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

% **Date of decision: 28th September, 2015.**

\+ **W.P.(C) 1345/2015**

M/S. SESA STERLITE LIMITED ..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Manish Garg, Mr. Akshay Bhardwaj, Ms. Shreya Dahiya and Ms. Reena, Advs.

Versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Neeraj Jain and Mr. Kavindra Gill, Advs. for R-1 to 3/UOI.

AND

\+ **W.P.(C) 5317/2015**

KONARK EXIM PVT. LTD. ..... Petitioner

Through: Dr. G.K. Sarkar, Ms. Malabika Sarkar and Mr. Prashant Srivastava, Advs.

Versus

DIRECTORATE GENERAL OF FOREIGN TRADE ..... Respondent

Through: Mr. Sanjeev Narual, CGSC with Mr. Ajay Kalra, Ms. Meha Rashmi and Mr. Anshuman, Advs. for UOI.

AND

\+ **W.P.(C) 5288/2015**

K.S. COMMODITIES PVT. LTD AND ANR. ..... Petitioners

Through: Mr. Vinod Mehta, Adv.

Versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr. Manik Dogra, Ms. Nitya and Ms. Nidhi Parashar, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. These petitions are being listed together and have been taken up together for hearing today also.

2. The counsel for the respondents in W.P.(C) No.5288/2015 seek opportunity to file counter affidavit which has not been filed till date.

3. I am however not inclined to give any opportunity for filing the counter affidavit as sought inasmuch as the respondents are the same in all the petitions and counter affidavits have been filed in other two petitions. Moreover, enough opportunity has already been given for filing the counter affidavit and these matters have been listed today for hearing, from 24th September, 2015, on which date no such request was made.

4. The counsels for the respondents Directorate General of Foreign Trade (DGFT) in W.P.(C) Nos.5317/2015 & 5288/2015 state that the challenge in these petitions is to a Notification and thus the matter is to be considered by the Division Bench of this Court.

5. The senior counsel for the petitioner in W.P.(C) No.1345/2015 states that the challenge is not to any Notification to require consideration by the Division Bench of this Court. The counsels for the petitioners in W.P.(C) Nos.5317/2015 & 5288/2015 state that though the prayer paragraphs in their petitions may have been differently worded but the challenge made by them and pressed by them also before this Court is not to any Notification and even if reads so, be treated as the challenge as made in W.P.(C)

No.1345/2015.

6. In this view of the matter, the counsels have been heard. I may in this regard also notice that the Registry of this Court vide Notification dated 31st July, 2013 has also clarified that though writ petitions challenging constitutional validity of any Act, Rules or Regulations are to be listed before the Division Bench dealing with that subject but challenge to a policy, scheme or guideline is not to be treated as a challenge to the vires of the Act, Rules or Regulations.

7. The senior counsel for the petitioner in W.P.(C) No.1345/2015 has drawn attention to the Notification No.27(RE-2012)/2009-2014 dated 28th December, 2012 of the Ministry of Commerce & Industry, Govt. of India issued in exercise of powers under Section 5 of the Foreign Trade (Development and Regulation) (FTDR) Act, 1992 read with para 2.1 of Foreign Trade Policy (FTP), 2009-2014 making amendments to the FTP 2009-2014 with immediate effect. By the said amendment, a new paragraph was added at the end of para 3.14.3 of FTP 2009-2014 as para 3.14.4 and which para 3.14.4 is as under:

"3.14.4	***Incremental Exports Incentivisation Scheme***
Objective	*(a) The objective of the Scheme is to incentivize incremental exports.*

Entitlement *(b) An IEC holder would be entitled for a duty credit scrip @ 2% on the incremental growth (achieved by the IEC holder) during the period 01.01.2013 to 31.3.2013 compared to the period from 01.01.2012 to 31.3.2012 on the FOB value of exports. Incremental growth shall be in respect of each exporter (IEC holder) without any scope for combining the exports for Group Company.*

(c) Incentive will be admissible only if the IEC holder has achieved growth in the financial year 2012-2013 vis a vis financial year 2011-2012. Quantum of benefit will be calculated on the incremental growth achieved subject to eligibility criteria given in para 3.14.4(d) of FTP 2009-014.

Eligibility Criteria *(d) For the purpose of the scheme, export performance shall not be allowed to be transferred from any other IEC holder. Benefit under this scheme will not be allowed to an exporter who had made no export between 01/01/12 to 31/03/12. The following exports shall not be taken into account for calculation of export performance or for computation of entitlement under the Scheme:*

(i) *Export of imported goods or exports made through trans-shipment.*

(ii) *Export from SEZ / EOU / EHTP / STPI / BTP / FTWZ.*

(iii) *Deemed Exports*

(iv) *Service Exports*

(v) *Third Party exports*

(vi) *Diamond, Gold, Silver, Platinum,*

other precious metal in any form including plain and studded jewellery and other precious and semi-precious stones.

(vii) *Ores and concentrates of all types and in all formations.*

(viii) *Cereals of all types.*

(ix) *Sugar of all types and all forms.*

(x) *Crude / petr5oleum oil and crude / primary and base products of all types and all formulations.*

(xi) *Export of milk and milk products.*

(xii) *Export performance made by one exporter on behalf of other exporter.*

(xiii) *Supplies made to SEZ units.*

(xiv) *Items, export of which requires an export authorisation (except SCOMET), will not be considered.*

(xv) *Export of Meat and Meat Products.*

(xvi) *Exports of Singapore, UAE and Hong Kong.*

Special Provision *(e) The scheme is region specific and will cover exports to USA, Europe and Asian countries only. Disclaimer provisions of para 3.17.10 (b) of FTP shall not be admissible. This benefit will be over and above any benefit being claimed by the exporter under any of the Chapter 3 Schemes, therefore, provisions of para 3.17.8 of FTP 2009-14 will not be invoked for such benefit.*

Utilisation of Scrip *(f) The duty credit scrip will be freely transferable. Such scrips shall also be eligible for domestic sourcing as per para*

3.17.5 of FTP 2009-14."

The Notification dated 28th December, 2012 also adds the following at the end of para 3.17.8 of FTP 2009-2014:

> *"Benefit under para 3.14.4 of FTP will not be covered under this para"*

And under the heading Effect of this Notification provides as under:

> *"Effect of this Notification: The Scheme to incentivize incremental exports is being notified."*

8. It is the case of the petitioner in W.P.(C) No.1345/2015 that it, on 26th July, 2013, made a claim under the aforesaid amendment, of the value of Rs.10,95,83,585.60 paise and the necessary incentive scrips were issued to it on 19th March, 2014 but the same were lost by it necessitating it to apply to the respondents for issuance of duplicate scrip and which have been denied to the petitioner. The duplicate scrips have been denied to the petitioner because of a Notification No.44(RE-2013)/2009-2014 dated 25th September, 2013 of the Govt. of India, again in exercise of powers under Section 5 of the FTDR Act, further amending Chapter 3 of the FTP 2009-2014 by inserting the following paragraphs (i) & (ii) below paragraph 3.14.4.(c) inserted by the earlier Notification, as under:

> *"(i) Benefit of Incremental Export Incentivisation Scheme for the last quarter of 2012-13 will be limited to 25% growth*

or Incremental growth of Rs.10 crores in value, whichever is less.

(ii) Claims in excess of this value will be subjected to greater scrutiny by Regional Authority."

The effect of the Notification mentioned is as under:

"Effect of this Notification: Few amendments have been made in Notification No.27 dated 28.12.2012 for claiming benefit of Incremental Export Incentivisation Scheme."

And because of clarification dated 23rd September, 2014 issued by the respondent Directorate General of Foreign Trade (DGFT) clarifying that sub-paragraphs (i) & (ii) aforesaid added vide Notification dated 25th September, 2013 below paragraph 3.14.4(c)

"are independent paras in both the Notifications Nos. 44 and 43 dated 25.09.2013. The limiting of claim is clearly mentioned in the first sub-para of both notifications which fixes the upper limit of grant of benefit. The second sub-para in both the notifications only directs RAs to exercise caution while dealing with cases of incremental growth of exports under the scheme. It does not entitle any applicant to higher levels of benefits under the scheme."

and directing that entitlement under the scheme be computed as under:

*"**IEIS for the last quarter of 2012-13:** Benefit of Incremental Export Incentivisation Scheme for the last quarter of 2012-13 will be limited to 25% growth or Incremental growth of Rs.10 crores in value, whichever is less. RAs should recover excess claim over Rs.20 lakhs, if sanctioned by them.*

***IEIS for the whole year of 2013-14:** Benefit of Incremental*

Export Incentivisation Scheme for the year 2013-14 will be limited to a scrip of a value not exceeding Rs.1 Crore per IFC. RAs should recover excess claim over Rs.1 crore, if sanctioned by them."

9. It is the contention of the senior counsel for the petitioner in W.P.(C) No.1345/2015 that the subsequent Notification dated 25th September, 2013 cannot have any retrospective effect as is sought to be given by the respondents including by issuing the clarification aforesaid. It is contended that the petitioner made exports from 1st January, 2013 to 31st January, 2013 under the earlier Notification dated 28th December, 2012 and the incentive which has accrued to the petitioner under the said earlier Notification dated 28th December, 2012 cannot be taken away by the subsequent Notification dated 25th September, 2013 and clarification issued thereunder. Reliance in this regard is placed on the judgment dated 8th December, 2014 of a learned Single Judge of this Court in W.P.(C) No.6387/2012 titled ***Malik Tanning Industries Vs. Union of India***.

10. The only difference in facts in the other two petitions i.e. W.P.(C) Nos.5317/2015 & 5288/2015 is that the petitioners in those petitions were not issued any scrips as had been issued to the petitioner in W.P.(C) No.1345/2015 for the amount to which the petitioners claim to be entitled to but have been issued scrips for a lesser value in accordance with the

subsequent Notification dated 25th September, 2013.

11. The counsels for the respondents in W.P.(C) Nos.5317/2015 & 5288/2015 informs that an appeal has been preferred to the Division Bench against the judgment in ***Malik Tanning Industries*** supra and which was listed today and of which notice has been issued.

12. The counsels for the respondents contend that since the petitioners have been denied the incentive to which they claim to be entitled to, for the reason of the Notification dated 25th September, 2013, without making a challenge to the said Notification and which has not been made in W.P.(C) No.1345/2015 and though made in W.P.(C) Nos.5317/2015 & 5288/2015 is not being pressed, the petitioners are not entitled to the relief claimed. It is stated that the petitioners are merely challenging the Clarification issued and without challenging the Notification, the challenge to the Clarification issued is of no avail.

13. I am unable to agree. In my opinion, the petitioners have no need to challenge the subsequent Notification dated 25th September, 2013. The claim of the petitioners is that their entitlement under the earlier Notification dated 28th December, 2012 remains unaffected by the subsequent Notification dated 25th September, 2013 which cannot have any retrospective

operation. The counsel for the petitioner in W.P.(C) No.5288/2015 has in this regard also drawn attention to the judgment of the Division Bench of this Court in ***Agri Trade India Services Pvt. Ltd. Vs. Union of India*** 2006 (204) E.L.T. 161 (Delhi) laying down that in the absence of a specific power, the delegatee cannot retrospectively legislate. It is contended that thus the claims of the petitioners under the earlier Notification dated 28th December, 2012 remain unaffected by the subsequent Notification dated 25th September, 2013.

14. The counsel for the respondents in W.P.(C) No.5288/2015 has drawn attention to the judgment of the Division Bench of Gujarat High Court in ***Adani Exports Limited Vs. Union of India*** 2004 LawSuit(Gujarat) 445 to contend that it was held therein that if a scheme is being abused or misused, the Government can always exercise power to amend the same. It is contended that the incentive introduced vide the Notification dated 28th December, 2012 was also being abused / misused by incrementing the exports to own companies without any actual increase in exports, merely to claim the incentive. It is further contended that the increase in exports across the board was of 5% only, however to claim incentive increase in exports was claimed to be of more than 20% and which is clear evidence of

abuse.

15. The counsel for the respondent DGFT in W.P.(C) No.5317/2015 has also contended that if the petitioners are aggrieved from non-grant of the incentive claimed, the remedy of appeal under Section 9(5) read with Section 15 of the Act is available. However, on enquiry, whether not the Appellate Authority would not be bound by the Clarifications issued and thus what purpose the appeal would serve, the counsel has fairly not chosen to controvert.

16. The counsel for the respondents in W.P.(C) No.1345/2015 contends that the Central Government is empowered to amend the policy and the DGFT is empowered to apply and interpret the policy and if any doubt or question arises in respect of the interpretation of any provision of FTP or in the matter of classification of any item, the said doubt is to be referred to the DGFT whose decision shall be final and binding. Reliance in this regard is placed on ***Atul Commodities Private Limited Vs. Commissioner of Customs, Cochin 9*** (2009) 5 SCC 46.

17. I have considered the aforesaid contentions.

18. I may at the outset state that in view of the Notification dated 31st July, 2013 supra of the Registrar of this Court clarifying that challenge to a

policy is not to be treated as a challenge to the *vires* of the Act, Rules and Regulations required to be considered by the Division Bench as per the Roster of this Court, this Bench would be competent to go into the question also of the challenge if any required to be considered to the Notification dated 25th September, 2013 supra of the Government of India in exercise of powers under Section 5 of the FTDR Act. Section 5 of the FTDR Act empowers the Central government to from time to time formulate and announce by notification in the Official Gazette the foreign trade policy and to in like manner amend that Policy. In exercise of the said power, the Central Government has framed the FTP 2009-2014 and which Policy was amended vide Notifications dated 28th December, 2012 and 25th September, 2013 supra. The said Notifications being but a change brought about by the Central Government in the Policy, if the petitioners are to be found to be entitled to the relief claimed and being found disentitled thereto owing to the Notification dated 25th September, 2013 and if the said Notification dated 25th September, 2013 was to be found to be contrary to law and / or violative of Article 14 of the Constitution of India, this Bench would be competent to hold the amendment to the Policy brought about by the Notification dated 25th September, 2013, to be bad.

19. A Co-ordinate Bench of this Court in ***Malik Tanning Industries*** supra was concerned with a challenge to a policy circular of the DGFT having the effect of excluding the products exported by the petitioners therein from the definition of technical textiles, thereby rendering the petitioners therein ineligible for claiming the incentive available under the Focus Product Scheme. It was *inter alia* the contention of the petitioners therein that the impugned circular sought to take away the benefits that had already been availed and utilized by the petitioners and which were, pursuant to the impugned circular, sought to be recovered back from the petitioners. This Court held, (i) that though DGFT is entitled to clarify a doubt as to the classification but the entry in question was unambiguous and the purpose of the impugned circular was not clarificatory but to curtail the number of products which would be eligible for the export incentive; (ii) that the power granted to DGFT for clarifying any question and doubts with regard to the entries cannot be used to provide a definition where the entry itself is not ambiguous; (iii) that the impugned circular therefore brought about the substantive change as it restricted the scope of the Focus Product Scheme in respect to technical textiles as envisioned under the FTP; (iv) that as per Section 5 of the FTDR Act, a policy cannot be made with retrospective

effect; reliance in this regard was placed on ***Union of India Vs. Asian Food Industries*** (2006) 13 SCC 542; (v) that the power exercised by the Central Government is a power delegated by the Legislation and it is well settled that in the absence of an express provision enabling a delegate to make delegated Legislation with retrospective effect, no such power can be inferred; (vi) that Section 5 of the FTDR Act does not empower the Central Government to frame policy with retrospective effect; (vii) that thus the schemes framed under the FTP cannot be altered or amended with retrospective effect; reliance was also placed on ***Mahabir Vegetables Oils (P) Ltd. Vs. State of Haryana*** (2006) 3 SCC 620.

20. The Division Bench of this Court in ***Agri Trade India Services Pvt. Ltd.*** supra was concerned with the challenge to a Notification dated 4th July, 2006 of the Central Government purporting to amend the earlier Notification dated 27th June, 2006 and thereby prohibiting the export of certain goods which was permissible under the earlier Notification and adversely affecting the contractual and property rights and obligations which had already accrued. It was held that Section 5 of the FTDR Act does not empower the Central Government to give retrospective effect to a Notification issued under that provision.

21. Applying the aforesaid law, it follows that the Central Government, in exercise of powers under Section 5 of the FTDR Act, could not by Notification dated 25th September, 2013 take away the entitlement if any already accrued under the Notification dated 28th December, 2012. The same would amount to giving the Notification dated 25th September, 2013 a retrospective effect and which has been held to be impermissible.

22. In the present case, while the earlier Notification dated 28th December, 2012 entitled an IEC holder to duty credit scrip @ 2% on the incremental growth (achieved by the IEC holder) during the period 1st January, 2013 to 31st March, 2013 compared to the period from 1st January, 2012 to 31st March, 2012 on the FOB value of exports, without any maximum limit of the duty credit scrip to which an IEC holder may thereby become entitled to, the Notification dated 25th September, 2013 restricted / limited duty credit scrip to which an IEC holder may become so entitled to 25% growth or incremental growth of Rs.10 crores in value, whichever is less. Introduction of an outer limit to the benefit, to which a person may become entitled to, would definitely qualify as an amendment and not as a clarification. The earlier Notification dated 28th December, 2012 entitled an IEC holder to duty credit scrip @ 2% on the incremental growth and which 2% could be of any

value, without any limitation whatsoever. However, vide subsequent Notification dated 25th September, 2013, the said duty credit scrip to which an IEC holder could become entitled to under the earlier Notification dated 28th December, 2012 was limited to a maximum of 25% growth or Rs.10 crores whichever is less. Introduction of a maximum limit is by way of an amendment and can by no stretch of imagination be treated as a clarification. There was no ambiguity in the earlier Notification dated 28th December, 2012, as to the maximum amount to which an IEC holder may become entitled thereunder, to require any clarification. Moreover, the Notification dated 25th September, 2013 itself is titled as an 'amendment' and describes the effect thereof also as 'amendment' of the earlier Notification dated 28th December, 2012.

23. As far as amendment is concerned, the view of the Division Bench of this Court in ***Agri Trade India Services Pvt. Ltd.*** supra, binding on the undersigned, is that the same cannot be retrospective. The amendment brought by the subsequent Notification dated 25th September, 2013 limiting the benefit, earlier unlimited, to 25% growth or Rs.10 crores whichever is less, for the last quarter of 2012-2013 i.e. 1st January, 2013 to 31st March, 2013 and with which we are concerned, would definitely be retrospective. It

has thus but to be held that the said amendment of 25th September, 2013 cannot take away the benefit which has already accrued due as on 31st March, 2013.

24. Supreme Court, in ***Shiv Ganga Papers Pvt. Ltd. Vs. Union Territories of Daman & Deu*** MANU/SC/0392/2014, held that an explanation should only explain and clarify and if it accepts, excludes or restricts, it is not an explanation but a proviso and should be considered as operative only from the date of its coming into effect. It was further held that the Notification in that case, instead of removing the ambiguity in the earlier Notification, introduced fresh conditions bringing substantial changes in the Notification and was thus not explanatory or clarificatory.

25. There is another aspect of the matter. Though vide Notification dated 25th September, 2013 it was provided that the benefit given vide the Notification dated 28th December, 2012 would be limited to 25% growth or incremental growth of Rs.10 crores in value, whichever is less but owing to Clause (ii) of the Notification dated 25th September, 2013 providing that claims in excess of 25% growth or incremental growth of Rs.10 crores in value will be subject to greater scrutiny by Regional Authorities, the Regional Authorities of the respondents were of the view that the

Notification dated 25th September, 2013 did not prohibit / bar benefit in excess of 25% growth or incremental growth of Rs.10 crores in value and only required claims in excess thereof to be subjected to greater scrutiny. The same indeed is a plausible interpretation of the Notification dated 25th September, 2013. It is because of this only that the necessity for the DGFT to issue the clarification dated 23rd September, 2014 arose. What thus follows is that even according to the respondents the claims under the Notification dated 28th December, 2012 in excess of the limits prescribed by the Notification dated 25th September, 2013 have been barred, not by the Notification dated 25th September, 2013, but by the clarification dated 23rd September, 2014. Supreme Court in ***Atul Commodities Private Limited*** supra relied upon by the counsel for the respondents in W.P.(C) No.1345/2015 held (a) that there is a difference between amendment and clarification; (b) that under the scheme of the FTDR Act, one finds a clear demarcation between an amendatory provision and a clarificatory provision; (c) that the power to amend FTP is exclusively vested in the Central Government whereas the power to clarify is vested in DGFT; (d) that a change of categorisation can be done only by an amendment under Section 5 of the Act; (e) it is not open to the DGFT to vide a circular, change

categorisation of items; (f) that under the FTP, DGFT is empowered to interpret the policy. Thus, if it were to be said that the bar / prohibition against benefits accrued under Notification dated 28th December, 2012 in excess of the limits prescribed in Notification dated 25th September, 2013 is by the clarification dated 23rd September, 2014, then the same is clearly beyond the powers of the DGFT.

26. That brings me to the judgment of the Division Bench of the High Court in ***Adani Exports Limited*** supra relied upon by the counsel for the respondents in W.P.(C) No.5288/2015. A close reading of the same shows the same to be not laying down that an incentive introduced and accrued can be taken away retrospectively, if found to have accrued by abuse/misuse of the policy/scheme. I am afraid the counsel is misreading the judgment. The Division bench in Para 21 of the judgment has clearly observed that the amendments to the Scheme under consideration in that case were "not having retrospective effect" and were at the most "retroactive". It is further mentioned in the said paragraph of the judgment "hence none of the principles against retrospectivity will apply in the instant case." Rather, the contention of the petitioners therein was that amendments were taking away "vested rights". A vested right is different from an accrued right. It was in

the context of rights given under a Policy and which were subsequently withdrawn that it was held that where the overwhelming public interest so demands, the legislation / subordinate legislation may have to be allowed to take away 'future benefits promised in the past'. It is thus not as if the decision therein is contrary to the view of the Division bench of this Court in ***Agri Trade India Services Pvt. Ltd.*** supra.

27. The petitions thus but have to be allowed and are allowed.

28. The petitioners are held entitled to what they may have been entitled to under the Notification dated 28th December, 2012 and without any cap and / or maximum limit. The decision of the respondents denying such benefit to the petitioners are quashed / set aside and the respondents are directed to issue the duty credit scrip to the petitioners in terms of the Notification dated 28th December, 2012 on or before 31st January, 2016.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 28, 2015
bs/gsr..
(corrected & released on 28th November, 2015)