BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.04.2022

PRONOUNCED ON : 19.09.2022

CORAM

THE HONOURABLE MR.JUSTICE **C.SARAVANAN**

W.P.(MD)No.15613 of 2016
and
WMP(MD)Nos.11479 & 14324 of 2016

Madura Coats Pvt.Ltd.,
Rep.by its Manager, Excise & Legal,
New Jail Road,
P.O. Box No.35,
Madurai 625 001, Tamil nadu. ... Petitioner

vs.

1. The Director General of Foreign Trade,
Ministry of Commerce,
Udgyog Bhavan,
New Delhi 110 011.

2.The Policy Relaxation Committee (PRC),
O/o.Directorate General of Foreign Trade,
Ministry of Commerce,
Udyog Bhavan,
New Delhi 110 011.

3. The Joint Director of General of Foreign Trade,
Plot No.117, 1st Main Road,
K.K.Nagar, Madurai 625 020.

4. The Assistant Commissioner of Customs,
Office of the Assistant Commissioner of Customs,
166/2B, Harbour Express Bye Pass Road,
Tuticorin 628 008. ... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus calling for the records pertaining to the order passed by the second respondent in its Order in Case No.I in F.No.01/94/180/1081/AM10/PC.4/PRC as contained in the minutes of the second respondent's meeting held on 05.04.2016 and 11.04.2016, quash the same and consequently allow the review and direct the first respondent to direct the third respondent to issue revalidation and enhancement of value of import entitlement in respect of the above said 5 Advance Authorisations which are the subject matter of the impugned order.

For Petitioner	:	Mr.T.Mohan for M/s.D.Geetha
For Respondents	:	M/s.L.Victoria Gowri Asst.Solicitor General of India.

ORDER

This Writ Petition has been filed for issuance of a Writ of Certiorarified Mandamus, to call for the records relating to the impugned order passed by the second respondent in Case No.1 in F.No. 01/94/180/1081/AM 10/PC – 4 /PRC as contained in the Minutes of the Meeting held on 05.04.2016 and

11.04.2016 and quash the same and to direct the first respondent to direct the third respondent to issue Revalidation and Enhancement of value of import entitlement in respect of the following 5 Advance Authorizations which are the subject matter of the impugned order.

2. By an interim order dated 24.08.2016, this Court has granted status quo. Order dated 24.08.2016 reads as under:-

> Mrs.S.Srimathy, Learned Counsel takes notice for R1 to R3. Mr.S.Gurumurthy, Learned Counsel takes notice for R4. There shall be an order of status -quo prevailing as on date.

3. The petitioner has challenged the impugned decision of the second respondent Policy Relaxation Committee in its Meeting held on 05.04.2016 & 11.04.2016 in Case No.1 bearing F.No.01/94/180/1081/Am10/PC-4/PRC as reflected in the Minutes of the Meeting held on these two days pursuant to an Order dated 28.10.2015 of the Hon'ble Division Bench of this High Court in W.A No. 575 of 2014.

4. By the impugned decision, the second respondent Policy Relaxation Committee in Case No.1 bearing F.No.01/94/180/1081/Am10/PC-4/PRC has rejected the request of the petitioner to revalidate the period of validity of the aforesaid Advance Authorisations.

5. The petitioner has thus also prayed for a direction to the first respondent to direct the third respondent to issue revalidation and enhancement of the value of import entitlement in respect of the above mentioned Advance Authorizations.

6. The petitioner has thus also prayed for a direction to the first respondent to direct the third respondent to issue revalidation and enhancement of value of import entitlement in respect of the above mentioned Advance Authorizations.

7. The impugned order has been passed pursuant to order dated 28.10.2015 of the Hon'ble Division Bench of this Court in W.A.(MD) No. 575 of 2014 which was disposed of with the following observation:-

> 13.Keeping the above lacunae in mind, we are of the view that DGFT has not gone into the issue as to whether it is a case falling squarely under para 2.5, where he has to exercise discretion taking into consideration materials relevant to the case of the appellant for relaxation of the policy and for grant of revalidation of the licence. On this score, we find that the reasons given by the learned Single Judge do not support the case of the department and the appellant has made out a case that its plea has not been considered by the authority, namely DGFT, in the light of what has been explained in the letter dated 16.02.2011 and the other one, dated 28.12.2011, which calls for consideration in terms of paragraph 2.5 of the policy. Accordingly, the order of the learned Single Judge is set aside, the writ petition is allowed, by way of remand. We remand the matter to the DGFT for fresh consideration, after affording an opportunity for personal hearing to the appellant, at the earliest.

8. The Petitioner is engaged in the manufacture of yarns and sewing threads of cotton and synthetics in its factories in Madurai, Tuticorin, and Ambasamudram in Tamil Nadu, Panoli in Gujarat, and Serampore in West Bengal and markets both in the Domestic Tariff Area and in Foreign Market.

9. It is submitted that the petitioner is a major exporter of yarns and sewing threads of cotton and synthetics with an export turnover of Rs.300 Crores per annum and that the petitioner is also accorded with the status of a Star Export House and is recognized as a leading Exporter of sewing threads and yarns by the Synthetic and Rayon Textile Export Promotion Council of India.

10. These products were said to have been exported out of the country and therefore in anticipation of export orders and based on the exports already made by the petitioner, the petitioner applied for the advance authorizations under the Foreign Trade Policy 2005-09 and the relevant Handbook of Procedure (HBP) was in force till August 28, 2009.

11. The dispute in the present writ petition is confined to the following four Advance Authorizations issued to the petitioner under the Foreign Trade Policy 2004-2009.

S.No.	**Date**	**Advance Authorisation Nos.**	**Validity Period*** **24 Months**	6 Months Extension **
i)	28.03.07	3510020677	27.03.2009	27.09.2009
ii)	28.03.07	3510020678	27.03.2009	27.09.2009
iii)	28.03.07	3510020679	27.03.2009	27.09.2009
iv)	24.04.07	3510020837	23.04.2009	23.10.2009

(* Para 4.22 of HOP – 2004-09)
(** Para 4.22 of HOP 2004-09)

12. Earlier, the petitioner had asked for revalidation and enhancement in the value of the above four Advance Authorisations along with Advance Authorisation No.3510018818 dated 08.06.2006. However, the petitioner gave up its claim for revalidation and enhancement in the value for Advance Authorisation No.3510018818 dated 08.06.2006 in the previous round of litigation before this Court in W.A No. 575 of 2014. The reason for giving up its claim appears to be the non-utilization of the said Advance Authorisation.

13. To appreciate the dispute, relevant portion of the impugned decision as reflected in the Minutes of Meeting in Case No.1 bearing F.No. 01/94/180/1081/Am10/PC-4/PRC dated 05.04.2016 & 11.04.2016 are reproduced below:-

> **B.** The Committee deliberated the case at length. Relaxation in Policy and procedure is granted under Para 2.58 of FTP, 2015-2020 which states as under:-
>
> **2.58 Exemption from Policy/Procedures**
>
> DGFT may in public interest pass such orders or grant such exemption, relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade to any person or class or category of persons from any provision of FTP or any Procedures. While granting such exemption, DGFT may impose such conditions as he may deem fit after consulting the Committees as under:

S.No.	Description	Committee
(a)	Fixation / modification of product norms	Norms Committees
(b)	Nexus with Capital Goods (CG) and benefits under EPCG Schemes	EPCG Committee
(c)	All other issues	Policy Relaxation Committee (PRC)

C. Bare reading of the provisions of the above para, it is crystal clear that DGFT may in public interest grant exemption, relaxation or relief, as he may deem fit, after consulting PRC, on ground of genuine hardship and adverse impact on trade. Thus the policy relaxation is not a matter of right. For seeking relaxation, the applicant has to establish genuine hardship or prove beyond reasonable doubt adverse impact on trade. In this case, the applicant has failed to establish concrete ground of genuine hardship or adverse impact on trade.

D. Their contention of genuine hardship that due to introduction of SAP software they faced technical problems in all their units across India during the year 2007-09, imports and exports made from the said units against the above said authorizations were incorrectly accounted resulting into loss of control over accounting of goods under the said authorizations and; ultimately excess exports as well as shortfall in imports occurred inadvertently without the said discrepancies coming the notice of Applicant. However, it was not sustainable and acceptable to the committee for the following reasons:

a. SAP stands for Systems Applications and Products in Data Processing, SAP by definition is also made of the ERP (Enterprise Resource Planning) software as well the name of the company. SAP system comprises of a number of fully integrated modules which covers virtually every aspect of the business management. Thus, by introduction of the SAP, the applicant's accounting efficiency must have been improved. The software must have giving accurate position of their inventories and pending obligation position against individual Licence. Hence the situation of excess export should had not been arisen. The committee, therefore, was of the view that introduction of SAP cannot be attributed to genuine hardship in fulfilling excess export and not importing eligible quantity within the validity of the Authorisations. The applicant itself stated that they had 23 Advance Licences in operation but could not import only in 5 Licence. This proves itself that SAP was not the reason but it was their failure in systematic and timely monitoring of Licences by the management. Further, the applicant has not submitted any documentary evidence that the SAP was introduced during the validity of these Authorisations and for any inconvenience in implementing of SAP software in the concerned unit, they had taken up the issue with software providing company. Therefore, these submissions are not accepted by the committee.

b.The said five Authorisations were issued as per FTP, 2004-2009. In terms of Para 2.12 of HBP, 2004-2009, Advance Authorisation was issued having initial validity of 24 months for import. In terms of Para 4.23 of HBP, 2004-2009, RA was empowered to allow one revalidation for six months on merit of the case, which the applicant has availed. So effectively, Authorisation holder was having 30 clear months to import duty free goods against the said Advance Authorisations.

C. Enhancement in value and quantity of Authorisation is allowed only in situation where an exporter received export order for higher quantity than stipulated in the Advance Authorisation during its validity. Exporter for some reason, may not have time to obtain a new Authorisation. In that case, he can approach RA to allow enhancement in quantity and value of the valid Authorisation. Second situation could be that while making shipments, if a buyer suddenly enhanced the requirement and placed additional order. In that case, exporter may make excess shipment of required quantity without approaching RA for enhancement. To deal such situations, Para 4.21 of HBP provides enhancement in quantity and value of the Authorisation. However, the Authorisation holder must apply to RA concerned within the validity of such Authorisation. Enhancement in quantity and value of Authorisation will not serve any purpose, if it is not obtained within the validity of the Authorisation. In this case, the applicant did not approach the RA concerned for doing so. Therefore he has no merit for seeking enhancement after expiry of the said 5 Authorisations.

d. The committee endorsed the views taken by Dr.Anup K.Pujari, the then DGFT, while passing order dated 24/29.10.2013. This committee also have the same view that provisions of late cut provided in the Para 9.3 of HBP, 2004-2009 applicable only in the case where time limit for submission of any application is prescribed. Time limit is provided for post shipment scheme, export incentives scheme and drawback scheme under FTP. Advance Authorisation scheme is need based. Exporter can obtain Advance Authorisation as and when he got order from buyer. He can obtain Advance Authorisation in anticipation also. Therefore, no time is prescribed for obtaining Advance Authorisation in FTP. So far revalidation request is concerned, further six months revalidation is allowed in continuation of the validity of the Authorisation. Therefore, Authorisation holder has to seek further revalidation, on merit, within extendable validity of six months only. Hence, the late cut provision is not applicable in such cases.

e. The committee further endorsed the views of Dr.Anup K.PUjari, the then DGFT, taken in the order dated 24 / 29.10.2013 that PRC has not considering any request for revalidation after 2010. The cases cited by the applicant were considered by the committee prior to 2010 only. After 2010, taking into consideration the bad situation of balance of payment and balance of India's trade, the committee decided not to allow further revalidation where exports were made but imports were not made within the validity of Authorisation unless the Authorisation holder was denied / prevented their legitimate benefits due to system error or force majeure or Authorisation lost its validity in the possession of government Agency. The committee has been consistently and uniformly adopting this practice since

November, 2010. The applicant could not cite any case in which request for revalidation was considered after 2010. Hence, the case of the applicant cannot be placed on similar footing.

f. Having heard the averments and submissions of the applicant, the committee was of the view that the applicant could not establish the case of genuine hardship and any violation of right of equal treatment. The applicant has been given 30 month time for making import as was available to other exporters and that was more than sufficient. There is no merit in the case. The committee, therefore, did not accede to the request.

14. This is the third round of litigation before this Court. The impugned rejects the request of the petitioner for an extension of the period of validity under Paragraph 2.5 of the Foreign Trade Policy 2004-09[Later under Para 2.58 of Foreign Trade Policy 2009-2014 and Foreign Trade Policy 2013-2024] as it stood during the period when the advance authorization was procured by the petitioner from the Regional authority under the Foreign Trade Development Act, 1992 and the relevant Foreign Trade Policy (FTP) and Hand Book of Procedure (HBP).

15. The subject Advance Authorisation was issued with a validity period of 24 months from the date of their issue as per the policy in force between 2004-2009 The period of validity of the subject Advance Authorization expired during the currency of Foreign Trade Policy 2005-09 read with the relevant Handbook of Procedure (HBP) as in force till 31.03.2009 and partly during the currency of Foreign Trade Policy 2009-14 from 01.04.2009.

16. The extended period of 30 months validity expired during the currency of Foreign Trade Policy 2009-14. Though not argued, the petitioner had another grace period of six months under the Handbook of Procedure (HBP).

17. Long after the expiry of period of validity of the respective Advance Authorisations, the petitioner approached the respondents for revalidation and extension of the period in the respective Advance Authorisation on 16.2.2011 and 28.12.2011.

18. When the petitioner applied for Advance Authorisation Foreign Trade Policy 2009-2014 (FTP) along with Handbook of Procedure (HBP) was in force. When the impugned decision was passed, the new Foreign Trade Policy 2015-2020 (FTP) along with Handbook of Procedure (HBP) was in force.

19. The impugned order was decided partly in the light of Foreign Trade Policy 2015-2020 (FTP) read with Handbook of Procedure (HBP) as in force.

20. The petitioner cited difficulties on account of the economic meltdown and global recession during 2008 and 2012 for meeting out its obligations under the Foreign Trade Policy and thus wanted concession in the form of revalidation of the period of export, in the import value under the advance authorisation and other benefits under Para 2.5 of the Foreign Trade Policy 2009-09.

21. Additionally, the petitioner has also blamed its System Application Programme (SAP) systems for the confusions. The case of the

petitioner before the second respondent was as under:-

> i.In view of certain technical problems faced in the newly implemented SAP software system in Applicant's all units across India during the year 2007-09, imports and exports made from the said units against the above said authorization were incorrectly accounted resulting into loss of control over accounting of goods under the said authorizations and ultimately excess exports as well as shortfall in imports occurred inadvertently without the said discrepancies coming the notice of Applicant.
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> ii.In view of global crises of meltdown in 2007-09 which affected Textile Industries across Asian region, most foreign suppliers from Asian countries from whom the Applicant purchased their raw materials, had held back their operations partially to withstand in the global market resulting into undue delay in servicing the orders placed by the Applicant. Consequently, the Applicant could not import the raw materials in proportion to the excess exports which were made during duty paid raw materials so as to meet export customer's requirement.
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> iii.Entire export obligation under all the above said five authorizations was met in full, both terms of quantity and value, well within validity of license and also achieved value addition in excess of 15% besides excess exports.

iv.Since duty paid raw materials were used in the excess exports made under the above said authorizations, the same need to be replenished for neutralization of actual incidence of duties suffered by the Applicant.

v.The above stated reasons contained in the representations dated 16.02.2022 and 28.12.2011 made by the applicant make it evident that genuine hardship will be caused to the applicant unless the applicant's request for relaxation is granted under the corresponding provisions of the FTP/Procedures.

vi.Applicant have not only fulfilled export obligation against the five advance authorizations well within the EO period both in terms of value and quantity but have also made additional exports within the original EO period besides having achieved value addition in excess of 15%.

vii.Applicant's delayed request for revalidation of the above said five advance authorizations cannot by any stretch of imagination be considered as deliberate or malafide as the applicant stands to lose by not seeking his duty free import entitlement proportionate to the excess exports made by him by requesting revalidation of the said authorizations.

viii.Applicant submit that when the EO under the above said authorizations was fulfilled within the validity of the said authorizations and the foreign exchange relating thereto including against the excess exports, was realized fully by the Government, there is no revenue loss too to the Government.

ix.As against the above, the denial of revalidation of the above said advance authorizations on technical grounds or otherwise results into heavy loss to the Applicant.

x.No limitations specified for filing application under Para 4.21 and 4.23 of the HBP of FTP.

22. The specific case of the petitioner is that the petitioner has discharged the export obligation under the respective Advance Authorizations and has surpassed the quantity and therefore would have been entitled to enhancement in the quantity on account of the exports made.

23. It is submitted that certain technical issues cropped up in the newly implemented SAP software system in all its factories across India during the year 2007-09 resulting in loss of control over the accounting of both imports and exports under the Authorizations resulting in excess exports as well as shortfall in imports which came to the notice of the petitioner belatedly.

24. It is further submitted that the petitioner could not make imports due to the global crisis and economic meltdown between 2007-09 which

caused undue delay in servicing the orders placed by the petitioner for raw materials from foreign suppliers who held back their orders partially to withstand in the global market.

25. It is submitted that the petitioner made such excess exports specifically against the said Advance Authorization by indicating the Authorization Number in the Shipping Bills of Export and that the petitioner had no other option to avail the benefit against such excess export except seeking 'Enhancement' and 'Revalidation' to the Authorizations as prescribed under paragraphs 4.21 and 4.23 of the Handbook of Procedures (HBP) respectively, particularly when the petitioner had made ZERO imports as against the quantity of 200 Tons allowed in the Authorization No. 3510020837 dated 24.04.2007 although made therein exports in excess of EO specified therein.

26. It is submitted that the petitioner obtained authorization in March 2007 on the strength of orders then present or in the pipeline. Exports made against the authorizations were made rapidly using duty paid out of raw materials which were then lying in stock.

27. It is further submitted that the customers fortuitously did not cancel the existing orders and therefore the export orders were met on time. However, there was hardly any new business or new orders for a while coupled with foreign suppliers of inputs in making supplies to the petitioner. Therefore, the petitioner could not import inputs due to dwindling exports.

28. It is further submitted that by the time the global economy recovered and orders started to trickle, respective Advance Authorisation expired and therefore the writ petitioner sought revalidation and enhancement of input entitlement in line with actual exports done (in three of the authorization) and to enable it to utilize of import entitlement (in respect of one Authorisation where no import was made).

29. It is submitted that this hardship to the petitioner was not even adverted by the DGFT, though he was specifically mandated to do so by the order dated 28.10.2015 of the Hon'ble court in Writ Appeal No.575 of 2014.

30. It is submitted that on account of several factors ranging form the economic meltdown witnessed during 2008-10 and on account of glitches in the System Analysis Programmer (SAP) of the petitioner, the petitioner failed to note that the period of these authorisation expired and therefore the petitioner was unable to apply for extension of time and revalidation.

31. It is submitted that although the above inadvertent lapse occurred in respect of 13 Authorizations out of 23 Authorizations handled during the period 2007-2009, the petitioner had decided to pursue the claims in respect of five Advance Authorizations initially, but restricted it to four.

32. It is submitted that in view of the petitioner's inability to file an application seeking enhancement / revalidation either before the expiry of the Advance Authorization or within the additional period of 6 months provided for revalidation under Paras 4.21 and 4.23 of Handbook of Procedures, the petitioner had submitted an application under Para 2.5 of the Foreign Trade Policy before the Policy Relaxation Committee (PRC) on 16.02.2011 seeking relaxation of the provisions of the Policy or Procedures on the ground of

genuine hardship faced by the petitioner and grant revalidation of the said Authorizations for 6 months as well as enhancement of import quantity in commensurate with excess exports which were rejected by them on 02.06.2011, on the specious ground that it was an internal management issue and not a genuine hardship warranting relaxation.

33. The petitioner submitted another application in respect of each of the 5 Authorizations before the Policy Relaxation Committee (PRC) on 28.12.2011 which too was rejected by the Policy Relaxation Committee (PRC) on 11.09.2012 reiterating the earlier decision of the Policy Relaxation Committee (PRC) and therefore, the petitioner submitted their appeal on 10.10.2012 before the first respondent requesting to review the rejection order passed by the second respondent in terms of Para 9.13 of Handbook of Procedure of Foreign Trade Policy.

34. It is submitted that the petitioner, during the pendency of their representations before the second respondent, was issued with Show Cause Notices by the third respondent in respect of each of the 5 Advance Authorizations demanding submission of original authorizations together

with proof of import and export documents for the redemption of all such Authorization.

35. The petitioner referred to a specific case of M/s.Claris Lifesciences Ltd, Ahmadabad wherein 2nd respondent PRC has granted revalidation of licenses in respect of applications which were filed within 2 years from the date of expiry of license taking into account that the exporter has fulfilled the EO within valid EOP vide PRC Meeting No.03/AM 09 dated 31.07.2008 – Case No.32 – File No.01/94/180/190/AM09/PC-4. It has been specifically stated in this case that "The Committee observed that revalidation application is to be made within 2 years from the date of expiry of License".

36. The petitioner further referred to the following cases wherein the second respondent PRC has granted validation of licenses in respect of applications filed within a reasonable period after expiry of total validity period of 30 months of the said licenses taking into account that the exporter has fulfilled the EO within EOP.

a. Case No.1 PRC Meeting No.09/AM07 dated 22.11.06 (P.No.96) License No.0710022414 dated 12.7.2003 M/s.Masturial Pvt. Ltd. Bangalore.

b. Case No.3 PRC Meeting No.09/AM07 date 22.11.06 (P.No.9) License No.0210059954 dated 16.1.2004 M/s.Zeal Exports, West Bengal.

C. Case No.2 PRC Meeting No.01/08 date 24.05.2007 (P.No.98) License No.0311024332 dated 22.12.2003 M/s.Exempler Nihon Spindle Mfg. Co. Pvt. Ltd. Mumbai.

d. Case No.3 PRC Meeting No.01/08 date 24.02.2007 (P.No.98-99) License No.0310242659 dated 18.12.2003, M/s.Exempler Nihon Spindle Mfg. Co. Pvt. Ltd. Mumbai.

37. It is further submitted that vide replies dated 12.09.2012 the petitioner requested the third respondent to keep the proceedings / redemption of all the impugned 5 advance authorizations in abeyance pending disposal of their application filed with the Policy Relaxation Committee (PRC) as the petitioner had not only fulfilled Export Obligation prescribed in all 5 authorizations but also made excess exports and awaiting enhancement / revalidation of the same and that their request for production of original authorization together with all proof of export documents for having fulfilled Export Obligation would prevent them from claiming re-validation of the said authorization for import of duty free inputs commensurate with excess exports made under the said authorization.

38. It is submitted that the petitioner, however, sent copies of the documents together with details of quantum & value of exports made in fulfillment of Export Obligation to the third respondent. Therefore, it is submitted that there can be no doubt that the petitioner had actually affected the exports claimed and this has never been contested.

39. It is submitted that their appeal filed before the first respondent was again rejected by the second respondent vide its order dated 05.02.2013 merely reiterating the earlier order which was challenged by the petitioner before this High Court in W.P.(MD)No.2865 of 2013 and W.A.(MD) No.229 of 2013, wherein, this Court passed a common order dated 29.07.2013 remitting the matter to the first respondent to pass fresh orders.

40. It is further submitted that the petitioner's representation and request made before the first respondent during the personal hearing held on 08.10.2013 in the adjudication of remand proceedings were rejected by them vide order dated 29.10.2013.

41. It is also submitted that the petitioner challenged the above rejection order of the first respondent before this Court in W.P.(MD) No. 18266 of 2013, but, the same was dismissed on 28.02.2014 and in W.A.(MD) No.575 of 2014, this Court remanded the case back to the first respondent for fresh consideration in terms of Para 2.5 of the Foreign Trade Policy vide its order dated 28.10.2015. However, the petitioner was directed to appear before the second respondent to make their representations.

42. During the personal hearing held on 05.04.2016 respondent (PRC) under the Chairmanship of the first respondent, the representation of the petitioner was rejected by the second respondent vide its impugned order dated 05.04.2016/11.04.2016 in the form of Minutes of Meeting in the Case No.1 in F.No.01/94/180/1081/AM 10 / PC – 4 /PRC. Aggrieved by the same, this Writ Petition has been filed challenging the impugned order.

43. The learned counsel for the petitioner submits that the impugned order of the second respondent is unsustainable and untenable in view of the

following submissions of the petitioner which were brushed aside by the second respondent merely endorsing the views expressed in their earlier orders which have been set aside earlier on two occasions by this Court and could not have been endorsed by the Directorate General of Foreign Trade (DGFT) / Policy Relaxation Committee (PRC).

44. The learned counsel for the petitioner submits that while this High Court remanded the issue involved in this petition to the DGFT for fresh consideration vide order dated 28.10.2015 (Page No. 283 Spiral Volume), it has specifically stated therein that "*…. and the appellant has made out a case that its plea has not been considered by the authority, namely DGFT, in the light of what has been explained in the letter dated 16.02.2011 and the other one, dated 28.12.2011, which calls for consideration in terms of the paragraph 2.5 of the Policy.*" The above Para 2.5 reads that "*Any request for relaxation of the provisions of this Policy or of any procedure, on the ground that there is genuine hardship to the applicant or that a strict application of the Policy or the procedure is likely to have an adverse impact on trade, may be made to the Director General of*

Foreign Trade for such relief as may be necessary. The Director General of Foreign Trade may pass such orders or grant such relaxation or relief, as he may deem fit and proper".

45. He further submits that the second respondent has considered the petitioner's claim over difficulties faced by them in accounting exports & imports under the impugned authorization due to introduction of SAP vide their letter dated 16.02.2011 albeit unsatisfactorily, but brushed aside the same by stating that the introduction of SAP cannot be attributed to genuine hardship in making excess export and not importing eligible quantity within the validity of the authorization and no proof was adduced by the petitioner for having introduced SAP software system and faced difficulties during the relevant period.

46. The learned counsel for the petitioner further submitted that the second respondent, however, completely failed to consider the other claims of the petitioner made in their letter dated 28.12.2011 regarding genuine hardship caused to them on account of global crisis of meltdown during 2007-2009 which caused undue delay in servicing the orders placed by the

petitioner for raw materials from foreign suppliers who held back their operations partially to withstand in the global market.

47. The learned counsel for the petitioner submits that there is no dispute that the entire Export Obligation under all the four Advance Authorizations was met in full both in terms of quantity and value well within the validity period of Authorizations and in fact, the petitioner achieved value addition as fixed therein besides having made excess exports which too were made within the original Export Obligation period together with value addition.

48. The learned counsel for the petitioner submits that when the Government realized foreign exchange for the entire exports including excess exports made against the impugned 4 authorizations and the petitioner had faced genuine hardship as detailed in the above paras, any denial of the petitioner's request for Policy Relaxation to grant 'Revalidation' and 'Enhancement of input quantity and value' on technical grounds would cause heavy loss to the Petitioner, but revenue loss to the Government, grant of the relaxation could not cause any revenue loss to the government as the

exchequer had enjoyed the benefits of the foreign exchange brought in by the petitioner through its exports.

49. In this connection, the learned counsel for the petitioner relied upon the decision of the Division Bench of the Delhi High Court in the case of **IFB Industries Ltd.** Vs. **Union of India**, 2017 (353) ELT 322 (Del) wherein it has been held that while policy relaxation may not be a matter of right, however, it cannot whimsically be denied it facts and circumstances warrant relaxation.

50. The learned counsel for the petitioner submits that the impugned order did not deny the eligibility of the petitioner under the above provisions for requesting 'enhancement' and 'revalidation' but denied such request on the ground that the petitioner did not apply for the 'enhancement' within the validity of the Authorization to the Regional Authority (RA) concerned as well as did not apply for 'revalidation' within extendable validity of six months vide Paras D(c) and D(d) therein. Curiously, the respondent claims for the first time in the impugned order (Para D) that the extension of authorization had been obtained by the Licensee from the Regional Authority

(RA) for 6 months which is incorrect as no such extension had been sought to be obtained by the petitioner.

51. The learned counsel for the petitioner submits that the above contention of the second respondent demanding filing of application within the validity of Authorization or within the extendable validity of six months has no basis as the said Paras 4.21 and 4.23 of the Hand Book of Procedure of Foreign Trade Policy do not specify any period within which the Exporter / Importer is required to apply for 'enhancement' and 'revalidation'.

52. The learned counsel for the petitioner submits that the second respondent denied the applicability of their orders in the following cases to the petitioner's case wherein they had granted revalidation of licenses in respect of applications filed within 2 years or within a reasonable period from the date of expiry of licence taking into account that the exporter had fulfilled the EO within the valid Export Obligation Period.

Sl. No.	Name of the Firm	Case No., /PRC Meeting No./ Date	Licence issued period
1	Indian Steels and Allied Products, Chennai	Case No.10 Meeting No. 11/AM07 Date: 15.02.2007	July 2003 2
2	Claris Lifesciences Ltd Ahmedabad	Case No.10 Meeting No. 11/AM07 Date: 15.02.2007	July 2003
3	Masturlal Pvt Ltd Bangalore	Case No.1 Meeting No.09/AM07 Date: 22.11.2006	Nov 2002 - Feb 2008
4	Zeal Exports West Bengal	Case No.3 Meeting No.09/AM07 Date: 22.11.2006	January 2004
5	Exempler Nihon Spindle Mfg Co Pvt Ltd, Mumbai	Case No.2 Meeting No. 01/08 Date: 24.05.2007	December 2003
6	Exempler Nihon Spindle Mfg Co Pvt Ltd Mumbai	Case No.3 Meeting No. 01/08 Date: 24.05.2007	December 2003

53. The learned counsel for the petitioner submits that the second respondent denied the applicability of the above case references merely endorsing the views of the then Directorate General of Foreign Trade (DGFT) stated in the earlier order dated 24.10.2013 / 29.10.2013 that the Policy Relaxation Committee (PRC) did not consider any request for

revalidation after 2010 and that the cases cited by the Petitioner were considered by the 2nd Respondent prior to 2010 only and that revalidation could be considered in cases where the Authorization holder was denied / prevented their legitimate benefits due to system error or *force majeure* or authorization lost its validity in the possession of government agency, which cannot be a valid reason for the respondent to do a *volte face* on the basis of some predetermined, unannounced policy range.

54. He further submits that the above reasoning of the second respondent merely endorsing the views of the first respondent is unsustainable when the said order was set aside by this Court in its order dated 28.10.2015 in W.A. (MD) No.575 of 2014 and that there was no change in the law or declared policy to justify such decision taken by them unilaterally resulting into discrimination to the petitioner, particularly in the light of the genuine hardship caused to the petitioner on account of the global crisis and meltdown during 2007-2009.

55. He further submits that the petitioner also requested the first and second respondents to grant import entitlement commensurate with the

excess exports made under the impugned 4 advance authorisations as admissible under Para 4.21 of Handbook of Procedures of Foreign Trade Policy by imposing a cut in terms of Para 9.3 of Handbook of Procedures.

56. It is submitted that the second respondent denied the request of the petitioner to consider their import entitlement with a late cut as provided under the above Para 9.3 of Handbook of Procedure (HBP) merely endorsing the views of the then Directorate General of Foreign Trade (DGFT) stated in the earlier order dated 24.10.2013 /29.10.2013 that it is applicable only in the case where the time limit for submission of any application is prescribed and that such time limit is provided for post shipment scheme, export incentives scheme and drawback scheme under Foreign Trade Policy (FTP).

57. It is further submitted that the above reasoning of the second respondent merely endorsing the views of the first respondent is unsustainable when the said order was set aside by this Court vide order dated 28.10.2015 in W.A.(MD) No.575 of 2014 and that the reasoning of the second respondent of restricting the applicability 'late cut' provided under Para 9.3 of Handbook of Procedure (HBP) only to post shipment scheme /

export incentives scheme / drawback scheme under Foreign Trade Policy (FTP) which has no basis in as much as the Para 9.3 specifically states 'any application' as well as the said Para 9.3 has been provided under Chapter 9 which deals with 'Miscellaneous Matters" covering all the situations and therefore there is no bar in applying the 'late cut' provided under Para 9.3 of Handbook of Procedure (HBP) to the petitioner's case while granting benefit under Para 4.21 of Handbook of Procedure (HBP).

58. It is also submitted that when the second respondent himself stated in Para D(c) that the petitioner should have applied for Enhancement under Para 4.21 of Handbook of Procedure (HBP) within the validity of the Advance Authorization and in Para D(d) that the petitioner should have applied for Revalidation under Para 4.23 of Handbook of Procedure (HBP) within extendable validity of six months and that in the counter affidavit filed on behalf of the first to third respondents, it has been admitted that although no time limit has been prescribed for filing the request of revalidation, it can reasonably be understood that for a relief of six months validity, a request has to be filed within the validity of the authorization or the petitioner could have come within the licensing period.

59. The learned counsel for the petitioner further submits that when the second respondent himself admitted as above that the application seeking revalidation and enhancement in the value and quantity of inputs should be filed within the validity of authorization or within an extendable validity period of six months, the entitlement of benefit sought under Para 4.21 and 4.23 should be granted by applying the 'late cut' provided under Para 9.3 of Handbook of Procedure (HBP)

60. He further submits that in as much as the first application of the petitioner dated 16.02.2011 seeking revalidation and enhancement in value and quantity in respect of all the five advance authorizations except No. 3510018818 dated 08.06.2006 was filed well within 24 months' time limit prescribed under Para 9.3 of Handbook of Procedure (HBP) of Foreign Trade Policy (FTP) for late receipt of application as detailed in the attached ANNEXURE, the petitioner's request for import entitlement in respect of the balance four advance authorizations should be granted by imposing a late cut of 10% in terms of Para 9.3 of Handbook of Procedure (HBP) of Foreign Trade Policy (FTP).

61. The petitioner opted for 'Advance Authorization' Scheme, under the FTP. Under the FTP read with HOP, import the raw materials without payment of all duties of customs which are required for the manufacture of final product meant for export and is obligated to export the final product for the 'value', 'quantity' and 'period' as specified in the said Advance Authorization issued by the Directorate General of Foreign Trade (DGFT) Authority with a validity of 24 months besides achieving the 'value addition' as fixed by the said Authority.

62. It is also submitted that the Advance Authorization Scheme provides for 'Enhancement or Reduction" in the value of Authorization' which may be claimed by the petitioner either before or after the exports as well provides for 'Revalidation of Authorization', whereby, the petitioner shall seek revalidation of the Authorization issued to him for additional six months from the date of expiry of 24 months enabling the petitioner to import and export under the said authorization during such extended period.

63. It is further submitted that while the petitioner had obtained several Advance Authorizations from time to time from the third respondent based on their export orders and re-deemed the said Authorizations after fulfillment of the conditions specified therein including the Export Obligation regularly, the petitioner is concerned with the 5 Advance Authorizations obtained from the third respondent for the import of Polyester Filament and Polyester Staple fibre without payment of duties of customs duty for the manufacture of Polyester Polyester Corespun Yarn and sewing threads meant for export subject to fulfillment of conditions specified in the said Authorization within its validity period.

64. It is also submitted that while the petitioner had not only fulfilled the Export Obligation specified in all the 5 Advance Authorizations both in terms of 'quantity' and 'value' but also made excess Exports within the validity period of the said Authorizations besides achieving the 'value addition' as fixed by the Directorate General of Foreign Trade (DGFT) Authority and consequently the petitioner was entitled to claim enhancement of value and quantity of imports commensurate with the exports made in excess of the Export Obligation specified therein in terms of paragraph

4.21of Hand Book of Procedure (HBP) as well as Revalidation of Authorization in terms of Para 4.23 of Handbook of Procedure (HBP).

65. The learned counsel for the petitioners submits that this Court while remanding the proceedings involved in this matter vide its order dated 28.10.2015 in W.P. (MD) No.575 of 2014 to the first respondent, observed that the first respondent did not go into the petitioner's claim under Para 9.3 of Handbook of Procedure (HBP) of Foreign Trade Policy (FTP) because the original authority acceded to the fact that the case could be considered under Policy Relaxation *de hors* of Para 9.3 of Handbook of Procedure (HBP).

66. Therefore, it is prayed for consideration of the petitioner's contentions regarding the applicability of Para 9.3 of Handbook of Procedure (HBP) and for a direction to the second respondent to grant the benefit claimed by the petitioner under Para 4.21 & 4.23 of Handbook of Procedure (HBP) of Foreign Trade Policy (FTP) applying the late cut provided under Para 9.3 of Handbook of Procedure (HBP).

67. It is also prayed for an extension of time to import material against exports already made within the validity of the authorization (24 months). The petitioner has brought in valuable foreign exchange into the country and has acted conscientiously in the matter of fulfillment of export obligations and in fact, exceeded the export obligations entitling it to seek enhancement of import in respect of three of the four authorizations.

68. It is submitted that the petitioner's genuine hardship (both in terms of SAP issues peculiar to it as well as the global recession/slowdown which affected the industry in toto) ought to have resulted in the Directorate General of Foreign Trade (DGFT) allowing the review and not the Policy Relaxation Committee (PRC) reiterating the Directorate General of Foreign Trade's (DGFT's) earlier rejection.

69. It is further submitted that the petitioner having identified the exports with the relevant Advance Authorizations was estopped from claiming any other benefits under the Duty Drawback Scheme or the DEPB (Duty Entitlement Passbook) Scheme and the rejection by the Policy

Relaxation Committee (PRC) would result in a conscientious exporter being deprived of the import incentives on venial ground.

70. It is also submitted that when the petitioner was willing to have the benefits reduced by imposition of late cut in terms of Para 9.3 of the Handbook of Procedure (HBP) of Foreign Trade Policy (FTP) within the time stipulated therein, it was not fair to deprive the petitioner of the benefits therein merely because of the passage of time.

71. It is submitted that the absence of why the petitioner was denied the benefits of relaxation without any acceptable explanation as to why in similar cases cited by the Petitioner, extension of validity to enable for imports was extended by PRC even without late cut and in some cases after imposing a composition fee of 2% [as against the 10% late cut specified in Para 9.3 of Handbook of Procedure (HBP) of Foreign Trade Policy (FTP)] which none can claim exemption/policy relaxation as a matter of right, it cannot be whimsically and arbitrarily denied.

72. It is finally submitted that the respondents, in spite of the two orders of remand of this Court, are only interested in reiterating their earlier orders and therefore no remand simpliciter is likely to achieve any purpose. It is therefore prayed for allowing this Writ Petition.

73. It is submitted that rights conferred under Foreign Trade Policy read with relevant Customs Notification cannot be denied merely because there was a delay in filing an appropriate application for revalidation and for relaxation of the period and terms of the licence in terms of paragraph 2.5 of the Foreign Trade Policy relevant for the period between the year 2004-2009.

74. The petitioner submits that the Foreign Trade Policy as it stood during the Advance Authorisations were procured between the Foreign Trade Policy for the year 2004-2009, the expression in paragraph 2.5 of the Foreign Trade Policy was different.

75. It is submitted that request for relaxation of the provisions of the policy or any procedure, on the ground that there was a genuine hardship to the applicant or that a strict application of the policy or the procedure was

likely to have an adverse impact on the trade, the Director General of Foreign Trade may grant such relief as if it may be necessary. It is submitted that the Director General of Foreign Trade was thus empowered to pass orders for grant of such relaxation or relief as may be deemed fit.

76. It is further submitted that as per the Foreign Trade Policy for the year 2004-2009, the Director General of Foreign Trade may also in public interest exempt any person or class or category of person from any of the provisions of the policy or any procedure and may, while granting such exemption, impose such conditions as they may deem fit.

77. It is submitted that such request ought to be considered only after consulting the Norms Committee in respect of Chapter-4 (excluding any provision relating to the Gem and Jewellery Sector) and the EPCG Committee if the request was in respect of imports under Chapter-5 of the Foreign Trade Policy / Hand Book of Procedure.

78. The learned counsel for the petitioner further submits that the Foreign Trade Policy which was in force from 2009-2014 altered the

language and therefore, the aforesaid amendment was not applicable to the facts of the present case.

79. That apart, it is submitted that there was an economic meltdown and crisis the world over. It is submitted that though the petitioner was able to discharge an obligation based on the earlier export orders booked, the petitioner was not able to utilise the Advance Authorisations as demand for the export products reduced drastically from 2009-2012 by which time these Advance Authorisations had expired.

80. It was submitted that these Advance Authorisations are valid for a period of 24 months from the date of issue and with a grace period of another six months in terms of Public Notice No.2/(PN) 1997-2002, dated 31.03.2001.

81. It is further submitted that under similar circumstances in the case of the following exporters, similar benefit has been granted to the following persons:-

11.1.M/s.Masturlal Private Limited, Bangalore *in Case No.1 PRC Meeting No.09/AM07 dated 22.11.2006 Licence No.0710022414 dated 12.07.2003.*

11.2.M/s.Zeal Exports, West Bengal in Case No. 3 PRC Meeting No.09/AMo7 dated 22.11.2006 Licence No.0210059954 dated 16.01.2004.

11.3.M/s.Exempler Nihon Spindle MfgCo.Private Limited, Madurai in Case No.2 PRC Meeting No.1/08 dated 24.05.2007 Licence No.031024332 dated 22.12.2003.

11.4.M/s.Exempler Nihon Spindle MfgCo.Private Limited, Madurai in Case No.3 PRC Meeting No.1/08 dated 24.05.2007 Licence No.0310242659 dated 18.12.2003.

82. It is therefore submitted that there cannot be any discrimination and therefore, the impugned order has to go. The learned counsel for the petitioner further submits that the impugned order is contrary to the decisions of the Division Bench of the Delhi High Court in **IFB Industries Ltd.** Vs. **Union of India and Another**, 2017 SCC OnLine Del 7889 : (2017) 353 ELT 322. The Division Bench of Delhi High Court remitted the case back to the DGFT. The relevant portion from the aforesaid order reads as under:

9. By an order dated 10.09.2015, this Court set aside the order of the PRC dated 09.06.2015 with liberty to the petitioner to file a representation before the PRC. The respondents were directed to pass a reasoned

order after giving the petitioner an opportunity of hearing.

10. Mr. Ganesh, learned Senior Advocate appearing on behalf of the petitioner submitted that extension orders were issued by the Joint DGFT, Kolkata in July 2010, after a delay of 1 ½ years. The extension was with retrospective effect from January, 2009. The petitioner, therefore, in effect, got an extension of 3 ½ years instead of full period of five years to which the petitioner was entitled under Clause 4.1.9 (A) of the FTP 2004-2009 as a matter of legal right.

11. The petitioner, therefore, applied to the PRC for an appropriate extension of export obligation period to make up for the lost extension period of 1 ½ years. Mr.Ganesh argued that the petitioner should be granted period of five years with effect from July 2010 till July 2015 and all exports made by the petitioner upto July 2015 should be taken into account towards discharge of the petitioner's export obligations. To this, the petitioner was entitled as a matter of legal right irrespective of exercise of discretionary indulgence by the PRC in favour of the petitioner.

12. Mr. Ganesh argued that with effect from 2009, the Import Controlling Authority changed the alphanumeric numbering of import licenses and also changed the software used by them .WP(C) NO.11198/2015 for recording the fulfilment of export obligations, as a result of which, the system and software of the respondent did not accept and record the earlier license numbers given to licenses issued

> ***prior to 2009 in connection with the shipping bills covering export made in relation to the licenses. These exports could not be considered for no fault of the petitioner, but only because of the software. Mr. Ganesh strenuously argued that the petitioner is entitled to have these exports taken into consideration, as a matter of legal right even without exercise of discretionary indulgence by PRC in favour of the petitioner.***
>
> *13.Mr. Ganesh argued that a large number of other exporters, including in particular, those who have made their exports on free shipping bills had applied to PRC for relaxation in the form of directions that the export made on such shipping bills should be considered towards discharge of the export obligations even though the shipping bills were free shipping bills and though the Advance License numbers could not be uploaded because of defect in the software. This specific prayer has been granted by the PRC in a large number of cases particulars whereof have been given in the writ petition.*

83. He further submitted that the impugned order has to go in the light of the law laid down by the Division Bench of Delhi High Court in **IFB Industries Limited**'s case referred to *supra*. The Division Bench of Delhi High Court in **IFB Industries Limited**'s case referred to *supra* has concluded as follows:-

48. May be, policy relaxation is not a matter of right, as argued by Mr. Makhija. At the same time relaxation cannot whimsically be denied if facts and circumstances warrant relaxation.

49. It is well settled that discretionary power cannot be exercised arbitrarily. If facts and circumstances exist which require exercise of discretion in a particular way, there is an obligation and/or duty to exercise discretion in that way. The proposition finds support from the judgment of the Supreme Court inEx. Capt. Harish Uppal v.UOI reported in(2003) 2 SCC 45.

50.As observed above, there is no specific denial that in large number of other cases, discretion has been exercised. The instances have been given. Refusal to exercise the power in the case of the petitioner would be totally arbitrary, discriminatory and bad in law.

51.Mr. Ganesh submitted that there is no need or warrant for a remand because the petitioner had already submitted to the respondent the central excise ARI-I documents (duly endorsed by the Central Excise Authorities) and the export invoice (also endorsed by the Customs Authorities). Mr. Ganesh submitted that these documents fully establish the exports. The documents have never been doubted or questioned by the respondents. The exports have been certified by the Customs and the Excise Departments which are a limb or wing of the Central Government of which the respondents are a *part.*

52.Mr. Ganesh referred to the pleadings in the writ petition and submitted that paragraph 4.20 of the Handbook of Procedure 2004-2009 gives the facility of clubbing of licenses only for the purpose of redemption/regularization without imposing any restriction based on the period to which the licenses relate. Paragraph 4.20 expressly provides that the licenses may relate to different periods but the only requirement is that the Customs Exemption Notification in question must be similar. That requirement was fulfilled in the present case. PRC had not suggested that the requirement had not been fulfilled. The petitioner is thus entitled to clubbing of licenses for the purpose of redemption and/or regularization, as argued by Mr. Ganesh. The finding of the PRC that clubbing of licenses would be allowed only if the licenses or Authorizations had been issued within a span of 36 months and the last shipment was within 48 months of the date of the first Licenses/Authorization is neither to be found in paragraph 4.20 of the Handbook. Rather paragraph 4.20.5 of the Handbook provides:

"*4.20.5. Notwithstanding the provisions of para 4.20.3 and 4.20.4 above, Clubbing of all expired licences may also be permitted provided all the expired licenses have been issued during the Exim Policy period of 1992-1997 & 1997-2002 i.e, 1st April, 1992 to 31st March, 2002."*

53.As argued by Mr. Ganesh, even though the respondent had filed lengthy and prolix *affidavit, they had not attempted to counter the correctness of the specific pleadings in paragraph 13 of the writ petition.*

54.From the impugned order of the PRC, it appears that the PRC has rejected the prayer of the petitioner for procedural relaxation and concession without proper application of mind to the contentions of the petitioner.

55.In a large number of cases, specific examples of which have been given in the writ petition and/or annexures thereto, PRC has considered exports under free shipping bills. Further the contention of the petitioner that exports were made under free shipping bills, only because the Advance License numbers were not accepted by reason of defects in the software, has been ignored. The PRC has not recorded any definite finding that the Advance License numbers could be accepted in the software.

56.The writ petition is allowed. The impugned decision is set aside. The PRC is directed to reconsider its order dated 13.10.2015 in the light of the observations made above. The PRC may call for documents to satisfy itself that the export relate to finished goods manufactured by incorporation of raw materials and inputs imported against Advance Licences. If it is found that the exports during five year period are relatable to the import licenses, clubbing of license for the purpose of redemption and/or relaxation shall be allowed.

84. The learned counsel for the petitioner has also produced a copy of the decision of the Hon'ble Supreme Court in **Ex-Capt.Harish Uppal** Vs. **Union of India**, 2012 (279) ELT 168 SC, which was referred by the Delhi High Court in **IFB Industries Limited**'s case referred to *supra* in paragraph 49 stating that the said decision is irrelevant in the context and not considered by the Delhi High Court. Nevertheless, it is submitted that in terms of the decision of the Delhi High Court also, the petitioner is entitled to the relief sought for in this writ petition.

85. The learned counsel for the petitioner has drawn attention to paragraph 9.13 of the Handbook of Procedure for the relevant Foreign Trade Policy 2004-2009, in terms of which it is submitted that the petitioner is also entitled to an extension of time subject to payment of 10% late cut fee.

86. Finally, the learned counsel for the petitioner submits that though the matter was referred back to the DGFT, the DGFT, obligated to perform the duties, referred the matter to Policy Review Committee, which is not warranted . It is submitted that even otherwise the impugned order has to go as it is contrary to the order passed by the Division Bench of this Court in W.A.(MD).No.575 of 2014, vide order dated 28.10.2015.

87. It is submitted that the Ministry of Commerce and Industry, Government of India has been notifying the Foreign Trade Policy (FTP) from time to time outlining the Indian Government's policy in accordance with the Foreign Trade (Development & Regulation) Act, 1992 for promoting Exports & Imports to boost the economy of the Country and that the Directorate General of Foreign Trade (DGFT) Organization attached to the said Ministry headed by the Director General of Foreign Trade is involved in regulating and promoting the Foreign Trade through regulations as a facilitator besides notifying Foreign Trade Policy (FTP) and the Handbook of Procedures (HBP) for implementing the said Policies.

88. It is submitted that Foreign Trade Policy (FTP) provides various schemes for the promotion of Exports which includes 'Duty Exemption & Remission Schemes' specified under Chapter 4 of Foreign Trade Policy (FTP). Duty Exemption scheme comprises Advance Authorization and Duty-Free Import Authorization which enable duty free import of inputs required for export production.

89. The learned counsel for respondents submits that the Regional Authority, with whom the undertakings were executed by the petitioner as Advance Authorization holder was required to maintain a proper record in a master register indicating the starting and closing dates of obligation period and other particulars to monitor export obligation.

90. However, in respect of shipments where six months period (one year in case of status certificate holder) for the realization of foreign exchange has not become due, the Regional Authority shall not take action for non-submission of bank certificate of exports and realization provided the other document substantiating fulfillment of Export Obligation have been furnished".

91. It is submitted that the petitioner cannot have any right to agitate after the expiry of 30 months, without making any request for enhancement in terms of para 4.21 of the relevant Handbook of Procedure 2004 -2009 and request for revalidation of import authorization in terms of para 4.23 of the Handbook of Procedure 2004-2009.

92. The petitioner having failed to utilize both the facilities in time cannot ask for revalidation after 2 years, after the expiry of original validity on 16.02.2011, citing the reason that certain technical issues cropped up in the newly implemented SAP software system in all their factories.

93. It is submitted that the request of the petitioner was rejected both by the Director General and the Policy Relaxation Committee as (1) time-barred; and (2)the reason mentioned in their request is an internal management issue and not a genuine hardship warranting for relaxation.

94. It is submitted that the decision of the 1st and the 2nd respondent was conveyed to the petitioner on 08.06.2011 and 17.06.2011.Since the Policy Relaxation Committee rejected the request of the petitioner, DGFT called for export document as per para 4.24.1 of the Hand Book of Procedure 2004-2009, on 08.06.2011 and 12.02.2012.

95. However, the petitioner failed to produce the called for documents and therefore a show cause notice dated 31.08.2021 was issued calling for personal hearing on 14.09.2012 to explain the reason for non-submission of documents.

96. None appeared for personal hearing, but submitted a letter on 14.09.2012 stating that the petitioner was once again approaching the Policy Relaxation Committee.

97. As far as **applicability of para 2.5 of the Handbook of Procedure 2004-2009 is concerned it is submitted that** the Policy Relaxation Committee deliberated the petitioner's case at length as to the applicability of this para of FTP and has rightly rejected the request of the petitioner.

98. It is submitted that a bare reading of the para 2.5 of the Foreign Trade Policy and the paragraph 2.58 of the subsequent Foreign Trade Policy make it clear that in public interest relief can be granted by the Director General of Foreign Trade by way of exemption, relaxation or relief after consulting PRC, on ground of genuine hardship and adverse impact on trade.

99. It is therefore submitted that the relaxation/ exemption form the Policy or the procedure is not a matter of right. For seeking relaxation, the

petitioner was required to establish genuine hardship and/or prove beyond reasonable doubt adverse impact on trade. In this case, the petitioner has failed to establish with concrete ground of genuine hardship or adverse impact on the trade.

100. It is submitted that the argument of the learned counsel for the petitioner that the petitioner faced genuine hardship due to introduction of SAP software in all their units across India during the year 2007-09 and that the imports/exports were made from the units against the above said authorizations were incorrectly accounted resulting in loss of control over accounting of goods under the said authorizations and ultimately excess exports and corresponding shortfall in imports occurred came to the notice of petitioner much later cannot countenanced for the following reasons:-

> (a) It is submitted that SAP stands for Systems Applications and Products in Data Processing. SAP by definition is also name of the ERP (Enterprise Resource Planning) software as well the name of the company. SAP system comprises of a number of fully integrated modules which covers virtually every aspect of the business management. Thus, by introduction of the SAP, the petitioner's accounting efficiency must have been improved. The software must have giving

accurate position of their inventories and pending obligation position against individual Licence. Hence the situation of excess export should not have arisen. The committee, therefore, was of the view that introduction of SAP cannot be attributed to genuine hardship in fulfilling excess export and not importing eligible quantity within the validity of the Authorisations. The petitioner itself stated that they had 23 Advance Licences in operation but could not import only in 5 Licence. This proves itself that SAP was not the reason but it was their failure in systematic and timely monitoring of Licences by the management. Further, the applicant has not submitted any documentary evidence that the SAP was introduced during the validity of these Authorisations and for any inconvenience in implementing of SAP software in the concerned unit, they had taken up the issue with software providing company. Therefore, these submissions are not accepted by the committee.

(b)Applicability of para 2.8 of the Handbook of Procedure 2004-2009**: It is submitted that** as per para 2.8 of the HBP every Authorisation is valid for prescribed period and shall contain such terms and conditions as may be specified by the Regional Authority which may include:

a.Quantity, description and value of the goods.

b.Actual User Condition.

c.Export Obligation.

d.Value Addition to be achieved and

e.Minimum export/import price”

(c) In view of these conditions and also the enhancement is connected with the validity period of Authorisation, the petitioner's request, is not a *bonafide* one was rejected after careful consideration of grounds of request as per law.

(d) Besides , Revenue aspect has been kept in mind in view of the burgeoning Current Account Deficit (CAD) and therefore allowing further imports that too, after two years , would cause irreparable damage to the overall balance of payment position of the Country.

101. It is further submitted that although no time limit has been prescribed for filing the request of revalidation, it can reasonably be understood that for a relief of six months validity, a request has to be filed within the validity of the Authorisation. Or, at least the Petitioner could have come within the same licensing period.

102. In this case , all their Authorisations had been issued during the licensing period of April-March 2007.They could have filed the request during this period. This was not done. Where as , they had submitted the request belatedly after expiry of three licensing periods i.e AM-2008,AM-2009,AM-2010.

103. Therefore , the policy parameters made applicable during AM-2007 cannot be applicable and extended to for the licensing period AM-2011.Hence , the request for revalidation could not be granted due to eclipse of time and as per the mandate of para 208 of FTP quoted above.

104. As far as applicability of para 4.26 of the Handbook of Procedure 2004-2009 is concerned, it is submitted that once the export obligation is completed by fulfilling the condition of the Authorisation, the petitioner was duty bound to submit the proof of export documents as prescribed under law for proper verification by the Joint Director of Foreign Trade, Madurai and redeeming their bond/LUT(Legal Undertaking) executed by the Petitioner.

105. Applicability of para 4.26 of the Hand Book of Procedure 2004-2009:

> i. As far as the present Writ Petition is concerned the respondents states that once the export obligation is completed by fulfilling the condition of the Authorisation , the petitioner is duty bound to submit the proof of export documents as prescribed under law for proper verification by the Joint Director of Foreign Trade, Madurai and

> redeeming their bond/LUT (Legal Undertaking) executed by the Petitioner. Had they submitted the documents along with the request for revalidation, such request would be considered at that time itself as per para 4.26 of the Hand Book of Procedure 2004-2009. This was not done. Instead, the petitioner in utter disregard to the mandate of the FTP AND HBP , had not at all filed the export obligation documents till date. It amounts to willful default on the part of Petitioner. It has not discharged it's responsibility lawfully as expected by any Authorisation Holder by the Rule .For the default in submitting the documents of export for discharge of export obligation undertaken by them, the Petitioner is liable for all penal action contemplated under FTP, more specifically under the Foreign Trade (Development & Regulation)Act, 1992 as amended. The petitioner takes shelter in litigation proceedings by misusing the due process of law. Therefore, in the absence of export documents to be submitted to the office of the Joint Director of Foreign Trade, Madurai within the prescribed time, the Petitioner does not deserve any sympathy whatsoever even though they claim to have fulfilled the export obligation undertaken by them.

106. Applicability of Paras 2.12,4.21,4.23 and 9.3 of the Handbook of Procedure 2004-2009:

> ii. Enhancement in value and quantity of Authorisation is allowed only in situation where an exporter received export order for higher quantity than stipulated in the Advance Authorisation during its validity. Exporter for some reason may not have time to obtain a new authorization .In that

case, he can approach the Regional Authority to allow enhancement in quantity and value of the valid Authorisation .Second situation could be that while making shipments, if a buyer suddenly enhanced the requirement and placed additional order. In that case , exporter may make excess shipment of required quantity without approaching the Regional Authority for enhancement. To deal such situations, para 4.21 of HBP provides enhancement in quantity and value of the Authorisation. However, the Authorisation Holder must apply to the Regional Authority concerned within the validity of such Authorisation. Enhancement in quantity and value of Authorisation will not serve any purpose, if it is not obtained within the validity of the Authorisation. In this case, the applicant did not approach the Regional Authority concerned for doing so. There fore he has no merit for seeking enhancement after expiry of the said 5 Authorisations.

iii. The submission of the petitioner in it's notes of submission B (ii) & (iii) in page 9 is incorrect and contrary to paras 4.21 & 4.23 of the HBP which specifies that the Regional Authority may consider a request of Authorisation Holder and grant one revalidation for 6 months from expiry date.

iv. More over the provisions of late cut provided in para 9.3 of HBP, 2004-2009 are applicable only in case where time limit for submission of any application is prescribed. Time limit is provided for post shipment scheme, export incentives scheme and drawback scheme under FTP.Advance Authorisation scheme is need based .Exporter can obtain Advance Authorisation as and when he got order from buyer. He can obtain Advance Authorisation in anticipation also. Therefore , no time is prescribed for obtaining Advance Authorisation in FTP.So far revalidation request is concerned , further six months revalidation is allowed

> in continuation of the validity of the Authorisation. Therefore , Authorisation holder has to seek further revalidation , on merit , within extendable validity of six months only. Hence, the late cut provision is not applicable in such cases.

106. If the petitioner had submitted the documents along with the request for revalidation, such request would have been considered at that time itself as per para 4.26 of the Handbook of Procedure 2004-2009.This was not done.

107. Instead, the petitioner in utter disregard of the mandate of the FTP AND HBP, has not filed the documents till date to substantiate export obligations. It amounts to willful default on the part of the Petitioner.

108. It has not discharged it's responsibility lawfully as expected by any Authorisation Holder by the Rule. For the default in submitting the documents of export for discharge of export obligation undertaken by them, the petitioner is liable for all penal action contemplated under FTP, more specifically under the Foreign Trade (Development & Regulation)Act,1992 as amended. The petitioner takes shelter in litigation proceedings by

misusing the due process of law. Therefore, in the absence of export documents to be submitted to the office of the Joint Director of Foreign Trade, Madurai within the prescribed time, the petitioner does not deserve any sympathy whatsoever even though they claim to have fulfilled the export obligation undertaken by them.

109. It is submitted that enhancement in value and quantity of Authorisation is allowed only in situations where an exporter receives export order for higher quantity than stipulated in the Advance Authorisation during its validity. Exporter for some reason may not have time to obtain a new authorization .In that case, such an exporter can approach the Regional Authority to allow enhancement in quantity and value of the valid Authorisation.

110. Second situation could be where while making shipments, the buyer enhances the requirement and places additional orders. In that case, exporters may make excess shipments of required quantity without approaching the Regional Authority for enhancement. To deal with such situations, para 4.21 of HBP provides enhancement in quantity and value of

the Authorisation However , the Authorisation Holder must apply to the Regional Authority concerned within the validity of such Authorisation. Enhancement in quantity and value of Authorisation will not serve any purpose, if it is not obtained within the validity of the Authorisation. In this case, the applicant did not approach the Regional Authority concerned for doing so. It is therefore submitted that there is no merit for seeking enhancement after expiry of the Authorisations.

111. The submission of the petitioner in their notes of submission B(ii)&(iii) in page 9 is incorrect and contrary to paras 4.21 & 4.23 of the HBP which specifies that the Regional Authority may consider a request of Authorisation Holder and grant one revalidation for 6 months from expiry date.

112. It is further submitted that the provisions of late cut provided in para 9.3 of HBP, 2004-2009 are applicable only in cases where time limit for submission of any application is prescribed. Time limit is provided for post shipment scheme, export incentives scheme and drawback scheme under the policy. Authorisation scheme is need based. Exporters can obtain Advance

Authorisation for confirmed export orders from the buyer or in anticipation of future exports. Therefore, no time is prescribed for obtaining Advance Authorisation in Foreign Trade Policy.

113. As far as request for revalidation of Advance Authorisation is concerned, a period of six months is allowed in continuation of the validity of the Authorisation. Therefore, the Authorisation holder has to seek further revalidation within such time. Hence, the late cut provision is not applicable in such cases. Therefore, it is prayed for dismissal of the writ petition.

114. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Additional Solicitor General of India, for the respondents.

115. The Foreign Trade Policy issued under Section 5 of The Foreign Trade (Development and Regulation Act), 1992 is to be read with Relevant Handbook of Procedure issued in pursuance of paragraph 2.4 of the Foreign Trade Policy. The Foreign Trade Policy and the relevant Hand Book of Procedure are issued once in five years.

116. Under para 4.1.3 of the Foreign Trade Policy 2004-09, holder of a holder of an Advance Authorisation is allowed to import inputs duty-free, which were to be physically incorporated in the export product (making normal allowance for wastage).

117. Imports under Advance Authorisations were exempted from payment of basic customs duty, additional customs duty, education cess, anti-dumping duty and safeguard duty, if any. To this effect, notifications were issued under Section 25 of the Customs Act, 1962 and amended from time to time.

118. As per para 4.1.10 of the Foreign Trade Policy 2004-09 Foreign Trade Policy (FTP) Advance Authorisation could also be issued for annual requirement. Status Certificate Holders and other categories of exporters having passed export performance for a period of two years preceding were also entitled for Advance Authorisation for annual requirement.

119. What the petitioner seeks is a admixture of all which is impermissible.

120. As per paragraph 2.3 of the Foreign Trade Policy, the decision of the first respondent DGFTis final. It reads as under:-

> "**2.3:Interpretation of Policy:-**
>
> If any question or doubt arises in respect of interpretation of any provision contained in FTP, or classification of any item in ITC (HS) or HBP- v1 or HBP-v2, or Schedule of DEPB Rates (including content, scope or issue of an authorization there under) said question or doubt shall be referred to DGFT whose decision thereon shall be final and binding."

121. Thus, the issue ought to have attained finality long back but for previous writ petitioner that came to be filed by the petitioner.

VALIDITY PERIOD OF AN ADVANCE AUTHORISATION.

122. As per Paragraph 4.1.7 of the Foreign Trade Policy, the validity of Advance Authorisation for import shall be as prescribed in Handbook of Procedure.

123. Paragraph 2.12 of the Handbook of Procedure to Foreign Trade Policy 2004-09 prescribes the validity period of Advance Authorisation. It was **24 months**. In the succeeding Foreign Trade Policy 2009-14 and the relevant Handbook of Procedure, the period of validity was reduced to **18 months.**

124. As per Paragraph 2.12.2 of the Handbook of Procedure, the period of validity means the period for shipment/ dispatch of goods covered under the licence/certificate/ Authorisation/ permission.

125. The validity of an import licence/ certificate/ Authorisation/ permission is decided with reference to the date of shipment/ dispatch of the goods from the supplying country as given in Paragraph 9.11 A of the Handbook and not the date of arrival of the goods at an Indian port.

126. Similarly, as per Paragraph 2.12.4 of the Handbook of Procedure where the date of expiry of either original or extended export obligation period falls before the last day of the month, such export obligation period shall be deemed to be valid until the last day of the month.

The original validity of export licence for restricted items shall be **12 months** from the date of issuance unless otherwise specified.

127. The subject Advance Authorisation came with a validity period 24 months from the date of their issue. Unless, they were revalidated before their expiry for a period of 6 months, the rights cannot be claimed except in accordance with the provisions of the Foreign Trade Policy and the relevant Handbook of Procedure.

REVALIDATION OF IMPORT /EXPORT LICENCE/ CERTIFICATE / AUTHORISATION / PERMISSION.

128. As per paragraph 2.13 of the Handbook of Procedure, a Licence/ Certificate/Authorisation/Permission may be revalidated on merits by the Regional Authority concerned, which issued Licence/Certificate/Authorisation/ Permission, for a period of 6 months reckoned from the date of expiry of the validity period.

129. Question of revalidation of an Advance Authorisation would arise only if such application is filed within 6 months from the date of expiry of the Advance Authorisation as is evident from a reading of Para 4.23 of the HOP. Paragraph 4.23 Handbook of Procedure before and with effect from 27.8.2009 are reproduced below for the comparison:-

Paragraph 4.23 Handbook of Procedure before 27.8.2009 under the Foreign Trade Policy 2004-09.	Paragraph 4.23 Handbook of Procedure with effect 27.8.2009 Foreign Trade Policy 2009-14.
Revalidation of Authorisation The Regional Authority may consider a request of the original authorization holder and grant one revalidation for a period of 6 months from the date of expiry of the original authorization. The request(s) for revalidation of authorization shall be made in the form given in '**Aayaat Niryaat Form**	**Revalidation of Authorisation** (a)RA may consider a request of original Authorisation holder and grant one revalidation for 6 months from expiry date. Request(s) for revalidation of Authorisation shall be made in **ANF 4E**. (b) In case of revalidation of advance authorization issued prior to 27.08.2009, it should be ensured that VA is maintained at 15% (and as per details mentioned in Paragraph 4.16 of FTP) mentioned in Paragraph 4.16 of FTP or as stipulated in the Advance Authorization, whichever is higher. However, for Advance Authorizations for products with VA as per Appendix 11B, the VA shall be as per the VA stated in Appendix 11B or as stated in Advance Authorisation, whichever is higher.

130. Request for an revalidation of an Advance Authorisation can be made once for 6 months from the expiry of date of its validity in terms of Paragraph 4.23 of the Handbook of Procedure and/or for enhancement/reduction in the entitlement in terms of Paragraph 4.21 of the Handbook of Procedure can be made only either before or after export.

131. Under Paragraph 4.23 of the Handbook of Procedure to Foreign Trade Policy 2004-09, the Regional Authority can consider a request of an original Authorisation holder and grant one revalidation for 6 months from the expiry date.

132. Request (s) for revalidation of Authorisation was to be made in Form ANF 4E.

133. Thus, the petitioner could expect re-validation of the Advance Authorisation only for a period of 6 months from the date of expiry of validity period. The period of six month would have expired on **27.09.2009** and on **23.10.2009**.

134. The request for revalidation was made on **16.02.2011** by the petitioner long after the period of validity of the respective Advance Authorisations expired on **27.03.2009** and on **23.04.2009**.

135. In this case, requests were made on 16.02.2011 and on 28.12.2011. Since the application was filed only on 16.02.2011 for the first time i.e. long after the date prescribed and beyond the period of 6 month and since the petitioner did not apply either for revalidation or extension of period of E.O immediately, within the prescribed period, the case of the petitioner cannot be considered under paragraph 2.5 or paragraph No.2.52 of Foreign Trade Policy beyond the period under 9.3 of the Foreign Trade Policy. Therefore, there is no error in the impugned decision of the second respondent.

136. Paragraph 9.3 of the relevant Foreign Trade Policy cannot be pressed for condoning the delay. Failure to file such application also cannot be condoned and overlooked by pressing Paragraphs 2.5 and 2.58 of the respective Foreign Trade Policy. Such applications even if filed belatedly can be entertained only within the time line stipulated in Paragraph 9.3 of the

Policy as it stood between 2009-2014/2009-14.

137. As per the provisions for the Handbook of Procedures of Foreign Trade Policy 1992-97, the application for revalidation was required to be made within a month of the expiry of the license (for initial period) or before the expiry of license (later period). Subsequently, these time limits prescribed for filing application for Enhancement/Reduction in the value of Advance Authorization as well as for Revalidation of Advance Authorizations have been removed under Paras 4.21 and 4.23 respectively under the Handbook of Procedures issued under the respective respondent of Foreign Trade Policy.

138. Therefore, it is not permissible. Thus, the application filed on 16.02.2011 was hopelessly time barred.Public Notice No.2/(PN) 1997-2002, dated 31.03.2001 referred to by the petitioner is also not relevant. It was issued in the context of Advance licence issued under EXPORT IMPORT POLICY 1997-2002. It has no relevance to the facts of the case. It reads as under:

"In exercise of powers conferred under Paragraph

4.11 of the Export and Import Policy, 1997-2002 as notified in the Gazette of India extraordinary, Part-II Section-3-Sub Section (ii) vide S.O.No.283 (E) dated 31.03.1997, the Director General of Foreign Trade hereby notify the following dispensation:-

2. Advance Licenses issued during 1992-97 Policy, shall be entitled for revalidation for a further period of 6 months, even if a time period of 30 months has already expired, subject to the following conditions:

i. This facility will be available where exports have already been completed but the licenses could not be utilized on account of expiry of these licenses.

ii.Application for revalidation may be submitted to the concerned Regional Licensing Authority within a period of 30 days from the date of the issuance of this Public Notice. License shall be revalidated for a period of 6 months from the date of endorsement of revalidation.

iii.No revalidation shall be effected where endorsement of transferability has already been endorsed. Similarly, no revalidation will be allowed in licenses where misrepresentation/ fraud has come to the notice of any authority.

3.This is issued in Public Interest".

139. Though the first respondent DGFT in his order dated

24/29.10.2013 admitted in para 5(a) that “Neither the Policy nor the Handbook has any provision for a last date for submission of application for revalidation or enhancement in value or for both, it cannot said the Policy did not specifically provide either any last date for submission of application to be received under advance authorization or similarly any last date for submission of any application for revalidation of such advance authorization.

ENHANCEMENT/REDUCTION IN THE VALUE OF AUTHORISATION:

140. Enhancement/Reduction in the Value of Authorisation is contemplated in Paragraph 4.21 of the relevant Handbook of Procedure. Request can be made either before or after the export. Paragraph 4.21 Handbook of Procedure before and with effect 27.8.2009 issued under the respective Foreign Trade Policy are reproduced below for the comparison:-

Paragraph 4.21.2 Handbook of Procedure before 27.8.2009under the Foreign Trade Policy 2004-09**.**	Paragraph 4.21.1 Handbook of Procedure with effect 27.8.2009 under the Foreign Trade Policy 2009-14.
Request for prorata Enhancement in Value and Quantity **may be made either before or after exports**. In such cases where there is a change in SION prior to export of said product, pro rata enhancement shall be given after calculating entitlement on revised SION.	
Paragraph 4.21.3 Handbook of Procedure before 27.8.2009 under the Foreign Trade Policy 2004-09.	Paragraph 4.21.2 Handbook of Procedure with effect 27.8.2009 under the Foreign Trade Policy 2009-14.
The application for the enhancement / reduction in the value of authorization shall be made in 'Aayaat Niryaat Form" of the Handbook of Procedure (Vol 1).	The application for the enhancement / reduction in the value of authorization shall be made in ANF 4E.

141. Though Paragraph 4.21 of the relevant Handbook of Procedure issued under the respective Foreign Trade Policy does not provide for any time limit for filing such application, it has to be construed that such application can be entertained only if the advance authorisation was alive. Further, under paragraph 4.23 RA may consider a request of original Authorization holder and grant one revalidation for 6 months from expiry date.

142. As per para 4.21 of Handbook of Procedure, the concerned Regional Authority could consider the request for enhancement or reduction in the value of the a 3. As per para 4.21.1 of the Handbook of Procedure to Foreign Trade Policy 2004-09, request for pro rata enhancement in the value and quantity may be made either before or after exports. It further stipulates that in such cases where there is a change in standard input output norm SION prior to export of the product, pro rata enhancement shall be given after calculating entitlement on revised SION.

APPLICATION AFTER EXPIRY OF LAST DATE:

143. Under Paragraph 9.3 of the Handbook of Procedure, wherever any applications are received after the expiry of the last date of submission of such application, but within 6 months from the last date, such application may be considered after imposing a cut fee at 10% of the entitlement. This was the position till 27.8.2009. After the new Foreign Trade Policy and the relevant Handbook of Procedure for the period 2009-14 were issued there was a further liberalization and restriction.

144. Paragraph 9.3 of Hand Book of Procedures for 2004-09/2009-14

and 2015-20 read as follows:-

<table>
<tr><td colspan="4">Paragraph 9.3 of Hand Book of Procedures is similar to Paragraph 9.02 of the Hand Book of Procedure 2015-20</td></tr>
<tr><td colspan="4">Applications received after expiry of prescribed date of Receipt:</td></tr>
<tr><td>2004-09</td><td colspan="2">2009-2014</td><td>2015-2020</td></tr>
<tr><td>Wherever any application is received after expiry of last date for submission of such application, but within 6 months from the last date, such application may be considered after imposing a cut fee @ 10% on the entitlement.</td><td colspan="2">Wherever any application is received after expiry of last date for submission of such application, the application may be considered after imposing a late cut in the following manner:-</td><td>Whenever any application for any fiscal/financial benefits under FTP complete in all respects is received after expiry o last date for submission of such application, the application may be considered after imposing a late cut in the following manner:-</td></tr>
<tr><td></td><td>1</td><td>Application received after the expiry of last date but within 6 months from the last date.</td><td>2%</td></tr>
<tr><td></td><td>2</td><td>Application received after 6 months from the Prescribed date of submission but not later than One year from the prescribed date</td><td>5%</td></tr>
<tr><td></td><td>3</td><td>Application received after 12 months from the Prescribed date of submission but not later than 2 years from the prescribed date.</td><td>10%</td></tr>
</table>

145. Paragraph 9.13 of the HOP which states DGFT may, on his own or otherwise, call for records of any case pending with or decided by an officer subordinate to him or an officer of any EPC/FIEO including a Group/ Committee of officers nominated, appointed or authorised by him and pass such orders as he may deem fit is also not relevant. Claim for Exemption from the Policy / Procedure under 2.5 of 2009-14 Policy and later 2.58 of 2015-2020 is without merits.

146. The application was filed on 16.02.2011 for the first time after the extension of two years. Thus, the application was beyond the limitation. Paragraph 9.3 of the Foreign Trade Policy therefore cannot come to the rescue of the petitioner.

PERIOD FOR DISCHARGING THE EXPORT OBLIGATION:

147. Period of export obligation (EO) under an Advance Authorisation commences from the date of issue of Authorisation, unless otherwise specified. Export obligation issued under FTP 2004-09, 2009-14 and 2015-20

were to be fulfilled within 18, 24 and 36 months respectively.

148. As per Paragraph 4.22 of the Handbook of Procedure with effect from 27.8.2009 the normal period of discharge of export obligation to 18 months.

149. Paragraph 4.22 Handbook of Procedure as it stood before and with effect from 27.8.2009 are reproduced below for a comparison :-

Paragraph 4.22 Handbook of Procedure before 27.8.2009.	Paragraph 4.22 Handbook of Procedure with effect 27.8.2009.
Export Obligation Period (EO) and its Extension:	

Paragraph 4.22 Handbook of Procedure before 27.8.2009.	Paragraph 4.22 Handbook of Procedure with effect 27.8.2009.
The period of fulfillment of export obligation under an Advance Authorisation shall commence from the date of issuance of authorisation. The export obligation shall be fulfilled within a period of 24 months except in the case of supplies to the projects/turnkey projects in India/abroad under deemed exports category where the export obligation must be fulfilled during the contracted duration of execution of the project/ turnkey project. In case of Spices (covered by chapter 9 of the ITC (HS) Classifications of Export & Import Items, 2004-09), the export obligation shall be fulfilled within a period of 90 days from the date of receipt of the first import consignment i.e. the date on which the first import consignment is cleared by the customs authorities against the authorisation.	(a) Fulfillment Period of EO under an Advance Authorisation shall commence from Authorisation issue date, unless otherwise specified. EO shall be fulfilled within 18 months except in case of supplies to projects/turnkey projects in India/abroad under deemed exports category where EO must be fulfilled during contracted duration. (b) RA may consider a request of Advance Authorisation holder for one extension of EO upto 6 months from the EO expiry date subject to payment of composition fee of 0.5% of the shortfall in E.O. (c)EO period for Advance Authorizations issued with input (s) as mentioned in Appendix 30A shall be as per the period stipulated against each entry therein. Facility of extension of EOP shall not be

150. However, under para 4.22.1 of the Handbook of Procedure 2009-14, a similar period of 6 month has been provided from the EO expiry date subject to payment of composition fee of 2% of the duty saved on unutilized imported items as per the authorisation.

151. A further 6 month has been provided subject to payment of composition of fee of 5% of the duty saved on the unutilized imported items as per the authorisation.

152. In the case of the first three Advance Authorisation, the normal period of 24 months for discharging the export obligation expired on **27.3.2009** during the currency of the Foreign Trade Policy 2004-2009. In the case of the last Advance Authorisation, the normal period of 24 months for discharging the export obligation expired **23.4.2009** during the currency of the Foreign Trade Policy 2009-2014.

153. The 1st grace period of 6 month extension for discharging the export obligation expired on **27.09.2009** for the first three advance

authorisation. The 1st grace period of 6 month extension for discharging the export obligation expired on **23.10.2009** for the last advance authorisation. As per sub paragraph -2 to paragraph 4.22.1 a further grace period of 6 months is prescribed. It reads as under:-

> Request for a further extension of six months may be considered by the Regional Authorities subject to payment of composition fee of 5% of the duty saved on all the unutilized imported items as per authorization.

Similar provision does not exist in the Handbook of Procedure 2009-14. The 2ndgrace period for discharging the export obligation expired on **27.02.2010** and **23.03.2010** respectively.

154. No applications were filed within the time prescribed for extending the period of export obligation. Since, such a request was made for the first time on 16.2.2011, it was correctly rejected on 02.06.2011. Further, it is also not clear about the quantity imported and quantity that was lying unutilized on these dates when the period expired. The case of the

petitioner does not fall within the above specified period. In any event no application was filed by the petitioner in time. Therefore, the petitioner has no case made on merits.

155. A second attempt was made on 28.11.2011 which was also rejected on 11.09.2012. The appeals were filed thus before the first respondent on 10.10.2012 which were rejected on 5.2.2013 . It led to the filing of W.P.(MD) No.2865 of 2013 and W.A.(MD)No.229 of 2013. The Court on 29.07.2013 remanded the case back for fresh consideration on 5.3.2013. Against the order dated 11.09.2011, the petitioner had filed appeal before the 1st respondent on 10.10.2012 which was rejected. Meanwhile, the petitioner was also issued with a Show Cause Notice on 12.09.2012.

156. Paragraph 4.28 of the Handbook of Procedure Foreign Trade Policy 2004-09 empowers the Regional Authority to regularize *bonafide*

default in the discharge of Export obligation. The petitioner has not invoked paragraph 4.28 of the Procedure Foreign Trade Policy 2004-09. It reads as under:-

Paragraph 4.28 of the Procedure Foreign Trade Policy 2004-09.	Paragraph 4.28 of the Procedure Foreign Trade Policy 2009-14.
Regularisation of Bonafide Default.	

Paragraph 4.28 of the Procedure Foreign Trade Policy 2004-09.	Paragraph 4.28 of the Procedure Foreign Trade Policy 2009-14.
The cases of *bonafide* default in fulfillment of export obligation may be regularized by the Licensing Authority in the manner indicated below: (i) If the export obligation is fulfilled in terms of value, but there is a shortfall in terms of quantity, the License holder shall, for the regularization, pay : - a) To the Customs Authority, customs duty on the unutilized value of the imported material along with interest at the rate of 15% p.a. thereon; and b) an amount equivalent to 3% of the CIF Value of unutilized imported material through a TR in the authorised Branch of Central Bank of India indicating the " Head Account ; 1453, Foreign Trade and Export Promotion and minor Head 102". However, the provisions of this sub paragraph shall not be applicable if the unutilized imported material was freely importable on the date of import. (ii) If the export obligation is fulfilled in terms of quantity but	**Cases of *bonafide* default in fulfillment of EO may be regularized by RA as under:-** i)If EO is fulfilled in terms of value, but there is a shortfall in terms of quantity, the Authorisation holder shall, for regularization, pay:- a) To customs authorities, customs duty on unutilized value of imported/indigenously procured material along with interest as notified; however, for the customs duty component, the authorization holder has the option to furnish valid duty credit scrips issued Chapter 3 of FTP and DEPB ; and b) an amount equivalent to 3% of the CIF value of unutilized imported material through a TR in authorized branch of Central Bank of India indicating the " Head Account: 1453, Foreign Trade and Export Promotion and Minor Head 102". Authorisation holder shall also be required to obtain a

157. Under Paragraph 2.5/2.8 of the Foreign Trade Policy DGFT may, in public interest exempt any person or class of persons from any of the provisions of FTP or any procedure and may, while granting such exemption, impose such conditions as he may deem fit. There is no public interest involved on account of delay and on account of the so called technical glitch in the petitioners SAP.

158. Request for revalidation of an Advance Authorisation can be made once for 6 months from the expiry of date of its validity in terms of Paragraph 4.23 of the Handbook of Procedure and/or for enhancement/reduction in the entitlement in terms of Paragraph 4.21 of the Hand Book of procedure can be made only either before or after export.

159. However, it should be made within the time prescribed under para 9.3 of the relevant Foreign Trade Policy. Such applications even if filed belatedly can be entertained only in terms of Para 9.3 of the Policy as it stood between 2009-2014.

160. The extended period for discharging the export obligation expired

during the currency of the 2009-14 Foreign Trade Policy. However, the case of the Petitioner was to be dealt in accordance with Paragraph 2.5 of the Foreign Trade Policy 2004-09 Policy.

161. Reprieve under these paragraph can be extended only if the application was filed in time. Paragraph 2.5 of the Foreign Trade Policy 2004-2009 and/ Paragraph 2.58 of the Foreign Trade Policy 2009-2014 are reproduced below:-

2004-2009 **2.5 of F.T.P**	**2009-2014** **2.5 of F.T.P.**	**2015-2020** **2.58 of F.T.P.**
Any request for relaxation of the provisions of this Policy or of any procedure, on the ground that there is genuine hardship to the applicant or that a strict application of the Policy or the procedure is likely to have an adverse impact on trade, may be made to the Director General of Foreign Trade for such relief as may be necessary. The Director General of Foreign Trade may pass such orders or grant such relaxation or relief, as he may deem fit and proper. The Director General of Foreign Trade may, in public interest, exempt any person or class or category of persons from any provision of this Policy or any procedure and may, while granting such exemption, impose such conditions as he may deem fit. Such request may be considered only after consulting Norms Committee (NC) if the	DGFT may pass such orders or grant such relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade. DGFT may, in public interest, exempt any person or class or category of persons from any provision of FTP or any procedure and may, while granting such exemption, impose such conditions as he may deem fit. Such request may be considered only after consulting committees as under:	Exemption from Policy/ Procedures DGFT may in public interest pass such orders or grant such exemption, relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade to any person or class or category of persons from any provision of FTP or any procedure. While granting such exemption, DGFT may impose such conditions as he may deem fit after consulting the Committees as under:

2004-2009 **2.5 of F.T.P**	**2009-2014** **2.5 of F.T.P.**		**2015-2020** **2.58 of F.T.P.**
	S.No.	Description	Committee
	(a)	Fixation/ modification of product norms under all schemes	Norms Committee
	(b)	Nexus with Capital Goods (CG) and benefits under EPCG Schemes	EPCG Committee
	(c)	All other issues	Policy Relaxation Committee (PRC)

162. A reading of the provisions of the above paragraph it makes clear that DGFT may in public interest grant exemption, relaxation or relief, as he may deem fit, after consulting PRC, on ground of genuine hardship and adverse impact on trade. Thus, the Policy relaxation is not a matter of right. For seeking relaxation, an applicant seeking relaxation/exemption has to establish genuine hardship or prove beyond reasonable doubt adverse impact on trade. In this case, the petitioner has failed to establish concrete ground of genuine hardship or adverse impact on trade.

163. The contention of genuine hardship that due to introduction of SAP software the petitioner faced technical problems in all their units across India during the year 2007-09, imports and exports made from the said units against the above said authorizations were incorrectly accounted resulting into loss of control over accounting of goods under the said authorizations and; ultimately excess exports as well as shortfall in imports occurred inadvertently without the said discrepancies coming the notice of Applicant indicates that the petitioner may not have suffered. Introduction of the SAP is intended for efficiency in accounting. It is intended to give accurate position of the inventories and pending obligation position against individual Licence. If excess export was made the petitioner would have availed other incentives associated with Exports. The committee's view that introduction of SAP cannot be attributed to genuine hardship in fulfilling excess export and not importing eligible quantity within the validity of the Authorisations cannot be fulfilled. The petitioner has itself stated that it had 23 Advance Authorisation in operation but could not import goods only under 5 Licence. This show that SAP was not the reason for the alleged failure in systematic and timely monitoring of Advance Authorisation by the management of the petitioner.

There are also no records to substantiate that the petitioner SAP was introduced during the period of validity of these Authorisations caused any inconvenience in implementing of SAP software in the concerned unit, they had escalated the issue with software company which had implemented SAP for the petitioner. Therefore, these submissions have been rightly rejected by the committee.

164. Under Paragraph 2.58 and 2.5 of the Foreign Trade Policy, the DGFT may pass such orders or grant such relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade.

165. The facts on record indicate that the petitioner did not have any difficulty in importing the goods under the respective Advance Authorisations during the period when there was economic recession.

166. On the other hand, it is the case of the petitioner that it has

surpassed the export obligation under taken during the period though the details of such exports are not forthcoming in the representations filed by the petitioner. The petitioner wants not only revalidation but also enhancement in the entitlement to import goods duty free under these Advance Authorisation which have expired long before. The global recession did not pose any difficulty or constrain the petitioner in any manner in discharging the export obligation under the respective Advance Authorisation.

167. As per paragraph 4.1.14 of Foreign Trade Policy 2004-09 (FTP) drawback under the Customs Act, 1962 and the rules made thereunder was available for any duty paid materials, whether imported or indigenous, used in the export goods as per the drawback rates fixed by the Department of Revenue, Ministry of Finance (Directorate of Drawback).

168. Coming to the issue under consideration, there is a subtle difference in the Foreign Trade Policy and the relevant Handbook of Procedure between:-

i. Exemption of Policy under Paragraph

graph 2.5 of the Foreign Trade Policy 2004-2009 and 2009-2014 and later under 2.58 of the Foreign Trade Policy /2015-20; and

ii. The period of validity of an Advance Authorisation and its Revalidation (Paragraph graph 4.23 of the relevant Handbook of Procedure); and

iii. The period for Discharging the Export Obligation and its extension; (Paragraph graph 4.22 of the Handbook of Procedure); and

iv. Enhancement/Reduction in the Value Of Authorisation; and(Paragraph graph 4.21 of the Handbook of Procedure); and

v. Filing of Application beyond the prescribed date(Paragraph graph 9.3 of the Handbook of Procedure)

169. Further, the request for revalidation and enhancement of entitlement were made long after the expiry of the period of validity of the Advance authorisation.

170. Paragraph 2.5 and 2.58 of the respective Foreign Trade Policy cannot be pressed into service for filing applications belatedly. Reprieve under paragraph 2.5 of the Foreign Trade Policy 2004-2009 and/or under Paragraph 2.58 of the Foreign Trade Policy 2009-2014 cannot be extended

for belated filing of application.

171. As per Paragraph 4.24.1 of the Handbook of Procedure to Foreign Trade Policy 2004-09, a Regional Authority is required to take action by refusing further Authorisations, enforce conditions of Authorisations and Undertakings and also initiate penal action as per law, where an Authorisation Holder fails to complete export obligation or fails to submit relevant information/documents.

172. The failure of the petitioner warrants action under Paragraph 4.24.1 of the Handbook of Procedure to Foreign Trade Policy 2004-09.

173. As mentioned above, the application filed were long after the respective Advance Authorisations expired. If the petitioner had filed application for revalidation of the Authorisation within 6 months in terms of Para 4.23 of Handbook of Procedure, the petitioner could have not only asked for extension of time for discharging the Export Obligation by one year extra i.e. 6 months + 6 months in terms of para 4.22 of the Handbook of Procedure but also for enhanced value of Authorisation as per Para 4.21 of Handbook of Procedure.

174. Even if there was a *bonafide* default, it could have been regularized only in terms of Para 4.28 of Handbook of Procedure. Questions of pressing 9.3 of Handbook of Procedure in favour of the petitioner would not arise if the petitioner did filed application within the period stipulated therein. The expressed prescribed date would be two months from the date of expiry of the Advance Authorization on 27.03.2009 for the first three Advanve Authorisation all dated 28.06.2007 & 23.04.2009 for the last Advance Authoisation dated 24.04.2007.

175. Para 2.5/2.58 of Foreign Trade Policy 2005-09 and 2009-14/2015-20 as the case may be, cannot be applied as the global melt down and technical glitch on account of SAP, implemented by the petitioner did not result in loss of Export Orders even according to the petitioner. The averment in the affidavit itself shows that despite global melt down, the existing export orders were not cancelled by the over sea buyers. On the other hand, the petitioner comfortably exported the goods. However, in the Shipping bill it failed to mention the details of Advance Authorisation .

176. It appears that the petitioner either did not fully utilize the four Advance Authorisations for importing the goods on account of glitch in its SAP and /or has utilized it for import but has not logged the export against in shipping bills. If the latter is true, the petitioner should produce the record for redemption of its liability under the Advance Authorisation.

177. In view of the above, the decision of the other High Courts cited and other decisions taken for other importer cited are not relevant. Further, as per Para 2.3 of the Foreign Trade Policy, the decision of the first respondent DGFT, is final.

178. Imports of supplies covered under paragraph 8.2(h) and (i) of the Foreign Trade Poliy 2004-09 were not exempted from payment of applicable anti-dumping and safeguard duty, if any. Imports under Advance Authorisation were permissible on actual user condition and such imports were not transferable.

179. Imports under Advance Authorisation was permissible on actual

user condition. Such imports were not transferable. The period of fulfillment of export obligation was as per the Handbook of Procedure issued along with the Foreign Trade Policy 2004-09.

180. Public Policy No.2 (PN) 1997-2002 dated 31.03.2001 for advance Licence issued under EXIM Policy No.31.03.2001 is not relevant in the context of Advance Authorisation issued under the Foreign Trade Policy 2004-2009 to the petitioner.

181. The only remedy available to the petitioner is to get duty draw-back in terms of Para (iv) of 4.28 of Handbook of Procedures 2004-2009 as per which the Regional Authority is empowered to regularize *bonafide* default in the discharge of export obligation. It reads as under:-

> 4.28 (iv). In case an exporter is unable to complete the export obligation undertaken in full and he has not made any import under the License holder will also have an option to get the License canceled and apply for drawback after obtaining permission from the Customs Authorities for conversion of shipping bills to Drawback Shipping Bills.

182. In view of the above discussion, this writ petition is disposed of with the following directions:-

(i) Fourth respondent Adjudicating Authority is directed to dispose the Show Cause Notice issued on 10.05.2013 within a period of twelve months from the date of receipt of a copy of this order.

(ii) To the extent, the petitioner has utilized the Advance Authorisations, it shall file necessary documents for discharging its Export Obligation undertaken.

iii) To the extent, the petitioner has not utilized the Advance Authorisations it shall file necessary application for duty draw back in terms of 4.28 (iv) of Para Handbook of Procedures to 2004-09.

iv) No costs. Consequently, connected miscellaneous petitions are closed.

19.09.2022

Index : Yes/No
Internet : Yes/No
Speaking : Non Speaking Order
kkd

To

1. The Director General of Foreign Trade,
   Ministry of Commerce,
   Udgyog Bhavan,
   New Delhi 110 011.

2.The Policy Relaxation Committee (PRC),
   O/o.Directorate General of Foreign Trade,
   Ministry of Commerce,
   Udyog Bhavan,
   New Delhi 110 011.

3. The Joint Director of General of Foreign Trade,
   Plot No.117, 1st Main Road,
   K.K.Nagar, Madurai 625 020.

4. The Assistant Commissioner of Customs,
   Office of the Assistant Commissioner of Customs,
   166/2B, Harbour Express Bye Pass Road,
   Tuticorin 628 008.

C.SARAVANAN,J.

Smn2/kkd

Pre-delivery Common Order in
W.P.(MD)No.15613 of 2016

19.09.2022