

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION NO.33702 OF 2011

ORDER:

This writ petition is filed seeking to declare the order-in-original dated 30-12-2010 passed by the first respondent, as confirmed by the 2nd respondent, by his order dated 13-12-2011, in Ref.F.No.113382010-11/ECA.I/2853, as illegal, unjust and contrary to the provisions of law and violation of rights guaranteed under Articles 19(1) and 300A of the Constitution of India.

2. The case of the petitioner, in brief, is as follows:-

a) The first petitioner, M/s. Suryalakshmi Cotton Mills Limited, is engaged in the business of manufacture and export of Yarn and Denim fabrics, while the second petitioner is its Managing Director. For the purpose of convenience, the petitioners herein are referred to as 'the petitioner'.

b) The petitioner has filed an application for Duty Free Credit under Target Plus Scheme (TPS), which is one of the export promotional schemes, made available in Chapter 3 of the Foreign Trade Policy (FTP). The Duty Free Credit means a certificate issued to the eligible exporters as a reward/benefit, based on which, the scrip holder can import capital goods and other eligible items without payment of Customs Duty. In other words, the Duty Free Scrip can be considered as equivalent to cash paid to the exporters, which, they would, otherwise, have to

pay the amount in the form of Customs Duties for the import of goods at the time of clearance. The petitioner has executed necessary undertakings before the competent authority in connection with and for the purpose of issuance of the Duty Free Credit Certificate.

c) The first respondent, based on the applications filed by the petitioner, and the undertaking executed by it, issued necessary certificates. In effect, the first respondent considered two applications filed by the petitioner for a value of Rs.9,02,45,941/- and Rs.1,62,04,039/- respectively. Based on the certificates/scrips issued by the competent authority, the petitioner availed the benefit of adjusting the value of scrips against the customs duty payable on the import of goods.

d) Subsequently, the Chief Commissioner of Customs, Central Excise and Service Tax, Hyderabad Zone, Hyderabad, has addressed a letter dated 18.11.2009 to the first respondent, stating that the petitioner has misused the TPS, basing on which, the Director of Revenue, Intelligence, Hyderabad (DRI) initiated investigation and recovered certain documents from the registered office of the petitioner on 25.09.2009.

e) Based on the information received from the DRI, vide letter dated 11.1.2010, a show-cause notice dated 25.2.2010 was issued alleging that:

i) *The noticee has fraudulently availed the benefits of the TPS;*

ii) *The noticee is not eligible to include in their export turnover the exports made by M/s.Bronze Logistics Pvt.Ltd. (BLPL), as the definition of 'Group Company' as given in para 9.28 of the Foreign Trade Policy is not satisfied;*

iii) *Based on the statements of Shri Paritosh K.Agarwal it is alleged that M/s.BLPL was in existence only for 17 months;*

iv) *Export turnover of the BLPL is Rs.19.11 crores only and not Rs.85.66 crores.*

f) The petitioner submitted a detailed reply, stating that there is no violation of the principles of natural justice as copies of the statements of Shri Paritosh K.Agarwal, Managing Director of the petitioner and letter dated 11.01.2010 of the DRI, have not been supplied to him.

g) As per the FTP prevailing at the time of making application for TPS by the petitioner, the provisions of para 9.28 of the FTP provided three alternatives and independent criteria and the satisfaction of any one of the three alternatives is sufficient for consideration of Bronze Logistics Private Limited (BLPL) as a group company of the petitioner. The petitioner has satisfied all the clauses of para 9.28 of the FTP. As the TPS is not a licence, the provisions of Foreign Trade (Development and Regulation) Act, 1992 and the Rules made thereunder are not applicable and the petitioner is entitled for TPS benefits. The export turnover of BLPL by 31.3.2005 was Rs.85.66 crores and not Rs.19.11 crores and for the reasons stated above; the show-cause notice is *ex facie* illegal. However, the first respondent without appreciating the submissions made by the petitioner, passed an

order dated 30-12-2010 by confirming the show-cause notice on the following grounds:

- i) *As per the language of para 9.28 of the relevant Foreign Trade Policy, export turnover of the Group Companies may be included in calculating the export turnover of the applicant company only if the Group Company was part of the group for a period of two years prior to submitting the application;*
- ii) *To be entitled to benefits under the TPS scheme, each and every member of the Group Company must individually satisfy the eligibility and entitlement criteria as set forth in the FTP;*
- iii) *The petitioner acted fraudulently in obtaining the TPS scrips, and therefore, these scrips are liable to be cancelled, and all duty benefits, gained from these scrips have to be returned;*
- iv) *Alternatively, even if the export turnover of BLPL can be considered, it could only be considered to the extent of Rs.19.11 crores and not 85.66 crores as claimed by the appellant;*
- v) *Export turnover is not to be calculated on Fright On Board (FOB) value of exports, rather on actual amount of exports realized by the exporter;*
- vi) *A scrip issued under the Target Plus Scheme satisfies the definition of licence under the FTDR Act, 1992 and therefore penal proceedings may be initiated against the exporter by canceling the TPS scrip.*

h) Aggrieved by the said order, the petitioner filed an appeal along with the stay petition before the second respondent, contending that the first respondent passed the order without jurisdiction to adjudicate the matter which involves the amount in excess of 25 crores limit as prescribed in terms of the Notification No.102(RE 2008) 2004-09, dated 17.4.2009. However, the second respondent without appreciating the submissions made by the petitioner, passed an

order dated 13.12.2011, confirming the order dated 30.12.2010 passed by the first respondent.

i) The first respondent, subsequent to his order, suspended the Import Export Code No.0988005247 of the petitioner. However, the same was restored consequent to the interim order of the second respondent dated 01.03.2011. Again in view of the order dated 13.12.2011 of the second respondent, the restoration of IE Code stood withdrawn. Hence, the present writ petition is filed as there is no efficacious alternative remedy.

3. The respondents filed their counter affidavit denying the allegations in the writ petition, contending that the petitioner has misused the right and misrepresented the facts amounting to fraud while submitting the application for Target Plus benefit to the licencing authority. It is well settled law that no one has got a fundamental right to export or import and such a right can be exercised only with reference to the tenets of the Foreign Trade Policy and procedures announced under the FT (DR) Act, 1992 and Rules made thereunder. By conducting itself unconstitutionally and unlawfully, the petitioner has lost the right to export and claim the benefits. Therefore, the impugned orders have filled the gap between the lawful and unlawful activities and prevented unjust enrichment to the petitioner for protecting the Government revenue. It is also highlighted that the petitioner, having vast experience in export import policy and procedures and having recognized by the Government as a Status Holder in exports, it is expected to follow the policy and

procedure meticulously and should not have indulged in such an activity of misrepresentation of facts of its export data, thereby committing fraud and as such, this kind of exporter needs to be penalized for its illegal activities for gaining unintended benefits, otherwise, it will lead to a situation that the big fish will eat away the small ones causing imbalance in the social and economical fabric of the nation. Keeping such implications and objective in mind, the impugned orders were passed strictly in accordance with the law and the petitioner is liable for complying with the directions without any further loss of time. The petitioner has no chance or grounds to win the case before this Court as it had already failed in two quasi judicial proceedings leading to the imposition of several penal actions therein. Since the petitioner had violated the mandate of the Foreign Trade Policy with a criminal intention of cheating the Government, it cannot have any fresh facts to defend the matter before this Court. The petitioner was enriched by illegally availing the benefit under the scheme to a tune of Rs.10.64 crores and imported goods worth of several crores without paying customs duty, which is otherwise payable by the petitioner before the Customs Authorities; For six long years, the petitioner has enjoyed the money and multiplied its income and made profits. Therefore, the revenue due to the Government along with interest has to be recovered from the petitioner for such a criminal misconduct and conspiracy; the penalties also have to be paid by them. There are no merits in the writ petition

and therefore prayed to dismiss the same in the interest of justice.

4. Heard Sri D.Prakash Reddy, learned senior counsel appearing on behalf of Sri Vikram Pooserla, learned counsel for the petitioner and Sri K.Lakshman, Assistant Solicitor General of India, appearing for the respondents.

5. It is contended by the learned Senior Counsel appearing on behalf of the learned counsel for the petitioner that:

a) The impugned order dated 13.12.2011 passed by the 2nd respondent, confirming the order dated 30-12-2010 passed by the 1st respondent in the matter relating to claiming of TPS benefits by the petitioner, is illegal, unjust in the facts and circumstances of the case and is without jurisdiction.

b) As per Section 13 of the FT(DR) Act, 1992, any penalty or any confiscation may be adjudged under this Act by the Director General or subject to such limits as may be specified by such other officer as the Central Government may by notification in the official gazette, authorizes in this behalf.

c) Vide Notification No.102, dated 17.04.2009, the 1st respondent has been empowered to exercise powers in cases involving goods valued up to Rs.25 crores. The TPS involved in this case itself was valued at Rs.10.64 crores and the value of goods exported against these TPS issued was over Rs.147 crores, and the penalty imposed is Rs.38.07 crores. Therefore, the first respondent was not at all empowered to adjudicate the matter

and the impugned order passed by him is bad in law. The order dated 30-12-2010 passed by the first respondent is without jurisdiction, and in support of his contention, he relied on a decision of the Allahabad High Court in **Sant Baba Mohan Sigh V. Commissioner of Income Tax, U.P¹**.

d) The show-cause notice as well as the order-in-original dated 30-12-2010, in which it was alleged that the petitioner did not satisfy para 9.28 of FTP defining the expression “Group Company” and pursuant to the clarification sought by the petitioner to DGFT, the Policy Interpretation Committee of DGFT vide their minutes of the meeting held on 5.8.2011 accepted the interpretation placed by the petitioner in their reply to the first respondent and in the appeal before the 2nd respondent.

e) The petitioner was denied an opportunity to clarify the matter with regard to the incremental growth, threshold limit and the eligibility criteria and the respondents have traveled beyond the scope of show cause notice and it is settled law that the authority cannot pass an order beyond the scope of show cause notice. In support of his contention, he relied on a decision reported in **SACI ALLIED PRODUCTS LTD. V. COMMISSIONER OF CENTRAL EXCISE²**.

f) The second respondent failed to note that a proviso was inserted to para 3.7.2 of the FTP vide notification No.7, dated 4.6.2005, stating that the exports mentioned in para 3.7.5 of the FTP should be included for determining the positive growth. If

¹ (1973) 90 ITR 197

² (2005) 7 Supreme Court Cases 159

the exports of the nature referred to in para 3.7.6 of the FTP had not been excluded, in terms of the above notification, it would reveal that there was an incremental growth.

g) There is no basis for the 1st respondent to allege that BLPL was a non-existent company and that the export made by the said company was not genuine. The observation of the second respondent that BLPL is not a group company and was acquired by the petitioner with an intention to claim the benefit of TPS is highly unjustified. In fact, BLPL being a part of the group company as defined under para 9.28 of FTP, consequently, the petitioner is entitled for the benefit of TPS.

h) The interpretation of the first respondent as confirmed by the 2nd respondent that each of the group company should individually satisfy the criteria of 20% growth in exports and the threshold limit of Rs.10 crores in AM 2003-04 and that 'export turnover' means the FOB value of exports realized during the financial year only is contrary to the express provisions of the Target Plus Scheme in the FTP.

i) The licence is a permission to import or export something, the import or export of which is otherwise prohibited/restricted. Permission to import is needed only when import is prohibited or restricted. No permission is required for non-restricted/non-prohibited goods or goods which are freely importable. As per para 3.7.6 of the FTP, the duty credit under TPS can be used for import of any inputs, capital goods including spares, office equipment, professional equipment and office furniture,

provided the same is freely importable. TPS does not give permission to import or export any item, import or export of which is otherwise restricted/prohibited. Therefore, TPS is not a licence. It is only scrip for credit/debit of customs duty. Therefore, the penal provisions of FTDR Act have no application.

j) In fact Section 9(4) has been amended by the Foreign Trade (Development and Regulation) Amendment Act, 2010 to substitute the word “licence” by the words “licence, certificate, scrip or any instrument bestowing financial or fiscal benefit”. Similar amendment has been made in Section 19(2) (b) (c) (d) & (e) of the FTDR Act. It is, therefore, evident from the above legislative action that the scrips or instruments bestowing financial or fiscal benefit (like TPS) were earlier not covered within the expression ‘licence’. Had it been so, there would have been no need to make the above amendments in the FTDR Act. Therefore, the provisions of Section 9 of the FTDR Act and Rule 10 of the FTR Rules cannot be invoked for cancellation of the TPS, which were issued to the applicant.

k) Non furnishing of the copy of the statement recorded from the Managing Director would amount to violation of principles of natural justice. In support of his contention, he relied on a decision reported in **Sunder Ispat Ltd. V. Commissioner of Customs and Central Excise**³.

l) The second respondent failed to note that the petitioner has complied with the conditions laid down in para 9.28 of the FTP 2004-09 and clauses i, ii and iii of para 9.28 of the FTP are

³ (2002) 141 ELT 24 (AP)

alternative to each other and being disjunctive, it is sufficient if one of the conditions laid down in each clause is satisfied for the purpose of being eligible to avail the benefit of TPS.

m) The second respondent has failed to observe that the BLPL was incorporated on 4.9.2002 and the company filed the application on 22.8.2005 for TPS. Therefore, the petitioner has satisfied the requirement of existence of the group company for 2 years in addition to satisfying all other requirements.

n) It is settled law that while interpreting a penal statute if more than one view is possible, the Court is obliged to lean in favour of the construction, which imposes the penalty. The power for recovery of the customs duty and interest lies with the Customs Authorities, and therefore, the penalty to the extent of Rs.19,03,66,389/- equivalent to the customs duty foregone and interest at the rate of 15% imposed by the first respondent who is not delegated such powers under Customs Act, is not sustainable in law. Moreover, there is no finding given by competent authority to determine the penalty in terms of customs duty. The Foreign Trade and the Customs Act are different and distinct in nature.

o) The first respondent has no power to adjudicate the question of penalty, where the value of the goods or service or technology covered by the authorization exceeds Rs.25 crores. In support of his contention, he relied upon a decision reported in **Adani Enterprises Ltd V. Union of India**⁴. Therefore, the

⁴ 2018 (359) ELT) 367 (Guj.)

learned counsel for the petitioner prayed to allow the writ petition by setting aside the impugned order.

6. The learned Assistant Solicitor General of India, while relying upon the counter affidavit, para 9.28 of the TPS and notifications, contended that the petitioner played fraud and availed the benefit of customs duty exemption under FTP by creating a false group company. The company does not fulfill the requirements of two years standing as group company, and under the notification, the first respondent is competent to pass impugned order (original order) and the order in appeal is lawful. Thus, the first respondent has rightly cancelled the said benefit and imposed penalty on the petitioner by examining all the records and after following due process of law. The first respondent has got the jurisdiction to decide the matter. The petitioner has got only the remedy of review under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992 against the order of appeal, but it has not availed the said remedy. Thus, it is a concurrent finding on facts and as such, it does not warrant interference of this Court by exercising the jurisdiction under Article 226 of Constitution of India. Therefore, he prayed to dismiss the writ petition.

7. The points that arise for consideration in this writ petition are:

- (i) *Whether the petitioner is eligible for exemption of customs duty on the imports and exports of its goods under Target Plus Scheme; and*

(ii) *Whether the first respondent has got jurisdiction to cancel the said benefit and impose penalty on the petitioner company?*

8. The order-in-original, dated 30-12-2010, passed by the first respondent reveals that the petitioner filed an application for Duty Free Credit under TPS for the year 2004-05. The application was processed and 19 scrips valuing Rs.9,02,45,841/- were issued. Subsequently, the petitioner firm filed another application and supplementary scrips valuing Rs.1,62,04,039/- were granted and thus, the petitioner firm had availed a total Duty Free Credit Scrips of Rs.10,64,49,880/- under TPS. Subsequently, the petitioner firm submitted third application dated 17.10.2007 to the Licencing Authority for another claim for issuance of Duty Free Entitlement scrip for a total value of Rs.15,66,234/-, in which, the turnover of exports for the year 2003-04 was shown as Rs.6838.85 lakhs and for the year 2004-05 it was shown as Rs.6874.59 lakhs. In column No.4 of the Appendix 17 D, the petitioner had shown M/s.BLPL and M/s.Surya Kiran International Ltd., (SKIL) as their group companies. Later, the Chief Commissioner of Customs, Hyderabad Zone, vide his letter dated 18.11.2009, and DRI, Hyderabad, vide his letter dated 11.1.2010, informed that the petitioner firm had been misusing the TPS and that they recovered certain discriminating documents. Scrutiny of balance sheet for 2003-04 of the petitioner firm did not reveal any details to prove existence of M/s.BLPL, Ludhiana as its group company. The petitioner procured 74% shares of

M/s.BLPL on 3.4.2004 and it had submitted application for grant of TPS to the licencing authority on 22.8.2005. As per para 9.28 of Foreign Trade Policy (2004-2009) "Group Company" should have been in existence at least two years prior to date of application under any of export promotion scheme. The DRI further informed vide his letter dated 11.1.2010 that the petitioner firm paid an amount of Rs.4 crores by admitting violation of the condition stipulated under para 9.28 of Foreign Trade Policy. Therefore, the licencing authority found that the petitioner firm misused the TPS and initiated proceedings under Foreign Trade (Development & Regulation) Act, 1992 and also issued a show-cause notice. The first respondent came to the conclusion that the petitioner firm had contravened the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and Foreign Trade (Regulation) Rules, 1993 read with Public Notice No.29 (RE 2007)/2004-09, dated 24.07.2007, and therefore confirmed the penal actions contemplated in the show cause notice and imposed a penalty of Rs.19,03,66,389/-, which is equivalent to the customs duty foregone along with interest at 15%. In addition to the same, he also imposed a penalty of Rs.19,03,66,389/- as a separate fiscal penalty. A penalty of Rs.25,00,000/- on the Managing Director and also a penalty of Rs.5,00,000/- each was imposed on the directors of the petitioner company. The entire scrips for a total value of Rs.10,64,49,880/- was also cancelled. Aggrieved by the said order, the petitioner filed an appeal in F.No.11/3382010-

11/ECA.I/2853, before the second respondent and the second respondent by his order dated 13-12-2011 dismissed the said appeal, confirming the order passed by the first respondent. Aggrieved by the said order, the present writ petition has been filed.

9. For the purpose of this writ petition, the relevant provisions of "Foreign Trade Policy 2004 – 2009 are extracted hereunder:-

Interpretation of Policy

2.3 If any question or doubt arises in respect of the interpretation of any provision contained in this Policy, or regarding the classification of any item in the ITC(HS) or Handbook (Vol.1) or Handbook (Vol.2), or Schedule Of DEPB Rate, the said question or doubt shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

If any question or doubt arises whether a licence/ certificate/permission has been issued in accordance with this Policy or if any question or doubt arises touching upon the scope and content of such documents, the same shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

TARGET PLUS SCHEME

Objective

3.7.1 The objective of the scheme is to accelerate growth in exports by rewarding Star Export Houses who have achieved a quantum growth in exports. High performing Star Export Houses shall be entitled for a duty credit based on incremental exports substantially higher than the general annual export target fixed (Since the target fixed for 2004-05 is 16 %, the lower limit of performance for qualifying for rewards is pegged at 20% for the current year).

Eligibility Criteria

3.7.2 All Star Export Houses (including Status Holders as defined in para 3.7.2.1 of Exim Policy 2002-07) which have achieved a minimum export turnover in free foreign exchange of Rs.10 crores in

the previous licencing year are eligible for consideration under the Target Plus Scheme.

Entitlement 3.7.3 The entitlement under this scheme would be contingent on the percentage incremental growth in FOB value of exports in the current licencing year over the previous licencing year, as under:

Percentage incremental growth	Duty Credit Entitlement (as a % of the incremental growth)
20% and above but below 25%	5%
25% or above but below 100%	10%
100% and above	15% (of 100%)

- Note
- (1) Incremental growth beyond 100% will not qualify for computation of duty credit entitlement.
 - (2) For the purpose of this scheme, the export performance shall not be transferred to or transferred from any other exporter. In the case of third party exports, the name of the supporting manufacturer/ manufacturer exporter shall be declared.
 - (3) Exporters shall have the option to apply for benefit either under the Target Plus Scheme or under the Vishesh Krishi Upaj Yojana, but not both in respect of the same exported product/s. Provided that in calculating the entitlement under Para 3.7.3 the total eligible exports shall be taken into account for computing the percentage incremental growth but the duty credit entitlement shall be arrived at on the eligible exports reduced by the amount on which the benefit is claimed under para 3.8.2.
 - (4) All exports including exports under free shipping bill verified and authenticated by Customs and Gems& Jewellery shipping bills but excluding exports

specified under para 3.7.5, shall be eligible for benefits under the Target Plus Scheme.

**Applicant
Companies**

3.7.4 Companies which are Star Export Houses as well as part of a Group company shall have an option to either apply as an individual company or as a Group based on the growth in the Group's turnover as a whole. (For the purpose of this scheme the definition of Group Company' as given in Chapter 9 will be applicable. Furthermore, only such companies of the Group as are Star Export Houses will be considered).

If a Group company chooses to apply based on the export of one or more of its individual Star Export House companies, the entitlement would be calculated considering the export performance of the applicant company during the previous licencing year and current licencing year. It shall be necessary that the adjusted export performance of all the Star Export House companies of the Group during the current licencing year does not fall below the combined performance of all Star Export House companies of the Group in the previous licencing year.

In case the Group chooses to apply based on the overall growth in Group's turnover (i.e the turnover of all the Star Export House companies) , any one of the Star Export House companies of the Group may file an application on behalf of all the Star Export House companies of the Group.

9.28 Group Company" means two or more enterprises which, directly or indirectly, are in a position to —

(i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty percent, of the members of the board of directors in the other enterprise; or

For the group companies to claim benefits or have their exports counted for benefits to be claimed by another member of the group, the group company should have been in existence at least 2 years prior to the date of application under any of the export promotion schemes notified in the Policy.

9.35 "Licensing Year" means the period beginning on the 1st April of a year and ending on the 31st March of the following year.

9.59 "Status holder" means an exporter recognized as One to Five Star Export House by DGFT/ Development Commissioner.

10. The powers and duties vested upon the officers under the Foreign Trade (Development and Regulation) Act, 1992 and the Customs Act, 1962 are different and distinct. Chapter II of the Customs Act, 1962, deals with class of officers of Customs and Section 3 of the said chapter reads as under:

“3. Classes of Officers of Customs. –

There shall be the following classes of officers of customs, namely :-

- (a) Chief Commissioners of Customs;
- (b) Commissioners of Customs;
- (c) Commissioners of Customs (Appeals);
- (cc) Joint Commissioners of Customs;
- (d) Deputy Commissioners of Customs;
- (e) Assistant Commissioners of Customs; and
- (f) Such other class of officers of customs as may be appointed for the purposes of this Act.”

11. The appointment and powers of the officers under the Foreign Trade (Development and Regulation) Act, 1992 are also extracted hereunder.

6. Appointment of Director General and his functions.—(1) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act.

(2) The Director General shall advise the Central Government in the formulation of the foreign trade policy and shall be responsible for carrying out that policy.

(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under sections 3,5, 15,16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.

10. Power relating to search and seizure.—(1) The Central Government may, by notification in the Official Gazette, authorise any person for the purposes of exercising such powers with respect to,—

(a) entering such premises where the goods are kept, stored or processed, manufactured, traded or supplied or received for the purposes of import or export and searching, inspecting and seizing of such goods, documents, things and conveyances connected with such import and export of goods;

(b) entering such premises from which the services or technology are being provided, supplied, received, consumed or utilised and searching, inspecting and seizing of such goods, documents, things and conveyances connected with such import and export of services and technology, subject to such requirements and conditions and with the approval of such officer, as may be prescribed:

Provided that the provisions of clause (b) shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefit under the foreign trade policy or is dealing with specified services or specified technologies.

(2) The provisions of the Code of Criminal Procedure, 1973(2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search and seizure made under this section.

11. Contravention of provisions of this Act, rules, orders and foreign trade policy:—

(5) A penalty imposed under this Act may, if it is not paid by any person, be recovered by any one or more of the following modes, namely:—

(a) the Director General may deduct or require any officer subordinate to him to deduct the amount payable under this Act from any money owing to such person which may be under the control of such officer; or

(b) the Director General may require any officer of customs to deduct the amount payable under this Act from any money owing to such person which may be under the control of such officer of customs, as if the said amount is payable under the Customs Act, 1962(52 of 1962); or

(c) the Director General may require the Assistant Commissioner of Customs or Deputy Commissioner of Customs or any other officer of Customs to recover the amount so payable by detaining or selling any goods (including the goods connected with services or technology) belonging to such person which are under the control of the Assistant Commissioner of Customs or Deputy Commissioner of Customs or any other officer of Customs, as if the said amount is payable under the Customs Act, 1962(52 of 1962).

13. Adjudicating Authority:—Any penalty may be imposed or any confiscation may be adjudged under this Act by the Director General or, subject to such limits as may be specified, by such other officer as the Central Government may, by notification in the Official Gazette, authorise in this behalf.

14. Giving of opportunity to the owner of the goods etc:—No order imposing a penalty or of adjudication of confiscation shall be made unless the owner of the goods (including the goods connected with services or technology) or conveyance, or other person concerned, has been given a notice in writing—

(a) informing him of the grounds on which it is proposed to impose a penalty or to confiscate such goods (including the goods connected with services or technology) or conveyance; and

(b) to make a representation in writing within such reasonable time as may be specified in the notice against the imposition of penalty or confiscation mentioned therein, and, if he so desires, of being heard in the matter.

14A. Controls on export of specified goods, services and technology:—(1) In regard to controls on export of specified goods, services and technology referred to in this Chapter, the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005(21 of 2005) shall apply to exports, transfers, re-transfers, brought in transit, trans-shipment of, and brokering in specified goods, technology or services.

(2) All terms, expressions or provisions of the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005(21

of 2005) shall apply to the specified goods, services or technology with such exceptions, modifications and adaptations as may be specified by the Central Government by notification in the Official Gazette.

(3) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Chapter—

- (a) shall not apply to any goods, services or technologies, or
- (b) shall apply to any goods, services or technologies with such exceptions, modifications and adaptations as may be specified in the notification.

14B.Transfer controls:—(1) The Central Government may, by notification in the Official Gazette, make rules in conformity with the provisions of the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005(21 of 2005) for, or, in connection with, the imposition of controls in relation to transfer of specified goods, services or technology.

(2) No goods, services or technology notified under this Chapter shall be exported, transferred, re-transferred, brought in transit or transshipped except in accordance with the provisions of this Act, the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (21 of 2005) or any other relevant Act.

14C.Catch-all controls.—No person shall export any material, equipment or technology knowing that such material, equipment or technology is intended to be used in the design or manufacture of a biological weapon, chemical weapon, nuclear weapon or other nuclear explosive device, or in their missile delivery systems.

14D.Suspension or cancellation of a licence.—The Director General or an officer authorised by him may, by order, suspend or cancel a licence to import or export of specified goods or services or technology without giving the holder of the licence a reasonable opportunity of being heard but such person shall be given a reasonable opportunity of being heard within six months of such order and thereupon the Director General or the officer so authorised may, if necessary, by order in writing, confirm, modify or revoke such order.

14E.Offences and penalties:—(1) In case of a contravention relating to specified goods, services or technologies, the penalty shall be in accordance with the provisions of the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (21 of 2005).

(2) Where any person contravenes or attempts to contravene or abets, any of the provision(s) of this Chapter in relation to import or export of any

specified goods or services or technology, he shall, without prejudice to any penalty which may be imposed on him, be punishable with imprisonment for a term stipulated in the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (21 of 2005).

(3) No court shall take cognizance of any offence punishable under this Chapter without the previous sanction of the Central Government or any officer authorised in this behalf by the Central Government by general or special order.]

15. Appeal:—(1) Any person aggrieved by any decision or order made by the Adjudicating Authority under this Act may prefer an appeal,—

(a) where the decision or order has been made by the Director General, to the Central Government;

(b) where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the Adjudicating Authority authorised by the Director General to hear the appeal,

within a period of forty-five days from the date on which the decision or order is served on such person:

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the aforesaid period, allow such appeal to be preferred within a further period of thirty days:

Provided further that in the case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of penalty or redemption charges has been deposited by the appellant:

Provided also that, where the Appellate Authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose.

(2) The Appellate Authority may, after giving to the appellant a reasonable opportunity of being heard, if he so desires, and after making such further inquiries, if any, as it may consider necessary, make such orders as it thinks fit, confirming, modifying or reversing the decision or order appealed against, or may send back the case with such directions, as it may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Provided that an order enhancing or imposing a penalty or redemption charges or confiscating the goods (including the goods connected with

services or technology) of a greater value shall not be made under this section unless the appellant has been given an opportunity of making a representation, and, if he so desires, of being heard in his defence.

(3) The order made in appeal by the Appellate Authority shall be final.

16.Review:—The Central Government, in the case of any decision or order made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, may on its or his own motion or otherwise, call for and examine the records of any proceeding, for the purpose of satisfying itself or himself, as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit:

Provided that no decision or order shall be varied under this section so as to prejudicially affect any person unless such person—

(a) has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied; and

(b) has been given a reasonable opportunity of making representation and, if he so desires, of being heard in his defence.

12. The petitioner company has applied for Duty Free Credit under Target Plus Scheme for the year 2004-2005 and availed the benefit of Rs.10,64,49,880/- under the said scheme by complying the procedure laid down in Appendix 17-D of the Foreign Trade Policy. Thereafter, the 1st respondent on receipt of the letter from Chief Commissioner of Customs, Hyderabad Zone, dated 18.11.2009 and DRI, Hyderabad, dated 11.1.2010, cancelled the said benefit on the ground that the petitioner company has been misusing the Target Plus Scheme. He also imposed total penalty of Rs.38,07,32,778/- with interest at the rate of 15% and also imposed penalty of Rs.25,00,000/- on the Managing Director and Rs.5,00,000/- each on the directors of the petitioner firm.

13. To decide the question as to whether the petitioner firm is entitled for the benefit of Target Plus Scheme, this Court has to examine the eligibility of the petitioner to avail the said benefit. The eligibility criteria is defined in Foreign Trade Policy at paras 3.7.2 to 3.7.4. The threshold limit of export turnover of Rs.10 crores in the previous licencing year satisfied once is eligible for the benefit under TPS.

14. The main allegation in the show-cause notice was that the petitioner wrongly included BLPL as a group company. As per para 9.28 of the Foreign Trade Policy 2004 – 2009; *Group Company* "means *two or more enterprises which, directly or indirectly, are in a position to —*

(i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty percent, of the members of the board of directors in the other enterprise; or

For the group companies to claim benefits or have their exports counted for benefits to be claimed by another member of the group, the group company should have been in existence at least 2 years prior to the date of application under any of the export promotion schemes notified in the Policy."

15. The first respondent interpreted the above definition that sub-para (i) and (ii) of para 9.28 of FTP shall be implementable only when the third condition is fully met for the reason that '% of incremental growth' has to be calculated based on two years export turnover of the applicant company (along with its Group Companies) and that incremental growth of exports by an

exporter shall not, directly or indirectly, be transferred to any other exporter and that the company should have been in existence for at least 2 years prior to date of application as the applicant's group.

16. In this regard, the petitioner, in its letter dated 17.08.2010 addressed to the Director General of Foreign Trade, and sought a clarification regarding the group company. The Policy Interpretation Committee, constituted under the Chairmanship of the Director General of Foreign Trade, noted that in the definition of Group Company under para 9.28 of FTP, the two combinations possible are:

- [1] Sub para (i) of para 9.28 + 2 years criteria: Exercise 26% or more, of voting rights; and the existence of group company should be seen for at least two years (from the date of incorporation, on the date of filing the application);
- [2] Sub-para (ii) of Para 9.28 + 2 years criteria : Appoint more than 50%, of the members on Board of Directors and the existence of group company should be seen for at least two years (from the date of incorporation on the date of filing the application);

The suggestion given by Regional Authority, Hyderabad that 'two years' criteria is the Sub-Para (iii) of Para 9.28 of FTP is not the correct interpretation. Therefore, the Committee decided to maintain the existing Para 9.28 of FTP.

17. The BLPL recorded its exports worth of Rs.85 crores after becoming the subsidiary of the petitioner firm. The BLPL was incorporated on 4-9-2002 and the petitioner filed application on 22-8-2005 and BLPL was in existence two years prior to the application made by the petitioner. Therefore, the petitioner firm

is eligible for exemption of customs duty on the import and export of its goods under Target Plus Scheme.

18. With regard to the power of the first respondent to exercise jurisdiction in deciding the matters under Foreign Trade (Development and Regulation) Act, 1992 is concerned; the Central Government, in exercise of powers under Section 13 of Act, had published a notification on 13.06.2013 specifying the authority and the limits of his power to act as the adjudicating authority under Section 11 of the Act. The notification reads as under:

“(E) In exercise of the powers conferred by section 13 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) and in suppression of the earlier Notifications mentioned below, the Central Government hereby authorizes the officers specified in column 2 of the table below for the purposes of exercising powers under section 13 read with section 11 of the FT(DR) Act, 1991, subject to the limits specified against such officers in the corresponding entry in column 3 of the said Table, namely.-

Sl. No.	Designation of Officer	Value of goods or services or technology covered by an authorization issued, registration certificate/permits issued for import or export or in respect of goods or services or technology for which import or export is permitted without any authorisation
1.	Additional Director General of Foreign Trade	Without limit
2.	Joint Director General of Foreign Trade	Upto Rs.25 crores
3.	Deputy Director General of Foreign Trade/Assistant Director General of	Up to 10 crores

	Foreign Trade.	
4.	Development Commissioner, Special Economic Zones	Without limit in respect of Export Oriented Units and units in Special Economic Zones
5.	Designated Officer, Department of Electronics & Information Technology	Without limit in respect of Units in software Technology Parks (STPs) and Electronics Hardware Technology Parks (EHTPs)

19. From the above provisions, it can be seen that under sub-section (4) of Section 9 of the Act, the Director General or the officer authorized under sub-section (2) would have the power for good and sufficient reasons to suspend, cancel any license, certificate, scrip or any instrument bestowing financial or fiscal benefits granted under the Act. The powers under sub-section (4) of Section 9 thus, concurrently vest in the Director General as well as the Officer authorized by him. The authorized officer would be exercising powers under the delegated authority. There is no pecuniary limitation in exercising such powers. Nevertheless, as a delegator, the Director General would still retain the concurrent authority to exercise such power. On the other hand, the penalty under sub-section (2) of Section 11 of the Act would be imposed by the adjudicating authority, as specified in Section 13. Section 13 refers to the notification which the Central Government may issue authorizing the Director General or other officers. In terms of the said Section, under notification dated 13.6.2013, the limit of exercising powers of Joint Director General of Foreign Trade were fixed at Rs. 25 crores where the value of goods or services or technology covered by the authorization issued, registration

certificate or permits issued for import or export or in respect of goods or service or technology for which import or export is permitted without any authorization.

20. In plain terms thus, the Joint Director could not have adjudicated the question of penalty where the value of the goods or service or technology covered by the authorization exceeded Rs. 25 crores. This pecuniary limit therefore, would take the present matter out of the purview of the Joint Director. The description in the notification is “value of goods or services or technology covered by an authorization issued, registration certificate/permits issued for import or export”. The Duty Free Credit Entitlement (DFCE) scrips would also be in the nature of an authorization issued for import of goods. Merely because such scrips are not separately mentioned in the notification would not mean that the case would not be covered by the said notification.

21. The benefit of TPS involved in this case was valued at Rs.10.64 crores and the value of the goods exported against the TPS was Rs.147 crores and the penalty imposed is Rs.38.07 crores. Therefore, it is contended by the learned senior counsel appearing on behalf of the petitioner that the first respondent is not empowered to adjudicate the case and the impugned order passed by him is bad in law. In the decision relied on by the petitioner (1 supra), the Allahabad High Court held that a proceeding is a nullity when the authority taking it has no jurisdiction either because of want of pecuniary jurisdiction or of

territorial jurisdiction or of jurisdiction over the subject matter of the proceeding.

22. It is further contended that no opportunity was given to the petitioner to clarify the matter with regard to the incremental growth, threshold limit and eligibility criteria and that the respondents have traveled beyond the scope of show cause notice. The Apex Court (2 supra) held that the authority cannot pass an order beyond the scope of show cause notice. It is also contended that the first respondent has not furnished the copy of statement recorded from the Managing Director of the petitioner firm. In a decision relied on by the learned counsel appearing for the petitioner (3 supra), this Court held that non furnishing of copy of statement recorded from the Managing Director amounts to violation of principles of natural justice. It was also held by the Gujarat High Court (4 supra) that the Joint Director could not have adjudicated the question of penalty where the value of the goods or service or technology covered by the authorization exceeded Rs.25 crores.

23. The first respondent issued show-cause notice dated 25.2.2010 basing on the letters issued by the Chief Commissioner of Customs, Hyderabad and DRI, Hyderabad, stating that the petitioner has been misusing the TPS and certain documents were seized from the petitioner. The first respondent has not independently enquired into the matter and did not inspect the premises of the petitioner at any time. In W.P.No.22828 of 2011, a single Judge of this Court, by order

dated 17.10.2012, observed that the said writ petition was filed by the close relative of the Managing Director of the petitioner company due to business rivalry and he also filed complaints before different forums to wreck vengeance against the Managing Director of the petitioner company. He also filed complaints before the CBI and in the said process; the first respondent initiated proceedings against the petitioner, without there being any material to show that the petitioner has played fraud and misused the TPS.

24. The first respondent has not furnished the copy of statement of the Managing Director of the petitioner company, and it is contended by the learned Assistant Solicitor General that the statements recorded under Section 108 of the Customs Act are distinct and different from statements recorded by the police officer during the course of investigation under the Criminal Procedure Code and in support of the said contention, he relied on a decision reported in **Union of India V.Padma Narain Aggarwal and others**⁵, but the facts of the said case are not all applicable to the facts of the present case. The other decisions relied on by the respondents are also not helpful to the case of the respondents.

25. It is contended by the learned Assistant Solicitor General of India that the petitioner has got alternative remedy of review under Section 16 of the FT (D& R) Act, 1992 against the order of appeal passed by the second respondent. Per contra, it is

⁵ (2008) 13 Supreme Court Cases 305

contended on behalf of the petitioner that the said remedy cannot be equated with the appeal and it is the petitioner to opt for any one of the remedies. More so, when the impugned order is passed in the year 2010, driving the petitioner to avail remedy under Section 16 of the Act, at this juncture after a lapse of nine years, would be a never ending litigation. It is settled principle of law that review is not an efficacious alternative remedy.

26. The respondents have not filed the proceedings initiated by the Chief Commissioner of Customs, Central Excise and Service Tax, Hyderabad Zone, the Director of Revenue Intelligence, Hyderabad or the CBI to show that petitioner was penalized for the irregularities committed by it in conducting the business.

27. As per Section 6 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government may appoint any person to be the Director General of Foreign Trade and whereas under Section 11(5) A of the Act, the Director General may direct any officer to recover the amount payable under this Act. Chapter V of the Foreign Trade (Development and Regulation) Act, 1992 deals with appeal and revision and the said power of revision has been substituted as review. This change has been came into force with effect from 27-8-2010.

28. The first respondent was not delegated with the powers as discussed supra for imposing penalty, which is equivalent to customs duty foregone, with interest. The crucial point to be noted here is that under the Customs Act, the concerned

authority has not quantified the amount of duty evaded and no assessment order has been passed fixing the liability upon the petitioner. The first respondent was also not delegated with the powers under Customs Act to take cognizance, since the principal Act has not undertaken any steps for fixing the evasion of customs duty in order to hold that the petitioner is liable to pay the penalty. Since the show cause notice was issued on 25-2-2010 and the cause of action has arisen in pursuance thereof, placing reliance upon the powers, which came into effect subsequently, is illogical and ultra vires. Directing the petitioner to avail the alternative remedy of review at this juncture i.e., in the year 2019, in a case, where the cause of action arose before 2010, will not serve any useful purpose, that too, when the review is not an efficacious alternative remedy.

29. The first respondent imposed a penalty of Rs.19,03,66,389/-, which is equivalent to the customs duty foregone along with interest at 15%. In addition to the same, he also imposed a penalty of Rs.19,03,66,389/- as a separate fiscal penalty, Rs.25,00,000/- on the Managing Director and also a penalty of Rs.5,00,000/- each was imposed on the directors of petitioner company. The total benefit availed by the petitioner under TPS was Rs.10,64,49,880/-, but the first respondent imposed total penalty of Rs.38,07,82,778/- plus Rs.25,00,000/- on the Managing Director and Rs.5,00,000/- each on the directors. The action of the first respondent is without

jurisdiction, unjust and contrary to the provisions of law and also against the principles of natural justice.

30. This Court, by order dated 23.12.2011, while granting stay of the impugned order, directed the petitioner to deposit a sum of Rs.2.5 crores on or before 15.2.2012 and another sum of Rs.2.5 crores on or before 31.3.2012 and in the event of default in compliance with the said condition, the respondents shall be free to take appropriate action for recovery of the amount. In due compliance of the above order, the petitioner has paid the said amount and accordingly, the interim stay granted on 23.12.2011 was made absolute. Therefore, the petitioner is entitled for refund of the said amount.

31. In view of the foregoing discussion, the writ petition is allowed, setting aside the order-in-original dated 30-12-2010 passed by the first respondent and also the order dated 13-12-2011 passed by the second respondent. The respondents are directed to refund the amount deposited by the petitioner, in pursuance of the interim order passed by this Court on 23.12.2011, within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs.

As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

T.AMARNATH GOUD,J

Date: 01-03-2019
Shr