divest the licence holder and the transferee of the rights available under such licences, but also as we have already pointed out hereinabove, with the said conditions which are either absurd on their face, or impossible of compliance by any holder, or transferee, of the DFIA licence issued on post-export basis. This would be contrary to the very ethos of the DFIA scheme itself, and not sanctioned by any of the provisions thereof.

42. Although we are of considered opinion that in absence of any power of amendment with retrospective operation, any subsequent issuance of any notification or instructions by Central Government or any other authority would not divest, the licence holder or the transferee, of the benefits promised on the date of issuance of DFIA, however, it is seen that the validity of the Customs Notifications which are issued by the Central Government to restrict exemption from anti-dumping duty are not under challenge in this writ petition. Therefore, we cannot direct the Commissioner of Customs at Ludhiana to grant exemption of anti-dumping duty.Consequently, the prayer in regard to exemption from anti-dumping duty is rejected. The exemption available to the petitioner under the DFIA would therefore be restricted only to the basic customs duty.

43. It is pointed out in the petition that despite absence of any power

under section 5 of the FTDR Act, 1992 for any retrospective amendment, several such amendments / instructions are being issued and are being arbitrarily applied in a retrospective manner. Some notifications of such nature are already struck down such as DGFT Notification No. 4 (RE:2013)/ 2009-14 dated 18.04.2013 withdrawing deemed benefits for supplies to Non-Mega Power Projects – Hon'ble High Court of Gujarat struck down the Notification in the case of **Alstom (India) Ltd. Vs. Union of India – 2014 (301) ELT 446 (Guj. Regarding** DGFT Notification No. 48(RE:2005)/ 2004-2009 dated 20.02.2016 adding new products ineligible for duty free benefits under Target Plus Scheme, the Hon'ble Supreme Court in **DGFT Vs. Kanak Exports reported in 2015 (326) ELT 0026** (SC) held that the said notification cannot be applied retrospectively.

44. It is seen that the DFIA is issued with a limited validity of 24 months. Due to the actions of the Respondents the DFIAs could not be utilised by the petitioner. The Hon'ble Supreme Court in the matter of **Sandeep Exports Ltd., 2004 (9) SCC 128** had directed the Respondents to issue certificate for the purpose of revalidation of expired licenses due to disputes raised by the department. We are satisfied that due *to the impugned invalid notifications / Public Notice / Circular, licenses could not be utilised by the petitioner. The petitioner cannot be expected to present licenses for debit in such circumstances. Therefore, a case for directing revalidation of the licence is also made out.*

45. In view of the above discussion, the writ petition of the petitioner is partially allowed in the following terms:

(i) Clause 4 of Notification No 31 (RE-2013)/2009-2014 dated 01/08/2013, Clause 2 of Public Notice

No 35 (RE-2013)/2009-2014 dated 30/10/2013, and Clause 3 of Notification No 90 (RE-2013)/2009-2014 dated 21/08/2014 are struck down.

(ii) It is declared that the rest of the said impugned Notification No 31 (RE-2013)/2009-2014 dated 01/08/2013, Public Notice No 35 (RE-2013)/2009-2014 dated 30/10/2013, and Notification No 90 (RE-2013)/2009-2014 dated 21/08/2014, would not apply to DFIAs issued prior to 01/08/2013, whether they be in the hands of the holders or of transferees thereof, provided, of course, that the transfer of the DFIAs has been effected after securing necessary permission of the DGFT therefor. The entitlement under the DFIA shall be as per the SION as it existed on the date of issuance of the DFIAs.

(iii) Respondents 1 to 3 are directed to revalidate the DFIAs dated 28/03/2012 and 13/04/2012 which are the subject matter of the present proceedings.

(iii) The Commissioner of Customs, ICD Ludhiana, is directed to allow exemption of basic customs duty in respect of the import of Soda Ash by the petitioner by debiting the DFIA licence under Bill of Entry no. 7080616 dated 16.10.2014.

(iv) The prayer for granting exemption, so far as anti-dumping duty is concerned, is rejected for the reasons recorded above.

46. The petition is accordingly disposed of.

47. The original files produced during the course of hearing be returned.

(M. JEYAPAUL)
JUDGE

(A.B. CHAUDHARI)
JUDGE

July 01, 2016
p.singh