IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CWP No.3372 of 2017
Date of decision:05.05.2017

R.P. International ... Petitioner

Versus

Union of India and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Prakash Jha, Advocate and
Mr. Gurmohan Singh Bedi, Advocate
for the petitioner.

Mr. Chetan Mittal, Senior Advocate with
Mr. Saurabh Goel, Advocate
for the respondent(s) – Union of India.

AMIT RAWAL J.

1. The petitioner, a proprietorship firm having its office at Amritsar, has invoked writ jurisdiction to seek vindication of Duty Free Import Authorization (DFIA) No. 0310663555 dated 04.11.2011 (Annexure P-3) originally issued with 24 months validity to the exporter M/s Gill and Co. Pvt. Ltd. The DFIA issued under Standard Input Output Norm (SION) J-373 which permitted duty free import of 'Pesticides'. The DFIA stipulates that the "Insecticides allowed for import with technical characteristics, specifications and quality as per schedule I of Insecticide Act 1968". According to the petitioner, the Policy Circular No.72 dated 24.3.2009 (Annexure P-3A at page 37) and Norms Committee Decision dated

31.05.2012 (Annexure P-9 at page 43) were applicable for permitting such duty free-imports. It is claim of the petitioner that due to continued erroneous approach of the respondent-authorities the DFIA could not be utilized for import of 'Pesticides' during its validity period after its purchase on 01.02.2013 from M/s Pacific Security Solutions Pvt. Ltd., who is also a transferee of the said DFIA Licenses. It is claimed by the petitioner that during the relevant period and even thereafter, the respondents continued to cause various impediments in utilization of the DFIAs for duty free import of 'Pesticides', which were beyond the control of the petitioner. Various developments have been shown on behalf of the petitioner to support the petition, for *inter alia,* seeking directions for revalidation of DFIA, so that the same can be utilized for duty free clearance of 'pesticides'.

2. The petition was strongly opposed by the respondents. It was mainly contended orally, in the reply and in additional affidavit that:-

3. The petition is liable to be dismissed with costs as the same is filed after gross delay after having failed to utilize the DFIA for own negligence on merely hypothetical issues. Neither any adverse or coercive action in respect of the said DFIA was taken by the respondents, nor was any explanation sought from the exporter in respect of the subject DFIA. The petitioner has not produced any documentary evidence as to where DFGT and customs authorities have denied the utilization of DFIA License during its validity period. In this regard, reliance has been made to citation **M/s Rup Diamonds and others vs. Union of India and others**

1989 (2) SCC 356; Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T.Murali Babu 2014(4) SC 108; Sawaran Lata etc. vs. State of Haryana and others 2010(4) SCC 532 and M/s Tilokchand Motichand and others vs. H.B.Munshi, Commissioner of Sales Tax, Bombay and another 1969(1) SCC 110.

4. The officers of respondents have not in any manner prevented the petitioner from utilizing the DFIA. The petitioner never approached the Regional Authority of DGFT, Additional DGFT, Mumbai or the DGFT, New Delhi for revalidation of DFIA.

5. The petitioner waited for 3 years to file the petition without any valid reasons. DFIA was purchased on 01.02.2013 and was valid for utilization till 04.11.2013. After having waited for 3 years, the petitioner has now belatedly approached the Court seeking revalidation of the DFIA License. The petitioner from Amritsar has not even produced any proof of membership of the Association which was following up the issue, thus, writ petition is not maintainable due to inordinate delay in preferring the claim before the authorities.

6. At the same time, it was also contended by the respondents that as per Para 4.32.2 of HBP, exporter is compulsorily required to give declaration with regard to technical characteristics, quality and specification about insecticides/pesticides in shipping bills, only then customs could have allowed the import of same type of insecticides/pesticides. The Policy Circular No.72 dated 23.4.2009 was not

applicable in the case of insecticides/pesticides as there was specific provision of these inputs in the Para 4.32.2 of HBP 2009-14. As per Para 4.2.2.(a) and Para 4.1.3.1 of the FTP only those inputs (import items), which have been physically incorporated in export product (making normal allowance for wastage), shall be allowed for import of inputs under DFIA license scheme.

7. The case is covered under Para 3 of Public Notice No. 35 dated 30.10.2013 as EODC and transferability have been obtained on 27.01.2012 prior to 01.08.2013, therefore, there is no question of applicability of Notification No.31 dated 01.08.2013 in the case of petitioner.

8. Norms Committee Decision dated 31.05.2012 was never accepted by the DGFT by issuing Public Notice to be published in Gazette of India in terms of Para 2.4 of FTP and was only recommendatory in nature.

9. The entire transaction has no legal basis and sought strict proof that the petitioner is the legal transferee of the DFIA License and the required taxes applicable for transfer of the said DFIA License/scrip were paid, since sale and transfer of DFIA License/scrips are subject to sales tax (CST/VAT) for sale. The customs authorities have not been made necessary respondents. The petitioner has not exhausted the alternate remedies available in terms of the provision of Foreign Trade Policy, Hand Book of Procedures and FTDR Act, 1992 as amended in 2010.

10. I have heard both sides at length and considered the

records, i.e., the oral and written submissions, browsed FTP, HBP, notifications, public notices, Instructions and decision of Norms Committee etc. very carefully and I find that the following indisputable facts emerge from the records:-

11. In 2009, the Foreign Trade Policy 2009-2014 was notified by the Central Government. Chapter 4- 'Duty Exemption & Remission Schemes' contained the Duty Free Import Authorization (DFIA) Scheme Annexure R-1 in Para 4.2.1 to 4.2.7, and read as follows-

"***DUTY FREE IMPORT AUTHORISATION (DFIA) SCHEME***

Scheme ***4.2.1*** *DFIA is issued to allow duty free import of inputs, fuel, oil, energy sources, catalyst which are required for production of export product. DGFT, by means of Public Notice, may exclude any product(s) from purview of DFIA. This scheme is in force from Ist May, 2006.*

Entitlement ***4.2.2*** *Provisions of paragraph 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.*

DFIA shall be issued in accordance with Policy and procedure in force on date of issue of Authorisaiton.

............"

Para 4.2.1 contained the basic feature of the Scheme in force from 1.5.2006, and this basic DFIA Scheme therefore necessarily permitted duty free import of 'inputs' which were "required for" production of export product, and DFIA was issued as per policy and procedure in force on the date of Authorization. Para 4.2.2 of FTP shows that regarding Entitlement' provisions of paragraph 4.1.3 shall be applicable in case of DFIA. Para 4.1.3 in the same Chapter is for Advance Authorization Scheme and contains basic 'Scheme' of Advance Authorization as well as 'Entitlement' for the same, providing that it can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer (s) for the purpose specified therein. Para 4.1.3 read as under-

"ADVANCE AUTHORISATION SCHEME"

Advance Authorization *4.1.3 An Advance Authorization is issued to allow duty free import of inputs, which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/utilised to obtain export product, may also be allowed. DGFT, by means of Public Notice, may exclude any product(s) from the purview of Advance Authorization.*

....

Advance Authorization can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer(s) for:

i) Physical exports (including exports to SEZ); and/or

ii) Intermediate supplied: and /or

.............”

So far as basic Scheme for DFIA and Advance Authorization are concerned, the difference is that whereas the DFIA Scheme vide Para 4.2.1 permits duty free import of 'inputs' which are “required for production of export product”, the Advance Authorisation allows duty free import of 'inputs', which are “physically incorporated in the export product”. Hence, as per Para 4.1.5 of FTP, unlike DFIA, an Advance Authorization and/or material imported thereunder will only be with actual user condition and will not be transferable even after completion of export obligation.

So far as 'Entitlement' is concerned manufacturer exporter or merchant exporter tied to supporting manufacturer(s) would be entitled for the benefit of the scheme for the purpose specified therein, in both the Schemes in view of Para 4.2.2 read with Para 4.1.3 of FTP. The instant case is concerning DFIA License and not Advance Authorization. The Handbook of Procedures(HBP) 2009-2014 issued by the respondent No.2 (Annexure R-1) in Para 4.32.3 stipulated the following-

*“**Application 4.32** An application in ANF4H alongwith documents therein, shall be submitted to RA concerned.*

***4.32.1** Guidelines as in paragraphs 4.4.1 and 4.4.3 above would be adhered to.*

> ***4.32.3*** *However, in respect of following items, <u>exporter</u> shall be required to give declaration with regard to technical characteristics, quality and specification <u>in shipping bill</u>. <u>RA while issuing DFIA</u> shall mention technical characteristics, quality and specification in respect of such inputs:*
>
> *Alloy steel including Stainless Steel, Copper Alloy, Synthetic Rubber, Bearings, Solvent, Perfumes/Essential Oil/Aromatic Chemicals, Surfacatants, Relevant Fabris, Marble, Articles made of polypropylene, Articles made of Paper and Paper Board,* ***Insecticides****, Lead Ingots, Zinc Ingots, Citric Acid, Relevant Glass fibre reinforcement (Glass fibre, Chopped/Stranded Mat, Roving Woven Surfacing Mat), Relevant synthetic Resin (unsaturated polyester resin,Epoxy Resin, Vinyl Ester Resin, Hydroxy Ethyl Cellulose), Lining Material".*

It is seen from the above procedure prescribed in HBP that the Regional Authority while issuing DFIA shall mention technical characteristics, quality and specification in respect of inter alia 'Insecticides'.

12. A Policy Circular No.72 dated 23.4.2009 (Annexure P-

3A) was issued by the respondent No.2 clarifying in respect of DFIA Scheme that since the objective of SION is to allow duty free import of the inputs which are actually used or are capable of being used in the export product, the exporter has the flexibility to import the alternative input / product mentioned in the SION. The necessity to issue the said clarification arose in view of the representations received purportedly doubt raised by Customs on the issue of allowing alternative inputs as per SION under DFIA Scheme, even if the input mentioned in SION, has not been specifically utilized in the manufacture of the exported product.

13. On 04.11.2011, the DFIA No.0310663555, vide Annexure P-3 was issued by the Regional Authority of respondent No.2 to the Exporter M/s Gill & Co. Pvt. Ltd. with 24 months validity. As per the Condition Sheet dated 4.11.2011 (at Page 31**)** attached to the DFIA, export of 20,00,000KLg of 'Raw Cotton (not carded or combed)' of FOB Value USD 4,800,600/- was required to be made. As per the DFIA Pre Import Item List dated 4.11.2011, amongst other items, duty free import of 22320 Kgs of '*Pesticides (Biocides/Fungicides/Herbicides/Insecticides)*' was permissible under the said DFIA, within total CIF USD 4,000,400/-, thus, Value Addition was also maintained.

14. Standard Input Output Norm (SION) J-373 (Annexure P-4) permitted duty free import of 0.01116 Kgs of *'Pesticides (Biocides/Fungicides/Herbicides/Insecticides)'* as an 'input' againt export of 1 Kg of '*Raw Cotton (not carded or combed)'*. Out of four types of Pesticides i.e. *Biocides/Fungicides/Herbicides/Insecticides*, Para 4.32.3

referred only to Insecticides. The DFIA was thus issued according to the SION as well as Para 4.32.3 by mentioning thereon permissible Insecticides as per Schedule of Insecticide Act, 1968. The DFIA contains the following endorsement-

> *"Insecticides allowed for import with Technical characteristics, specifications & quality as per schedule I of Insecticide Act, 1968"*

Evidently the Insecticides permitted to be imported were those which are in Schedule of Insecticide Act, 1968.

15. The DFIA was valid for imports till 3.11.2013 and was to expire on 4.11.2013. On 27.01.2012, consequent upon fulfillment of stipulated Export Obligation against the said DFIA, the Regional Licensing Office in Mumbai endorsed transferability by issuing Amendment Sheet No.2 (at Page 35 of Annexure P-3) and the status of the said DFIA was changed from Actual User to 'Transferrable' in terms of Para 4.72 of HBP. Duty free import of 21942.570 Kgs of *'Pesticides (Biocides/Fungicides/Herbicides/Insecticides)'* were permitted, as the actual exported quantity of Export Item 'Raw Cotton (not carded or comber)' was 1966180 Kgs for FOB USD 4,451,045.59. Though CIF value USD 3,500,000/- was mentioned against the import item Pesticides, however, there was a further endorsement-

"User Remarks

"XX VALUE RESTRICTION AGAINST ALL IMPORT

ITEMS STANDS DELETED xx"

16. On 10.05.2012, Amendment Sheet No.3 (Page 36) was issued in the said DFIA, which inter alia permitted duty free import of 21942.570 Kgs of *'Pesticides (Biocides/Fungicides/Herbicides/Insecticides)'* of CIF value USD 3,500,000/-. Thus, on actual exported quantity of "Raw Cotton, the permissible quantity of Pesticides on proportionate basis as per the SION applicable on the date of issuance of DFIA was endorsed on the DFIA.

17. The Norms Committee held a meeting NC 08/AM-13 dated 31.05.2012 for Case No.219 (Annexure P-9) on a reference from *Bombay Impex Chem Trade Association, Mumbai* on the issue of *"Difficulties in the import of insecticide/Pesticide/Fungicide/Herbicide against export of Raw Cotton (Not carded or combed) as per SION J-373".* After considering the request of the said Association, vide the said decision dated 31.05.2012, the Norms Committee decided the issue before it and inter alia accepted in relation to more than 40 products mentioned therein that they, as per Technical literature available, are '*pesticides and are required for cotton farming*', and informed the said applicant accordingly.

18. No contrary decision or Technical Report has been brought to my notice by the respondents to show that the various products mentioned in the decision dated 31.5.2012 of the Norms Committee were not 'Pesticides' and 'were not required for cotton farming'. There is nothing to show that the decision of the Norms Committee was assailed, or any order recalling the said decision was communicated to the applicant

Association by any higher authority in accordance with law. It is only contended on behalf of the respondents that the said decision of Norms Committee is recommendatory in nature.

19. On 05.11.2012 the Exporter/Licence Holder transferred the DFIA to M/s Pacific Security Solutions Pvt. Ltd. for valuable consideration vide Transfer Letter dated 05.11.2012 vide Annexure P-2 (colly) (at Page 27). On 01.02.2013, the said Transferee thereafter issued a letter (at Page 28), for re-transfer of the said DFIA to the petitioner M/s R.P. International.

20. The petitioner is a proprietorship firm having office at Amritsar, established on 1.9.1980, having bank account in Amritsar as per the Importer Exporter Code (Annexure P-1) issued by the office of respondent No.2. The petitioner has purchased the DFIA license on the condition that the payment for the same would be made only upon utilization of the said DFIA License i.e. After duty free import of Pesticides. The license remains un-utilized and the payment is yet to be made. However, with re-transfer of the DFIA in favour of the petitioner, the title to the DFIA is transferred to the petitioner, irrespective of the purchase on credit basis.

21. On 13.02.2013, within 2 weeks of the purchase of the said DFIA, the respondent No.2 issued Public Notice no.49 (Annexure P-5) and amended Standard Input Output Norm (SION) J-373 by deleting 'pesticides' which was one of the 'input' item required for use in export product. Thus, apparently after 13.02.2013, against export of Raw Cotton

(not carded or combed), DFIA were not issued with any Pesticides as permissible duty free import them. However, this amendment in SION-373 was only prospective, and legally it could not affect import of any Pesticides under DFIA already issued.

22. However, on 19.02.2013, the respondent No.2 issued Instructions vide File No.01/84/162/717/AM09/DES-VI/2174 to 2209 (Annexure P-6) concerning DFIA's already issued during 07.07.2011 to 13.02.2013, directing the Heads of all Regional Authorities as follows-

"No. 01/84/162/717/AM09/DES-VI/2174 to 2209
Govt. of India
Ministry of Commerce & Industry
Department of Commerce
Directorate General of Foreign Trade

*****

Udyog Bhawan, New Delhi
Dated 19th February, 2013

To:
Heads of All RA's
Subject: Advance Authorisaiton/DFIA under SION J-373

The Public notice No.63 dated 07.07.2011 included Pesticides (Biocides/Fungicides/Herbicides/Insecticides) as the fifth input under SION J-373. The said input stand deleted form SION J-373 vide Public notice 49 dt.13.02.2013 with effect from 13.02.2013.

2. During this period (from 07.07.2011 till 13.02.2013), your office may have issued Authorisations (AAs/DFIA's). Since J-373 (especially pesticides) is for Cotton crop, it is desirable to know if the inputs are finally going to the farmers.

Hence, it is necessary to check who the supporting manufacturers of the applicant are. Are they capable of producing cotton using pesticides.

3. The heads of RA's are to ensure strict scrutiny of documents including their original applications before, allowing waiver/ redemption/ transferability etc. Due care has, to be exercised so that these authorisation/imported goods against these authorisations are not misused.

4. An action taken report on the above lines may be sent to the Headquarters in case your office has issued authorisations under the above SION during the period as in Para 2 above. Please specify the number of authorisations issued (month wise, with vale) between 07.07.2011 to 13.02.2013.

5. This issues with the approval of DGFT.

Yours sincerely,

SD/-
(KAILASH CHAND MEENA)
(Deputy Director General Foreign Trade
For Directorate General of Foreign Trade
Email: kc.meena68@nic.in"

23. The subject DFIA dated 04.11.2011 was also already issued between the same period i.e. 07.07.2011 to 13.02.2013. The directions issued by the respondent No.2 vide the said Instructions dated 19.02.2013 were being applied in respect of DFIAs issued between 07.07.2011 to 13.02.2013. Therefore, the said instructions specifically covered the subject DFIA.

24. Thereafter, on 01.08.2013, a Notification No.31 (Annexure P-7) was issued by the Central Government, for amendment in the FTP by firstly inserting para 4.1.15 after Para 4.1.14 of FTP, which permitted only those inputs to be imported, which are physically incorporated/actually used in the export product, and secondly amending Para 4.2.3 of FTP so as to apply this newly inserted Para 4.1.15 to the DFIA holder.

25. On 30.10.2013, the respondent No.2 issued a Public Notice No.35 (Annexure P-8) to further elaborate on the applicability of Para 4.1.15 of FTP, as incorporated vide Notification no.31 dated 01.08.2013 and amended vide Notification 48 dated 30.10.2013. It was specified that-

> *"1. Where both export and import have been completed prior to 1.8.2013, such cases will not be covered under Notification No.31 dated 1.8.2013 (as amended), irrespective of whether the concerned authorization (AA/DFIA) has been redeemed or not.*
>
> *2. If only export has been fully completed/partly completed before 1.8.2013, then the corresponding import would be allowed subject to an undertaking from the authorization holder, that the inputs which have been actually used in the product already exported shall only be imported.*
>
> *3. If the DFIA has been endorsed as 'transferable' by the concerned RA, before 1.8.2013, the provisions of Notification*

no.31 dated 1.8.2013 (as amended) will not be applicable to such DFIA.

4. For every export made on or after 1.8.2013 provisions of Para 4.1.15 of FTP shall apply. It is immaterial whether for such export, corresponding Import has already been made (fully or partly) or import has not been made."

26. The amendment vide Notification no.31 dated 1.8.2013 issued by the Central Government could not have been applied retrospectively to disturb the rights under the DFIA already issued. In the instant case the DFIA was issued on 04.11.2011, therefore, the provisions of Notification no.31 dated 1.8.2013 (as amended) will not be applicable to such DFIA already issued before 1.8.2013. Vide PN 35 dated 30.10.2013, the respondent No.2 however, in essence sought to impose restrictions on imports and exports under DFIA already issued before 1.8.2013,

27. As evident from Para 2 of the public notice 35 dated 30.10.2013, as per the respondent No.2, the corresponding import was to be allowed subject to an undertaking from the authorization holder, that the inputs which have been actually used in the product already exported shall only be imported. Thus, physical incorporation or actual use of the imported input in the export product, subsequently introduced vide Para 4.1.15 of FTP was still being insisted vide notice, ibid. On 04.11.2013, i.e. After 4 days of the issuance of the Public Notice No.35 dated 30.10.2013, the validity period of the DFIA expired.

28. It is admitted in the reply/affidavit by the respondents

that retrospective amendments is not permissible, however, it is still being claimed that inputs which have been actually used and physically incorporated in the product already exported can only be imported.

29. Thus, so far as the period between the said Instructions dated 19.02.2013 (based on Public Notice No.49 dated 13.02.2013), till 30.10.2013 i.e. the date of issuance of Public Notice No.35 and even thereafter, regarding issue of permissibility of import of pesticides under DFIA where exports had already taken place, serious objections were raised by respondent No.2 and the same are continued in view of notice dated 30.10.2013.

30. Even now the respondents are raising objections on permissibility of duty free import of Pesticides/Insecticides under the DFIA on merits by claiming that Policy Circular No.72 dated 23.04.2009 was not applicable by relying on Para 4.32.2 of HBP 2009-14, and by claiming that as per Para 4.2.2 and Para 4.1.3 of the FTP only those inputs, which have been physically incorporated in export product, shall be allowed for import of inputs under DFIA license scheme. It is specific stand that actual Insecticide used by farmer ought to have been endorsed on Shipping Bill and duty free import of only that Insecticide could be permitted.

31. The petitioner has also placed on record in this regard letter dated 15.07.2014 (P-17) and 30.07.2014 (P-18) both of Bombay Impex Chem Trade Association, letter dated 1.8.2014 of Eastern India Cotton Exporter Association (P-19) and letter dated 08.06.2015 of Bajrang

Cotgin Pvt. Ltd. (P-20) as representations to be respondent No.2, inter alia, for opposing the Instructions dated 19.02.2013 on the ground of impossibility and for permitting imports of Insecticides as per Norms Committee Decision by endorsement in the DFIA giving description of all the pesticides mentioned in the decision of the Norms Committee. Vide order dated 24.06.2016 (P-21), the Hon'ble Gujarat High Court was pleased to direct respondent No.2 to decide these representations pending since July, 2014.

32. The Order dated 23.08.2016 passed by the respondent No.2 pursuant to the said Order dated 24.06.2016 is also placed on record, whereby the respondent No.2 rejected the representation of Bajrang Cotgin Pvt. Ltd.

33. The petitioner has also placed on record various Confirmation Certificates, Annexure P-16 (colly) issued by the Customs Authorities for the purpose of seeking revalidation of DFIA, certifying to the effect that non-utilization of DFIA licenses was due to litigation with regard to eligibility of availing duty free benefit. It clearly proves that there were various litigations going on where the duty free import under DFIA were being denied, and thus such certificates were required to be issued by the Customs Authorities.

34. The aforesaid chronology of events clearly leads to an irresistible conclusion that respondent No.2 issued such instructions due to which practically there was no possibility of utilizing the DFIA in duty free import of Pesticides/Insecticides, which was otherwise permissible.

35. I have also seen various other decisions relied upon by the petitioner to show instances of continued erroneous practice prevailing to deny the benefits under DFIA, by denying duty free import of alternative input to similarly placed importers by insisting upon providing actual use of inputs. Some of them are as follows-

(i) **Uni Colloids Impex Ltd. Vs. CC, 2014 (310) ELT 583 (T)**: The Tribunal in this case observed that:-

*"**15.** Moreover, Para 4.2.2(b) of Foreign Trade Policy stipulates that DFIA shall be issued in accordance with Policy and procedure in force on date of issue of Authorisation. We are therefore, not impressed by the submission of the Revenue that the position as prevailing on the date of clearance would govern imports under valid licence. The appellant, who are transferee, cannot be compelled to establish that wheat gluten was actually used in the manufacture of the biscuits which have been exported against the DFIA. The provisions of Notification No.31, dated 1-8-2013 (as amended) will not be applicable to such DFIA issued on 30-05-2012 i.e. issued prior to amendment. Consequently any policy circular or public notice, if seeks to deny the exemption which is otherwise available in the instant imports, will also have no applicability for the same reason."*

(ii) **CC(Mundra) Vs Global Exim, 2015 (328) ELT 385 (T):**

The Tribunal in this case observed that-

*"**7.** The other aspect of this case is that DGFT Notification No.31, dated 1-8-2013 deals with the case of import either (a) a generic import or (b) alternative imports. Public Notice No.35 dated 30-10-2013 have enlarged the scope of Notification No.31, dated 1-8-2013. Notification No.90, dated 2-8-2014 provides declaration of actually used quantify of inputs in the export goods. We find that in the present case, Phosphoric Acid is a specific entry mentioned in the DFIA Licence issued as per SION A-3627 in relation to the export goods Glass vials/phials/ampoules etc. So, the DGFT Notification 31, dated 1-8-2013 with Public Notice No.35, dated 30.10.2015 cannot be applicable in the present case. In our considered view, once the license was endorsed for transferability by the licensing authority, the nexus between import goods used in export goods, is not required to be established afresh by the transferee as held in various decisions relied upon by the Learned Advocate.*

***8.** In view of the above discussions, the appeal filed by the Revenue is rejected and the impugned order passed by the Commissioner (Appeals) is upheld. Both the applications are disposed of."*

(iii) CC vs USMS Saffron Co. Inc, 2016 (344) ELT 161

(Bom.HC): The Division Bench of Bombay High Court held that-

> *"12.....If a particular authorization does not contain an entry for restricting Saffron, then, by an inferential process and when the Licensing Authority did not think it proper to insert it, it will not be permissible to read it in the same......."*

36. Thus, I am of the view that in the aforesaid peculiar circumstances the petitioner was denied of his valuable right to utilize the DFIA for duty free import of Insecticide. Therefore, I do not find any merit in the objections regarding maintainability of the instant writ petition, the same is hereby rejected.

37. As regards the plea of delay and latches, Mr. Chetan Mittal, has relied upon three judgments rendered by the Hon'ble Supreme Court in **Chennai Metropolitan Water Supply and Sewerage Board (supra); Sawaran Lata (supra)** and **M/s Tilokchand Motichand (supra)** to contend that wherever the party has approached to the Court under Article 226 of the Constitution of India after a lapse of many years, particulary after 4 years of passing an order, such delay would not deserve any indulgence and the writ petition is liable to be dismissed.

I am further of the view that in such peculiar fact situation, respondents cannot blame the transferee of latches or negligence or for not utilizing the DFIA within validity period, for, that by putting up the DFIA for debating in respect of imported goods at any port despite the instructions issued by respondent no.2, the petitioner would unnecessarily have incurred losses in the form of continued interest, demurrage and detention charges, apart from blocking investment on costs of such goods only to fight cumbersome litigation with the hope of getting due legitimate entitlement. Resultantly, the objection of delay and latches raised by the respondents in the above stated peculiar fact situation is hereby repelled. In the interest of justice, the instant petition merits a decision on merits.

38. I am also not inclined to accept the objection of any alternate remedy. As clearly pointed out on behalf of the petitioner, respondent no.2 has issued the instructions and has declined the representations from the Associations as well as of one Bajrang Cotgin Pvt. Ltd. Thus, there is no alternate efficacious remedy available to the petitioner except the writ jurisdiction.

39. The objection of non-joinder of Customs Authorities as party to the instant writ petition is also misplaced as no relief has been sought and pressed against Customs Authorities. The prayer is for revalidation of the DFIA Licence issued by the respondents, so that it can be utilized for duty free import of Pesticides. If the DFIA is revalidated for such importation, the Customs Authorities would even otherwise be duty bound to permit duty free clearance of goods.

40. Vide a detailed judgment dated 01.07.2016 passed in CWP No.12647 of 2016 titled as Pushpanjali Floriculture Pvt. Ltd. vs. Union of India 2016 (340) ELT 32, the Hon'ble Division Bench of this Court was pleased to strike down *inter alia* Clause 4 of the above said Notification No.31 dated 01.08.2013 and Clause 2 of Public Notice No.35

dated 30.10.2013 referred above. It was observed and directed that:-

> *"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.*
>
> *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......"

41 Although leave has been granted in the SLPs preferred by both sides against the said judgment, the same is still binding on me. It is trite that any judgment unless and until it is set aside, remains binding even on the Co-ordinate Bench. Obviously, the said judgment is binding on all authorities as well.

42 The issue of impermissibility of retrospective applicability of the said Notification and Public Notice also already been decided by the Hon'ble Division Bench in Clause 2 of Public Notice No. 35

dated 30.10.2013 requiring undertaking was also struck down. The directions for revalidation were also given in the said judgment. I am of the view that in light of the said judgment, the DFIA would be governed by the FTP in force on the date on which DFIA was issued. Any subsequent amendment in the FTP or HBP cannot govern the entitlement under the DFIA as it existed as per the FTP on the date of issuance of DFIA. Therefore, discharge of export obligation, transferability and utilization of DFIA would necessarily be governed by the policy in force is vague on the date of issuance of DFIA. All instructions, orders, undertaking in any form, to the contrary based on above illegal public notice no.35 dated 30.10.2013 or Clause 4 of Notification No.31 dated 01.08.2013 are therefore non-est in the eyes of law.

43 The Hon'ble Supreme Court in the matter of **Oblum Electrical Industries Pvt. Ltd. Vs. CC. Bombay 1997(94) E.L.T. 449 (S.C)** was pleased to hold that:-

> *"11......In the notification two different expressions have been used namely, materials required to be imported for the purpose of manufacture of products' and 'replenishment of materials used in the manufacture of resultant products' which indicates that the two expression have not been used in the same sense. The expression 'materials required to be imported for the purpose of manufacture of products' cannot be construed as referring only to materials which are used in the manufacture*

of the products. The said exemption must be given its natural meaning to include materials that are required in order to manufacture the resultant products. On that view, the exemption cannot be confined to materials which are actually used in the manufacture of the resultant product but would also include materials which though not used in the manufacture of the resultant product are required in order to manufacture the resultant product. Crystar Beams imported by the appellant are materials, which though not used in the manufacture of H.T. Porcelain Insulators required for Lightening Arrestors, are materials which are required for producing the insulators in the kilns."

44 Similarly, so far as the basic Scheme for DFIA in para 4.2.1 and that for Advance Authorization in Para 4.1.3 are concerned, the difference is that whereas the DFIA Scheme permits duty free import of 'inputs' which are "required for production of export product", the "Advance Authorization" allows duty free import of 'inputs', which are "physically incorporated in the export product". The benefit of DFIA ought to have been given its actual meaning to include materials that are required in order to produce the export product, in essence, the duty free import under DFIA cannot be confirmed to only such goods which are actually used or physically incorporated in the production of the export product, but would also include goods which, though not used in the production of the export goods, are required in order to produce the same.

45 The Hon'ble Supreme Court in **Director General of Foreign Trade vs. Kanak Exports, 2015 (326) E.L.T. 26 (S.C.)** was pleased to hold against retrospective amendment in the Policy and observed as under:-

> *“133........If the Government realized afterwards that export of these items should not have been given the benefit of TPS and extending the benefit to now excluded items was an ill-considered move, though the Central Government was free to withdraw it in respect of such items but it could do so only prospectively, but was not entitled to do so with effect from the back date, i.e., April 1, 2005 by taking away the vested right that had already accrued in favour of exporters of these items.”*

46 The instructions dated 19.2.2013 issued with approval of respondent no.2 after deletion of Pesticides from SION J-373 w.e.f 13.2.2013 which causes unreasonable restrictions in the rights already conferred with the issuance of DFIA and the view taken by respondent No.2 on the Trade Representations or in the order dated 21.08.2016 as mentioned above by denying duty free import of Insecticides unless physically incorporated or actually used in the export product, are thus non est in the eyes of law.

47 The petitioner is seeking extension of validity period of DFIA for a further period of 18 months from now, with further directions to

endorse the Insecticide mentioned in the Norms Committee Decision dated 31.5.2012 (Annexure P-9) on the DFIA, so that the petitioner can avail the exemption under the said DFIA licence in import of any Pesticides.

48 It is seen that the DFIA contains a specific endorsement which allows import of Insecticides with Technical characteristics, specifications and quality as per schedule I of Insecticides Act, 1968. I am of the firm view that once the DFIA licence, when issued, permitted duty free import of any Insecticides with Technical characteristics, specifications and quality as per Schedule of Insecticide Act, 1968, no further requirement can be insisted upon on this score based on any subsequent development or amendment or instructions to deny duty free import of any of such Insecticides mentioned in the said Schedule to Insecticides Act, 1968. Duty Free import under the said DFIA of any of the Insecticides mentioned in the decision of the Norms Committee, recognized as 'required for' cotton farming, if in Schedule of Insecticide Act, 1968 shall necessarily permitted under the DFIA, subject to the quantity restriction mentioned in the Licence as per SION J-373. The Shipping Bills filed while making exports were to be seen at the time of export in the light of the details specified in the DFIA. It would not wholly erroneous and incorrect to insist on specifications of Pesticides used by farmers after the exports.

49 Vide Public Notice No. 49 dated 13.2.2013, the input Insecticide has been deleted but only prospectively. Thus, all DFIA Licences issued prior to 13.2.2013 under SION J-373 would permit duty free import of Pesticides (Biocides/Fungicides/Herbicides/Insecticides) with

specified quantity as per SION J-373 which permitted against 1 Kg of export item “Raw Cotton (not carded or combed)” duty free import of inputs for packing materials and 0.01116 Kgs of Pesticides (Biocides/Fungicides/Herbicides/Insecticides). Once norms are so fixed, it is not permissible to look into actual consumption of input on case to case basis, as is sought to be done by the respondents after exports. I also find merit in the submission made on behalf of the petitioner that it is also impossible to ascertain the actual pesticides used by every farmer. Cotton crop would be procured from various farmers or traders by spinning mills, and the exporter would thus be able to declare the consumption of Pesticides only as per the Norms in the Appendix 23 referred to in para 4.28 (v) of HBP fixed by respondent No.2. The same insecticide which are physically incorporated in the raw cotton exported, in any case cannot be imported. Law does not compel a man to do that, which he cannot possibly perform. This appears to be the reason for Norms Committee to identify pesticides that are required for growing cotton.

50. In the result, I am inclined to dispose of the writ petition with the following directions:-

(i) The subject DFIA No.0310663555 dated 4.11.2011 is re-validated for a period of 12 months from today and necessary endorsement for the same would be made by the Regional Authority, respondent No.4 within 15 days.

(ii) The import of any of the Insecticides required for cotton farming mentioned in the decision of the Norms Committee dated 31.5.2012(Annexure P-9) which is also in Schedule of Insecticide Act, 1968 shall be necessarily permitted under the said DFIA, subject to the quantity restriction mentioned on the DFIA.

51. Having seen 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 by respondent no.2 and are being arbitrarily applied in a retrospective manner, leading to unwarranted litigation and making an adverse impact on growth of export business. I am therefore inclined to request the learned Attorney General of India to look in this aspect and to suitably advise the respondents for remedial action as soon as possible.

52. The writ petition is disposed of accordingly. The Registry is directed to send a copy of this order to the learned Attorney General of India forthwith.

(AMIT RAWAL)
JUDGE

May 05, 2017
savita

Whether Speaking/Reasoned Yes/No

Whether Reportable Yes/No