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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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W.P.(C) 1809/2016

GREATSHIP (INDIA) LTD.

..... Petitioner

Through: Mr. Balbir Singh, Senior Advocate with
Mr. Rishi Agrawala, Mr. Nakul Mohta &
Mr. Rubal Maini, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Sanjay Jain, ASG with Mr. Kamal
Nijhawan, Senior Standing Counsel for R-
1 and R-5 and Mr. Sumit Misra, Advocate.

Mr. Sanjay Jain, ASG with Mr. Kirtiman
Singh, CGSC, Mr. Waize Ali Noor,
Mr. Pranav Agarwal, Mr. R. Ashok &
Mr. Sumit Gaur Advocates for R-2, 3 & 4.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

23.05.2016

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Dr. S. Muralidhar, J:

1. The challenge in the present writ petition by Greatship (India) Ltd. is to the validity of a Customs Notification No. 91/2009 dated 11th September 2009 issued by the Department of Revenue ('DoR'), Ministry of Finance under Section 25 (1) of the Customs Act, 1962 ('CA') restricting the transfer/sale of goods imported using the Served From India Scheme ('SFIS') duty certificates/scrips for the purpose of payment of customs duty. It is contended that inasmuch as the impugned notification stipulates

an absolute bar on transferability of goods imported under the SFIS, it is violative of Articles 14, 19 (1) (g) and 300A of the Constitution of India, Section 25 of the CA, the Foreign Trade (Development and Regulation) Act, 1992 ('FTDR Act'), the Foreign Trade (Regulation) Rules 1993 ('FTR Rules') and the Foreign Trade Policy ('FTP') 2009-14 as amended on 1st August 2013.

2. The challenge in this petition is also to a letter dated 12th June 2013 sent by the Commissioner of Customs (Exports) (Respondent No.5 herein) informing the Petitioner that the decision of the Policy Relaxation Committee ('PRC') constituted by the Director General of Foreign Trade ('DGFT') (Respondent No. 3 herein) conveying approval to the transfer of one of the imported vessels of the Petitioner utilising the SFIS scrips was contrary to para 3.12.7 of the FTP 2009-14 and para 3.11.6 of the Hand Book of Procedure ('HBP') and therefore the DGFT had been requested to keep the said decision in abeyance till the matter was resolved through mutual discussion.

Background facts

3. The Petitioner imported six ships between 10th January 2008 and 2nd March 2010. These were Greatship Anjali (imported on 10th January 2008), Greatship Akhila (imported on 6th April 2009), Greatship Aarti (imported on 7th October 2009), Greatship Ahalya (imported on 2nd February 2010), Greatship Amrita (imported on 12th February 2010), and Greatship Asmi (imported on 2nd March 2010). The customs duty on the import of the said vessels was paid using the SFIS duty credit scrips.

4. The Petitioner by a letter dated 14th March 2013 sought permission of the DGFT for the sale of Greatship Amrita. By a letter dated 30th April 2013, the DGFT forwarded the decision taken at a meeting of the PRC on 9th April 2013 to grant a no-objection certificate ('NOC') to the Petitioner for sale of Greatship Amrita. The Regional Authority ('RA') in the office of the DGFT was asked to take action in terms of para 2.43 of the HBP. On this basis, the Petitioner wrote a letter dated 6th May, 2013 to the Joint DGFT seeking confirmation to proceed with the sale of the said ship in view of the permission granted by the DGFT. A reminder was sent on 9th July, 2013.

5. In the meanwhile the Petitioner also wrote to the Commissioner (Exports) on 22nd March 2013 seeking permission. A further letter was also written on 8th May, 2013 to the Joint Secretary (Drawbacks), DoR seeking approval for transfer of the vessel Greatship Amrita. The Petitioner drew attention to the fact that the said vessel was imported in February 2010, i.e., more than three years earlier and that in terms of para 2.43.2 (a) of the HBP "prior permission of RA shall not be required for disposal of imported goods after a period of two years from the date of import."

6. The DoR by the impugned letter dated 12th June, 2013 informed the Petitioner that the decision taken by the PRC on 9th April 2013 was contrary to para 3.12.7 of FTP 2009-2014 and para 3.11.6 of the HBP and therefore it had asked the DGFT to keep the said decision in abeyance till the matter was resolved through mutual discussion.

7. On 9th July 2013 the Petitioner wrote to the Joint DGFT (Respondent

No.4) again referring to Para 2.43.2 of the HBP and stating that it was going ahead with the sale of Greatship Amrita in light of the NOC granted by the PRC at its meeting on 9th April 2013. The Petitioner sought confirmation for the said move.

8. On 1st August 2013, the DGFT in exercise of the powers under Section 5 of the FTDR Act read with para 2.1 of the FTP 2009-14 amended para 3.12.7 of the FTP 2009-14 to read as under:

"3.12.7 Entitlement/goods (imported/procured) shall be non transferable (except within group company and managed hotels) and be subjected to Actual User condition. However, these goods can be alienated on completion of 3 years from the date of import/procurement."

9. By a letter dated 6th September 2013, the Petitioner informed the Joint DGFT that in view of the recent amendment to para 3.12.7 of FTP 2009-14, it would be going ahead with the sale of Greatship Amrita since the said vessel was imported more than three years earlier.

10. On the same day i.e. 6th September 2013 the Commerce Secretary wrote to the Secretary (Revenue) on this issue as under:

"We are dismayed to receive your D.O. letter No. 605/17/2013-DBK dated 8th August, 2013 in which you have conveyed your reservations about alienation of goods imported by utilisation of SFIS scrip. SFIS scrip is a duty credit scrip. Accordingly, an import consignment for which duty is paid by using SFIS scrip, involves technically a "payment of duty", except that the payment is not by cash/cheque/draft; but through a valid scrip. Hence no 'exemption' of duty is involved. This position is clearly stated in para 3.12.6 and 3.12.8. of FTP.

2. The corresponding DoR Notification relating to, use of SFIS issued from 2006 onwards along with Central Excise Circulars have

also been examined carefully. The DoR Notification No. 34/006-CE dated 14.6.2006 and Central Excise Circular No. 837/14/2006-CX dated 3.11.2006 mentions in the subject "Procedure for debiting the original scrips issued under SFIS for payment of Central Excise Out in the case of domestic procurement of goods". The relevant portion in para 1 of the Central Excise Circular states:

"Duty Free credit scrips earned under the Scheme shall be permitted to be utilized for payment of excise duty in terms of the notification issued by Department of Revenue in this behalf for procurement from domestic sources of such inputs that are permitted for imports under para 3.6.4.5."

3. It may be appreciated that the phrase "duty free credit scrip" has been used incorrectly in the first sentence. The correct phrase should have been "duty credit scrips". The insistence by CBEC that goods imported by use of SFIS scrip may not be alienated unconditionally, even after three years of import, can be attributable to this inadvertent choice of words. Some restriction on alienation of an imported good is desirable when the import involves a corresponding obligation. Here the scrip itself is a benefit that has been "earned". Your letter also suggests that an alienation of goods imported procured under SFIS may attract duty. Saddling a benefit like this with additional conditions would be very harsh.

I request you to reconsider the issue."

11. Another letter was written on 10th December 2013, by the Commerce Secretary to the Revenue Secretary stating that it was not appropriate to compare SFIS with EPCG Scheme where the export obligation is mandated to be fulfilled in a specified period. According to the Commerce Ministry "a 3 year period is sufficiently long time to ensure that the goods imported by an SFIS holder get depreciated. An exporter who has already paid duty on import through usage of SFIS scrips cannot be asked to pay the duty again and again on sale of goods after 3 years." A further letter

was written on 17th/18th February 2014, by the Additional DGFT to the Joint Secretary (Drawback) requesting that the DoR should agree with the DGFT. It was pointed out that where any violation of the terms regarding alienation took place within three years and any such violation was pointed out, the DGFT would have no hesitation in taking action as per the FTDR Act.

12. The above correspondence reveals that the differences between the DGFT and the DoR on the issue persisted. On 18th March 2014, the Petitioner again wrote to the Joint Secretary (Drawback) in the DoR reiterating its intention to sell the vessels imported under the SFIS which had been imported more than three years earlier and seeking confirmation. The Petitioner received no response.

Orders in W.P. (C) 616 of 2015

13. On 8th January, 2015, the Petitioner wrote to the DoR for permission to sell Greatship Akhila which had been imported on 6th April 2009. However, with there being no response to this request, the Petitioner filed WP (C) No. 616/2015, in which an interim order was passed by this Court on 22nd January 2015, the relevant portion of which reads thus:

"In the meanwhile, Greatship Akhila (Anchor Handling Tug cum Supply Vessel), which was imported under the SFIS Scheme, may be permitted to be sold/ re-export/ alienated inasmuch as three years have elapsed from the date of import/procurement in terms of the foreign trade policy of 2009-2014, although there is no sequel notification by the Ministry of Finance, Government of India. This is being permitted on the specific condition that the petitioner shall furnish a bank guarantee in favour of the respondent No. 5 for an amount of Rs. 12 crores. We have taken this amount because, according to the learned counsel for the petitioner, the assessed

customs duty was Rs. 9.18 crores approximately at the time of importation which was exempted because of the SFIS Scheme. There may be other incidental charges and, therefore, to cover the same, the figure of Rs. 12 crores has been arrived at. The vessel may be sold/ re-exported/ alienated only after furnishing of the bank guarantee for Rs. 12 crores.

It is made clear that in case the petitioner is entitled to re-export/sell/ alienate under the Foreign Trade Policy of 2009-14, then no such duty would be payable. However, if they are not so entitled, then the duty plus other incidental charges would be payable. In order to cover that eventuality, the above order has been passed to secure the interest of the revenue."

14. Greatship Akhila was ultimately sold to a Vietnamese buyer by way of re-export on 17th June, 2015 with the Petitioner submitting a bank guarantee for the value of Rs. 12 crores. The said writ petition was disposed of by this Court by an order dated 5th May 2016 which reads as under:

"1. The Court has been shown a copy of a letter dated 29th April 2016 addressed to Mr. Kamal Nijhawan, Senior Standing counsel for the Respondent Nos. 1 and 5 (Department of Customs) by the Director (Drawback), Ministry of Finance, Department of Revenue in which *inter alia* it is recorded that there were meetings between the Department of Revenue and the Directorate General of Foreign Trade (DGFT) to consider the question whether capital goods imported during 2008-10 using Served From India Scheme (SFIS) scrips under the Foreign Trade Policy (FTP) 2004-09 can be exempt from the condition of actual user and be made eligible for alienation by applying the notification dated 1st August 2013 issued by the DGFT.

2. The letter then records that an agreement has been reached between the Department of Revenue and the DGFT that "specific individual cases of export sale of goods (other than goods defective

or unfit for use), can be dealt by DGFT on merits in terms of Para 2.5 of FTP subject to the condition that export would be without claim for any export incentive, rebate, refund, drawback and/or re-credit of incentive and the condition that bringing back into India shall be treated as fresh import”.

3. As far as the present petition is concerned, the Petitioner had sought permission to re-export Supply Vessel Greatship Akhila having identified a Vietnamese buyer. This Court by its order dated 22nd January 2015 permitted the Petitioner to go ahead with the sale subject to the Petitioner furnishing a bank guarantee for a sum of Rs. 12 crores in favour of Respondent No. 5. Pursuant thereto the Petitioner has re-exported the said ship.

4. In view of the agreement reached between the Department of Revenue and the DGFT as spelt out in the letter dated 29th April 2016 addressed to Mr. Nijhawan there is no surviving issue as far as the present petition is concerned since the Department of Revenue and the DGFT have agreed to permit re-export of capital goods imported during 2008-10 using SFIS scrips earned under FTP 2004-09.

5. Consequently, the bank guarantee furnished by the Petitioner shall stand discharged.

6. The writ petition and the application are disposed of in the above terms."

15. What is relevant as far as the present petition, which concerns the other five vessels, is that the letter dated 29th April 2016 of the DoR referred to an agreement reached between it and the DGFT that “specific individual cases of export sale of goods (other than goods defective or unfit for use), can be dealt by DGFT on merits in terms of Para 2.5 of FTP subject to the condition that export would be without claim for any export incentive, rebate, refund, drawback and/or re-credit of incentive and the condition

that bringing back into India shall be treated as fresh import”. In the present petition the Court passed a separate order on the same date i.e. 5th May 2016 *inter alia* noting the stand of the DoR as under:

"5. The specific stand of the Department of Revenue, as expressed today in the Court by the Director (Drawback), is that the Department of Revenue would not agree to alienation by way of sale in domestic market of such imported capital goods the duty in respect of which was paid by debiting the SFIS scrips under FTP 2004-09."

Submissions of counsel

16. Mr. Balbir Singh, learner Senior Advocate appearing for the Petitioner, submitted that in terms of the FTP 2004-09 which includes the HBP, alienation or transfer by sale of imported goods is permissible, without prior permission of the RA of the DGFT, if it is done two years after the date of import. It is, therefore, contended that the condition imposed by the impugned notification is contrary to FTP 2004-09. Mr Singh referred to the various paras of FTP 2004-2009 as well as FTP 2009-2014 and submitted that the condition of actual user was subject to the other provisions contained in the HBP. Mr. Singh referred to the decision of the Madras High Court in ***Tanfac Industries Ltd. v. Assistant Commissioner of Customs, Cuddalore 2009 (240) ELT 341 (Madras)***. In support of the submission that the benefit under the FTP 2004-09 would continue even under FTP 2009-14, he referred to the decision of this Court in ***Commissioner of Central Excise and Service Tax, LTU, New Delhi v. Havells India Ltd. 2015 (325) ELT 840 (Del)***.

17. Mr. Sanjay Jain, the learned ASG, stated that he was appearing before

the Court on behalf of both the DoR and the DGFT. He had at the hearing on 2nd March, 2016, stated that both the “Directorate General of Foreign Trade and the Commissioner of Customs (Export) will work out the modalities and their stand will be disclosed on the next date of hearing.” However, as already noticed, on 5th May 2016, the DoR reiterated its objections to alienation of the vessels imported under the SFIS in the domestic market even if they had been imported more than three years earlier.

18. There were two principal submissions made by Mr. Jain. He first clarified that the Respondents had no objection to the Petitioner seeking to avail of the facility of payment of customs duty or excise duty as the case may be by utilising SFIS scrips issued in terms of FTP 2004-2009 even under the FTP of 2009-2014. However, according to him, the payment of customs duty or excise duty by using SFIS scrips whether under the FTP 2004-2009 or FTP 2009-2014 could not be treated as actual payment of duty in cash but only as 'duty foregone'. According to Mr. Jain payment of duty by using SFIS scrips under FTP 2004-2009 is subject to three conditionalities:

- i. The import must be of goods that are essential to the main business of the importer.
- ii. The imported goods are subject to actual user condition; and
- iii. The imported goods cannot be alienated except within group companies and managed hotels or by way of re-export.

19. In other words Mr. Jain contended that goods that had been imported upon payment of import duty by using SFIS scrips issued under FTP 2004-

2009 came with a ‘baggage’ of the above conditionalities of non-alienability. According to him the said conditionalities would continue insofar as capital goods were imported under the SFIS under FTP 2004-09 although the said conditionalities were not continued under FTP 2009-14. He also submitted that what is contained in the HBP in Part 2 of the FTP would have given way to the main FTP. According to him para 3.6.4.6 of FTP 2004-2009 did not envisage any permission to alienate imported goods that were subject to an actual user condition.

Analysis of the relevant paras of FTP 2004-09 and 2009-14

20. The above submissions have been considered. The SFIS forms part of the FTP 2004-2009 and has been continued under FTP 2009-2014 as well. The provisions concerning SFIS in both the FTPs are more or less similar. Clause 2.3 of Chapter 2 of FTP 2004-2009 states as follows:

“2.3 Interpretation of Policy

If any question or doubt arises in respect of the interpretation of any provision contained in FTP, or classification of any item in the ITC (HS) or HBP-v1 or HBP-v2, or Schedule of DEPB Rates (including content, scope or issue of an authorisation thereunder), the said question or doubt shall be referred to the DGFT whose decision thereon shall be final and binding.”

21. The DGFT is a statutory authority exercising powers in terms of Section 6 of the FTDR Act. Under Section 6 (2) of the FTDR Act, the DGFT “shall advise the Central Government in the formulation of the FTP and shall be responsible for carrying out that policy.” In exercise of his powers under Section 6 (2) of the FTDR Act, the DGFT has issued the HBP which is a part of the FTP manual. Since the DGFT is entrusted by the statute to implement the FTP, para 2.3 of the FTP 2004-2009 as well as

para 2.3 of the FTP 2009-2014 have recognised the DGFT as being the final authority on all matters relating to the interpretation of the FTP. The slight change in FTP 2009-2014 is that under para 2.3(b) a Policy Interpretation Committee could be constituted to aid and advise the DGFT. Under Section 5 of the FTDR Act read with para 2.1 of the FTP 2009-2014, the DGFT has the power to make amendments to the FTP 2009-2014.

22. Para 3.6.4 of the FTP 2004-2009 as well as para 3.12 of the FTP 2009-2014 sets out the entire SFIS. The clauses sub-titled Objective, Eligibility, Entitlement, Remittances, Imports Allowed, Non-Transferability are identical under both FTPs. Relevant to the present case is para 3.6.4.5 of the FTP 2004-2009 (corresponding to para 3.12.6 of FTP 2009-2014) dealing with imports that are allowed. It states that the duty credit scrip may be used for import of any capital goods including spares, office equipment and professional equipment, etc. that are otherwise freely importable under ITC (HS). It states that the “imports shall relate to any service sector business of the applicant.”

23. As regards non-transferability both para 3.6.4.6 of FTP 2004-2009 and para 3.12.7 of FTP 2009-2014 provide as under:

“Entitlement/goods (imported/procured) shall be non-transferable (except within group company and managed hotels) and subject to Actual User condition.”

24. As already noted, in exercise of the powers under Section 5 of the FTDR Act read with para 2.1 of the FTP 2009-14, the DGFT issued Notification dated 1st August, 2013 amending para 3.12.7 of the FTP 2009-

14 to provide that the goods imported/procured against SFIS scrips could be alienated on completion of three years from the date of import/procurement. In other words the policy of permitting transfer of imported capital goods, including those subject to an Actual User condition where duty has been paid using SFIS scrips, is continued under FTP 2009-2014.

25. The term ‘Actual User’ is defined under both FTPs to mean “an actual user who may be either industrial or non-industrial.” The conditions under which there could be a transfer of the imported goods are contained in the HBP. Para 2.43 of the HBP reads as under:

“2.43- Transfer of Imported Goods

Freely importable goods can be transferred by sale or otherwise by imported freely. Transfer of imported goods, which are subject to Actual User condition and have become surplus to need of Actual User, shall be made only with prior permission of RA concerned. Following information along with supporting documents shall be furnished with request for grant of permission for transfer, to RA concerned:

- (i) Reasons for transfer of imported material;
- (ii) Name, address, IEC number and industrial Authorisation registration, if any, of transferee;
- (iii) Description, quantity and value of goods imported and those sought to be transferred;
- (iv) Copies of import Authorisation and bills of entry relating to imports made;
- (v) Terms and conditions of transfer as agreed upon between buyer and seller.

2.43.1 Prior permission of RA shall not, however, be necessary for transfer or disposal of goods, which were imported with Actual User condition, provided such goods are freely importable without Actual User condition on date of transfer.

2.43.2 Prior Permission of RA shall not be required for transfer or disposal of imported goods after a period of two years from the date of import. However, transfer of imported fire-arms by the importer/Authorisation holder shall be permitted only after 10 years of import with approval of DGFT.”

26. As already noticed it is the DGFT who issues the HBP. In terms of the FTDR Act, the DGFT is the final authority as far as the interpretation of the FTP is concerned. It is, therefore, not possible to agree with the contention of Mr. Jain that the HBP should give way to the FTP. It is only where the HBP is contrary to or inconsistent with the FTP that the latter will prevail. However, since it is the DGFT who has the final word as regards the FTP, and not the Customs Department or any other authority, and it is the DGFT who issues the HBP as well, the question of the HBP not binding the DoR or the DGFT does not arise. The Court has not been shown any para in either FTPs that prohibits goods imported by paying duty using SFIS scrips from alienation for all times to come. No doubt there is an 'actual user' condition attached to goods imported under the SFIS but as can be seen from para 2.43 of the HBP that spells out the procedure under both FTP 2004-2009 and FTP 2009-2014, alienation with prior permission of the RA is envisaged. Para 2.43.1 of the HBP clarifies that the prior permission of the RA is not necessary for the transfer or disposal of goods, imported with Actual User condition provided such goods are freely importable without Actual User condition on the date of

transfer. Further para 2.43.2 of the HBP states that no such prior permission of the RA is required if such transfer or disposal is taking place after two years from the date of import. These provisions have not undergone any change even under FTP 2009-2014 except to the limited extent that the period of two years in para 2.43.2 of the HBP has been changed to three years by incorporating it as part of para 3.12.7 of the FTP itself. There is no specific provision, and Mr Jain was unable to point out any, that mandates that transfer of goods imported under the SFIS when FTP 2004-09 was in force, even after completion of three years from the date of import, can never be permitted to be transferred, except to a group company, or managed hotel or by way of re-export.

27. Consequently, the Court is unable to accept the submission of Mr. Jain that there is a 'baggage' attached to goods imported under FTP 2004-2009 using SFIS scrips for payment of duty and that even if such capital goods are imported more than two years earlier they can never be alienated except to a group company or managed hotel or by way of re-export.

Validity of the impugned notification dated 11th September 2009

28. To recapitulate, the DoR issued Customs Notification No. 91/2009 dated 11th September 2009 under Section 25 (1) of the CA restricting the transfer/sale of goods imported using the SFIS duty certificates/scrips for the purpose of payment of customs duty. It is contended that inasmuch as the impugned notification stipulates an absolute bar on transferability of capital goods imported under the SFIS, the said notification is ultra vires the FTDR Act and the FTR Rules. A challenge also laid to the letter dated 12th June 2013 from the DoR to the Petitioner stating that it had asked the

DGFT to keep in abeyance the decision of the PRC granting NOC to the Petitioner for sale of Greatship Amrita.

29. On examination of Sections 5 and 6 of the FTDR Act and the relevant paras of FTP 2004-2009 and FTP 2009-2014 along with the relevant clauses of the HBP, the Court is satisfied that there is no valid justification for the DoR to oppose the request for alienation/transfer of imported goods in terms of FTP 2004-2009 where duty has been paid using SFIS scrips. As already noticed there is no such prohibition in FTP 2004-2009 and definitely not under FTP 2009-2014.

30. The SFIS scheme is implemented by the DGFT working under the Ministry of Commerce. In terms of the FTDR Act, it is the DGFT who has the final word on interpretation of the FTP. Whether it is para 3.6.4.6 of FTP 2004-09 or para 3.12.7 of FTP 2009-14, both of which stipulate 'non-transferability' of goods imported under SFIS, the interpretation of the DGFT is final. The FTDR Act, FTR Rules, the FTP and the HBP are a complete code governing the SFIS. Para 3.12.7 of the FTP 2009-14 has been amended by the DGFT in exercise of his statutory powers under Section 5 of the FTDR Act with effect from 1st August 2013 to permit alienation of goods that have been imported on completion of three years from the date of import. The said notification being statutory in character should equally bind the DoR.

31. The present case reveals the impasse brought about on account of the inability of two ministries of the central government viz., the Commerce Ministry and the Finance Ministry, to reconcile their differences about

permitting alienation of goods imported under the SFIS. Just as it is important to protect the revenues of the central government it is essential to honour the commitments to importers and exporters in the form of the various measures set out in the FTP which has the force of law having been made in exercise of the powers under the FTDR Act. It is therefore imperative that the FTDR Act, FTR Rules, the FTP, the HBP, the CA and notifications issued under the CA are viewed as forming part of one harmonious statutory scheme. They ought to be operationalised in a manner that is coordinated and harmonious and not at cross-purposes.

32. It is obvious in the instant case that the impugned notification dated 11th September 2009 issued by the DoR under Section 25 (1) of the CA on the one hand and the amendment to para 3.12.7 of the FTP 2009-2014 with effect from 1st August 2013 and para 2.43 of the HBP cannot co-exist. The notification dated 11th September 2009 issued by the DoR takes away what the amended para 3.12.7 of the FTP 2009-14 and para 2.43 of the HBP permits. It also takes away what para 3.6.4.6 of the FTP 2004-09 read with para 2.43 of the HBP permits. On the contrary, the DoR should have on its own have issued a fresh notification consistent with the changes brought about to para 3.12.7 of FTP 2009-14.

33. There is merit in the contention of the Petitioner that in the event of conflict of views between two ministries of the central government, the view taken by the ministry that is primarily responsible for the policy in question, which in this case is the FTP, should prevail. The SFIS was introduced by the Ministry of Commerce and its instrumentality, i.e. the DGFT has been statutorily entrusted with the final word on the

interpretation of the FTP. The letter dated 6th September 2013 from the Commerce Secretary to the Revenue Secretary is instructive. It refers to Circular No. 837/14/2006 dated 3rd November 2006 issued by the CBEC under the Ministry of Finance which acknowledged that payment of customs duty could be made by using the duty credit scrips. In particular it was pointed out that the expression "duty free credit scrip" had been used incorrectly and that the correct phrase should have been "duty credit scrips". It was suggested that the "insistence by CBEC that goods imported by use of SFIS scrip may not be alienated unconditionally, even after three years of import, can be attributable to this inadvertent choice of words." Importantly it was pointed out that "the scrip itself is a benefit that has been 'earned'". This also answers the misconception of the DOR that customs duty can only be paid in cash, and that use of duty credit scrips is only 'revenue foregone'. The position has been explained by the Madras High Court in *Tanfac Industries Ltd.* (*supra*) where it was held that the goods cleared by using DEPB scrips for payment of duty should be treated as duty payable goods and not as duty exempted goods.

34. The Court posed a query to the learned ASG whether denying permission to alienate goods imported under the SFIS when the FTP 2004-09 was operational while permitting such alienation if goods were imported under the SFIS under FTP 2009-14 was based on any rational criteria or was designed to achieve any legitimate objective. The learned ASG was unable point out any. Indeed denial of permission to transfer vessels imported more than three years ago only because they were imported under FTP 2004-09 serves no useful or rational purpose.

35. On the other hand the Petitioner had been impressing on the DoR the need for a much needed clarification as regards its notification dated 19th September 2009 which was impairing greatly its "ability to maintain a healthy fleet of vessels aligned to market conditions." The Petitioner had pointed out that the offshore oil and gas exploration and production market is plagued by cyclical fluctuations in demand and supply and that "owing to the current very sharp drop in crude oil prices, the oilfield operators world over are cutting down significantly on their oil exploration and production budget." It was further pointed out that "due to non-receipt of the approval, we could not proceed with the sale within a respectable timeframe afforded to us by the foreign buyers and consequently, we missed opportunity of making strategic sale of our asset." The nature of the industry demanded "that such a transaction is completed without any delay and usually within a tight timeline of two to three weeks."

36. In the circumstances, the stand taken by the DoR appears to be unjustified. The result of such a stand would be that while the transfer of vessels that were imported three years after 1st August 2013 do not require any permission, vessels that were imported more than three years earlier to 1st August 2013 would not be permitted to be transferred except by way of re-export or within the group or to managed hotels, come what may. While it is not clear what revenue is sought to be protected in that process, it surely subjects the importer of goods that fall in the latter category to discrimination. Such denial of permission would attract the vice of impermissible discrimination in terms of Article 14 of the Constitution particularly since it is based on no rational criteria. In fact it contradicts the intent expressed in the relevant paras of the FTP 2004-09 and the HBP

which have been adverted to. There is also nothing in the FTP which prohibits the sale of vessels that have completed more than three years after import from being sold in the domestic market. In other words, there is no justification for the DoR to insist that the vessels of the Petitioner that have completed more than three years after import should be transferred only by sale within group companies or managed hotels or be re-exported.

37. For all of the above reasons the Court holds that the impugned Customs Notification No. 91/2009 dated 11th September 2009 under Section 25 (1) of the CA to the extent it restricts the transfer/sale of goods imported using the SFIS duty certificates/scrips for the purpose of payment of customs duty, even where such goods satisfy the criteria for transferability under the FTP and HBP, is in violation of the FTDR Act, the FTR Rules as well as FTP 2004-2009 and FTP 2009-2014.

38. It is further held that the letter dated 12th June 2013 issued by the DoR asking the DGFT to keep in abeyance the NOC granted by the PRC on 9th April 2013 is contrary to the legal position explained above and can have no binding effect on the DGFT. On questions of interpretation of the FTP, it is the DGFT whose views will prevail. For the same reason, the stand of the DoR conveyed to the Court through the letter dated 29th April 2016 to Mr Nijhawan, learned counsel for the DoR, and recorded in the Court's order dated 5th May 2016 cannot prevail.

Conclusion

39. Consequently, the DoR is restrained from objecting to the transfer/sale of the vessels Greatship Aarti, Greatship Ahalya, Greatship Amrita,

Greatship Anjali and Greatship Asmi belonging to the Petitioner since each of the said vessels has been imported more than five years ago.

40. The writ petition is disposed of in the above terms but in the circumstances no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

MAY 23, 2016
b'nesh

