

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

+ **LPA No.755 of 2010**

% Reserved on: 8th December, 2012.
Pronounced on: 24th February, 2012

UNION OF INDIA & OTHERS . . . APPELLANTS

Through: Mr. Mohan Parasaran, ASG
with Mr. Satish Agarwala,
Advocate and Mr. Alok P.
Kumar, Advocate.

VERSUS

INDIAN EXPORTERS GRIEVANCE
FORUM & ANR . . .RESPONDENTS

Through: Mr. Tarun Gulati, Advocate
with Ms. Shruti Sabarwal,
Advocate.

CORAM :-

**HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

A.K. SIKRI, Acting Chief Justice

1. This intra-appeal filed by the Union of India impugns the judgment dated 05.8.2010 rendered by the learned Single Judge of this Court in Writ Petition (Civil) No.2497 of 2008 filed by the respondents herein. By means of the said decision, the writ petition of the respondents has been allowed to a limited extent holding that the duties and entitlement of the respondent society will be computed on the basis stated in the judgment and the corresponding duty credit will be given to them by the appellants within a period of 12 weeks from the date of judgment. The dispute arose on the nature of

entitlement, viz., the duty credit that may be used by the exporters earned by way of export incentive under the scheme called the Target Plus Scheme (TPS). Under the aforesaid TPS which was aimed at boosting the exports, it was decided to reward those exporters who achieved quantum growth in exports as per the target mentioned in the said scheme and were described as Star Export Houses. Certain percentage of incremental growth of FOB values of the exports were fixed as duty entitlement. The scheme further provided that these duty credits could be used for import of "any inputs, used capital goods including spares, office equipment, professional equipment and office furniture provided the same is freely importable under ITC (HS) Classification of Export and Import items, for their own use and that of supporting manufacturers....." It is the nature of these imports for which duty credit may be used has become the subject matter of contention. The learned Single Judge in the impugned judgment has given the detailed background of the scheme and the amendments made from time to time. It may not be necessary to restate all those in details. However, the relevant facts which touch upon the controversy that arises in the matter is the TPS was first introduced in the Foreign Trade Policy, 2004 announced in 01.9.2004. As per the said scheme:

- (i) All Star Export houses which have achieved a minimum export turnover in free foreign exchange of ₹10 Crores in the previous licensing year are eligible for a duty credit based on incremental exports (Paras 3.7.1 – 3.7.3 of the FTP, 2004).

- (ii) The duty credit may be used for import of any inputs, capital goods including spares, office equipment, professional equipment and office furniture provided the same is freely importable under the ITC (HS) classification of export and import items, for their own use or that of supporting manufacturers as declared in 'Aayat Niryat Form'.

2. Import entitlement regarding growth products was also stipulated as follows:

- (A) 3.7.6 Imports allowed:

The duty credit may be used for import of any inputs, capital goods including spares, office equipment, professional equipment and office furniture provided the same is freely importable under ITC (HS) Classification of Export and Import items, for their own use and that of supporting manufacturers as declared in '*Aayat Niryaat Form*'.

- (B) As Import of agricultural Products listed in Chapter 1 to 24 of ITC (HS) Classification of Export and Import items expect the following shall be allowed:

- (i) Garlic, Peas and all other Vegetables with a Duty of more than 30% under Chapter 7 of ITC (HS) Classification of Export and Import items.

- (ii) Coconut, Areca Nut, Oranges, Lemon, Fresh Grapes, Apple and Pears and all other fruits

with a Duty of more than 30% under Chapter 8 of ITC (HS) Classification of Export and Import items.

- (iii) All spices with a Duty of more than 30% under Chapter of ITC (HS) Classification of Export and Import items (except Cloves).
- (iv) Tea, Coffee and Pepper as per Chapter 9 of ITC (HS) Classification of Export and Import items.
- (v) All Oil Seeds under Chapter 12 of ITC (HS) Classification of Export and Import items.

Further, Natural Rubber as per Chapter 40 of ITC (HS) Classification of Export and Import items shall also not be allowed for import under the Scheme. Import of all edible oils classified under Chapter 13, shall be allowed under the scheme only through STC and MMTC.” 4. The above provisions were valid from 1st April 2004 to 31st March 2005. For the next licence year from 1st April 2005 to 31st March 2006, they were continued with certain minimal changes.

- (C) Appendix 17D, i.e., the prescribed form was issued by the Directorate General of Foreign Trade (for brevity 'DGFT') vide Public Notice No.07.4.2005. Applications were to be made in this prescribed form for availing of duty free export credit (DFEC)

under the TPS for the two licensing years, i.e., from 2004 to 2006. Serial No.10 of Appendix 17D against the column "category of exports", it was mentioned:

"Goods allowed to be imported under the scheme shall have a 'broad nexus' with the 'Export Product Group' and declaration in this behalf shall be made in Appendix 17D."

3. From the aforesaid, it becomes clear that the duty credit under the TPS was available for inputs that had a 'broad nexus' with the goods exported. To this extent, there is no quarrel.
4. Thereafter, by a Public Notice NO.16 dated 04.6.2005, the earlier Appendix 17D was replaced by a new one. Para 10 of Appendix 17D as amended contained a provision in relation to the "broad nexus" and read as under:

"Goods allowed to be imported under this scheme shall have a broad nexus with the products exported. For the purpose of import entitlements under this scheme, 'broad nexus' would mean goods imported with reference to any product groups of the exported goods within the overall value of the entitlement certificate."
5. On 08.4.2005, Para 3.2.5 of the HBP was amended with retrospective effect and state as follows:

"For the purpose of import entitlements under this scheme, 'broad nexus' would mean goods imported with reference to any of the product groups of the exported groups within the overall value of the entitlement certificate."

6. On 01.8.2006, a Circular was issued by the DGFT clarifying that so long as the imported goods belonged to the same "product group" as the exported goods, the exporter could use the duty credit under the TPS for such imported goods as well. According to the appellant, the above was issued in the context of a decision to permit a rice exporter to import almonds using the duty credit under the TPS. The above Circular of the DGFT was challenged by M/s. Indo-Afghan Chamber of Commerce in this High Court in W.P.(C) No.12603 of 2006 and the said Circular was defended by the DGFT in an affidavit filed in the above matter. However, the Department of Revenue objected to the above interpretation of the DGFT on the ground that the said interpretation almost rendered the concept of 'broad nexus' nugatory and redundant, leading to a serious loss of revenue for the Government. The matter was referred to the Committee of Secretaries. In its meeting on 13.2.2007, the Committee of Secretaries decided that the interpretation placed by the DGFT was incorrect and beyond the scope of the overall objective of the TPS itself. It was decided that the clarification dated 01.8.2006 be withdrawn and the affidavit filed, suitably amended. Following this, the Ministry of Law examined the matter and recommended that another clarification be issued and the amendment to Para 3.2.5 be deleted. Department of Revenue issued Circular No.21/09-Cus dated 08.5.2007 clarifying the scope and coverage of the goods that can be imported under the TPS.

7. Paras 3, 4 and 5 of the said circular state as under:

"3. The matter has been examined in consultation with the Ministry of Law (MOL). After examination of the provisions of Para 3.7.6 of the FTP and Para 3.2.5 (II) of

the HBP, the MOL has opined that the FTP does not use the expression "broad nexus" and, therefore, the same cannot be dissociated from the words "input" and "use" mentioned in the Policy. The MOL has categorically stated that the addition in Para 3.2.5 (II) of the HBP is to facilitate the search for "inputs" and "use" and any interpretation so as to dissociate the import from the "inputs" and "use" in the export goods would make it ultra vires the FTP. The MOL has further stated that the words "inputs" and "use" cannot be brushed aside and have to be in focus for the intended import. Together these words indicate that the item sought to be imported should be an "input" in the manufacture of the exported items which is required for "use" by the exporter or the supporting manufacturer, as the case may be. For this purpose, the intended input must have a relationship with the export product. Whereas SION will act as a prima facie evidence of the inputs, the exporter is not debarred from satisfying the authorities that there is a broad nexus between the intended import item as an input with the export product, both falling within the same product group. Ignoring to give effect to the words "inputs" in the beginning and "own use" towards the end in Para 3.7.6 of the FTP would mean to render a part of it redundant and would not be in keeping with the objective and framework of the scheme.

4. In the light of this, the Ministry of Law clarified that the holder of TPS certificate is permitted to import an item under the TPS and get the same processed into possible resultant products only if the same has a „broad nexus“ with the product group as an input in the export product and is required to be used as an input in the product exported for which TPS benefit is sought. The Ministry of Law has also clarified that the term „broad nexus“ with the product group is in addition to and not in substitution of the words "inputs" and "own use" in Para 3.7.6 of the Scheme.

5. The Ministry has accepted the aforesaid opinion of the Ministry of Law. Accordingly, import of goods against TPS certificates may be allowed keeping in view the said opinion discussed in paragraphs 3 and 4 above."

The above circular dated 8th May 2007 has been challenged in the petition filed before the learned Single Judge.

8. Subsequently, by a Public Notice dated 21st June 2007, the DGFT further made the following changes:

“In para 3.2.5 (II) second sentence, viz. „For the purpose of import entitlements under this scheme, „broad nexus“ would mean goods imported with reference to any of the product groups of the exported goods within the overall value of the entitlement certificate“ inserted in Handbook of Procedures (Vol.1) RE 2005 {HBP v1 (RE2005)} is hereby deleted.”

By the said Public Notice, the following notes were also added in para 3.2.5 (II) of the HBP:

“Note 1. The words „Goods“ in first sentence shall mean inputs and capital goods as permitted under Para 3.7.6 of FTP (RE2004 & RE2005). Note 2. In para 3.7.6 of FTP (RE2004 & RE 2005), there is no quantitative/duty quantum restriction on import of inputs related to export products, which may otherwise be stipulated as a norm for export product.”

9. The effect of the above Public Notice dated 21st June 2007, which has also been challenged in this petition, is that it seeks to further narrow down the right to import only such inputs under TPS as those which have nexus with the export product, and not the export product group. After the amendment, para 3.2.5 (II) of HBP reads as under:

“II. Goods allowed to be imported under this scheme shall have a broad nexus with the products exported. For the purpose of import entitlements under this scheme, „broad nexus“ would mean goods imported with reference to any of the product groups of the exported goods within the overall value of the entitlement certificate.”

10. Thereafter a further circular No. 45/2007-Customs dated 19th December 2007 was issued whereby the Respondents further clarified that the term “broad nexus” has to be construed with reference to the words “use” and “inputs” in the FTP. Thus

Respondent No.3 restricted the benefit under the TPS by clarifying that only "inputs" used in the manufacture/production of goods exported will be allowed to be imported.

11. Before the learned Single Judge, learned counsel for the Petitioners submitted that members of Petitioner No.1 Society had made incremental exports and had become entitled to duty-free credit. By unduly seeking to restrict the items that could be imported, an accrued benefit had been taken away. It is submitted that the schedule of making imports was planned well in advance and in the present case the exports had already taken place between 1st April 2004 and 31st March 2006. Any change in the HBP made long after the completion of those exports should not be permitted even on the ground of legitimate expectation. Importantly, it is contended that such change cannot be brought about through circulars and Forms but only by means of an amendment through the notification under Section 5 of the FTDR Act. The power to make such changes obviously could not have been delegated by the Central Government to the DGFT. It is for these reasons that the amended para 3.2.5 (II) of the HBP is assailed being beyond the competence of the DGFT and, therefore, liable to be quashed.
12. In reply, it was submitted by Mr.A.S.Chandhiok, learned Additional Solicitor General (ASG) appearing for the Respondents, that the term "broad nexus" became necessary to be defined since otherwise a person exporting garments might end up importing automobile parts which could not have

been used by such importer as either an input in manufacture by him or by an associate manufacturer. It is pointed out that the FTP does not use the expression "broad nexus" which appears in the HBP. However the term in the HBP cannot be dissociated from the words "input" and "use" in the FTP. The intended input must have a relationship with the export product. It is submitted that the condition of the broad nexus in para 3.2.5 (II) of the HBP was clarificatory of the terms "inputs" and "use" in the FTP and any interpretation so as to dissociate „inputs“ from "use" in the exported goods would be contrary to the provisions of the FTP. The Law Ministry had therefore clarified that "the holder of Target Plus Scheme certificate is permitted to import an item under the Target Plus Scheme and get the same processed into possible resultant products only if the same has a "broad nexus" with the product group as input in the export product and is required to be used as an input in the product exported for which Target Plus Scheme benefit is sought. It also clarified that "the term „broad nexus“ with the product group is in addition to and not in substitution of the words "inputs" and "own use" in para 3.7.6 of the Scheme". It is submitted that the subsequent circulars are all consistent with the above opinion of the Law Ministry.

Challenge to maintainability of the petition not sustainable

13. A preliminary objection has been raised by the learned ASG to the maintainability of this writ petition on the ground that the Petitioners do not have a *locus standi* to challenge the impugned Circulars and the Notifications. He places reliance on

the decision of this Court in ***Vaas Exports v. Union of India 143 (2007) DLT 525.***

14. This Court does not find the above preliminary objection to be tenable in law. Petitioner No.1 is a registered Society having as its members export houses and star trading houses all of whom are affected by the impugned Notification. Petitioner No.1 is entitled to represent the collective interest of its members. Recognizing the locus standi of Petitioner No.1 will avoid multifarious litigation by each of the members of the Petitioner No.1 seeking identical relief. The facts in ***Vaas Exports*** were different and, therefore that decision does not help the Respondents in the present case.

Scope of petition restricted to challenging the procedure adopted for change in the policy

15. It is next submitted by the learned ASG that the impugned Circular and Notification are an expression of the policy decision taken by the Government of India and, therefore, in effect the Petitioners are challenging the policy decision of the Government of India. It is submitted that in exercise of its powers under Article 226 of the Constitution, this Court cannot judicially review the executive policy of the Government of India.
16. In the considered view of this Court, there is no merit in the above objection either. The precise legal issue raised by the Petitioners is whether a change to the duty credit entitlements announced by the FTP can be brought about without amending such policy and by issuing Circulars and Notifications or Forms.

This can be examined by this Court in exercise of its powers under Article 226 of the Constitution. By doing so, this Court is not judicially reviewing the policy of the Government of India but only the procedure adopted by it to change the policy which might incidentally prejudice an exporter.

Is the procedure adopted for change in the FTP lawful?

17. It was further submitted that there was nothing in para 3.7.6 of the FTP to indicate that the goods imported would necessarily have to be used as inputs in the goods exported. It was submitted that the scheme was in fact one of a cash incentive as explained by the Jt. DGFT itself in its counter affidavit filed in W.P. (C) No. 12603 of 2006 in this Court (titled ***Indo Afghan Chamber of Commerce v. Union of India***). A change in the policy to the detriment of the Petitioners could not be brought about through Circulars and Forms but had to be only by way of a Notification under Section 5 of the FTDR Act. It was submitted that without prejudice to the submissions of the Petitioners regarding the validity of the Circular dated 8th May 2007, as long as the Petitioners were able to show that the goods imported constituted an input and had a broad nexus to any product group of exported goods, the Petitioners would be willing to abide by that condition. However, the change, in any event, cannot be made long after the exports had taken place. The exports and imports had been planned keeping in view the FTP already announced. He relied on the decisions in ***Atul Commodities Pvt. Ltd. v. Commissioner of Customs (2009) 235 ELT 385 (SC)*** and ***Union of India v. Asian Food Industries (2006) 13 SCC 542***.

18. Learned A.S.G. also relied on the decision in ***Atul Commodities Pvt. Ltd.*** (*supra*) to submit that the separate policy decision of the Government of India and the changes to such policy decision were not amenable to judicial review. The overall objective had to be kept in mind. Subsequent Circulars and Notifications were only clarificatory and were not inconsistent with para 3.7.6 of the FTP. He placed reliance upon the decisions in ***Tata Teleservices Ltd. v. Commissioner of Customs 2006 (194) ELT 11 (SC)*** and ***UCO Bank, Calcutta v. Commissioner of Income Tax, W.B. (1999) 4 SCC 599.***
19. This Court finds that a similar attempt made by the DGFT which issued Circulars and Public Notices to amend the EXIM Policy of 2002-07 was invalidated by a Division Bench of the Bombay High Court in ***Narendra Udeshi v. Union of India 2003 (156) ELT 819.*** The Bombay High Court observed that it was beyond the scope of the powers of the DGFT to bring out a change to the EXIM Policy. It was held that in the absence of any power under the FTDR Act, the Circulars and Public Notices to prohibit duty-free import of natural rubber under advance licence could not be issued by the DGFT. This Court finds that para 3.7.6 of the FTP, by itself, does not indicate that the imported goods should constitute "inputs" in the goods exported. In fact the language of para 3.7.6 is wide enough to include any kind of inputs: capital goods including spares, office equipment, professional equipment and office furniture etc. It is not possible to read para 3.7.6 restrictively. In ***Atul Commodities Pvt. Ltd.*** (*supra*) the Supreme Court explained that it was not open to the DGFT to change the nature of the

imported items as specified in the FTP from the category „free“ to the category „restricted“ by issuance of Circulars. It was explained by the Supreme Court with reference to the facts of that case that the circulars and notifications issued by the DGFT were clarificatory and not amendatory in nature. It was explained that under the FTDR Act, one finds a clear demarcation between an “amendatory clarification and a clarification.” It was further observed: “Section 5 of the FTDR Act contemplates amendment to the export and import policy under the FTDR Act. It empowers only the Central Government to make such amendment. This power is not given to the DGFT.”

20. Turning to the facts of the present case, this Court finds that even if one were to accept the argument of the learned ASG that the „broad nexus“ requirement was justified keeping in view the overall objective of the FTP, the further change by way of the Circular dated 21st June 2007 to restrict the import to only that goods which constituted an `input“ in the exported product is indeed impermissible.

21. It was *inter alia* clarified that in the light of this, the Ministry of Law has clarified that the holder of TPS certificate is permitted to import an item under the TPS and get the same processed into possible resultant products only if the same has a `broad nexus‘ with the product group as an input in the export product and is required to be used as an input in the product exported for which TPS benefit is sought. The Ministry of Law has also clarified that the term `broad nexus‘ with the product group is

in addition to and not in substitution of the words "inputs" and "own use" in Para 3.7.6 of the Scheme.

22. According to the appellant, still there was misuse of TPS and those instances were brought to the notice of the Department of Revenue which necessitated issuance of another Circular No.45/2007-Customs dated 19.12.2007 providing as under:

"3. The Board had clarified vide Circular No.21/2007-Cus. Dated 21.5.2007, that the words 'Inputs' and 'use' may not be brushed aside and have to be in focus for the intended import. Together, these words indicate that the item sought to be imported should be an 'Input' in the manufacture of the exported products which is required for 'use' by the exporter or the supporting manufacturer, as the case may be. For this purpose, the intended Input must have a relationship with the export product. Whereas SION will act as a prima facie evidence of 'Inputs', the exporter is not debarred from satisfying the authorities that there is a 'broad nexus' between the intended import item as an 'input' with the export product, both falling within the same product group, it was also clarified that the holder of TPS certificate is permitted to Import an Item under the TPS and get the same processed into possible resultant products only if the same has a 'broad nexus' with the product group as an 'input' in the product exported for which the TPS benefit is sought.

4. It is further clarified that under the TPS the exporter can import, within the entitlement, items in quantities in excess of that mentioned in SION or other items in the product group provided that, in either case, they form 'inputs' and are used by him.

5. In view of the position explained above, imports under TPS may be carefully scrutinized with reference to the provisions of the FTP, Handbook of Procedures, the customs notifications and Board's Circular referred to above so as to ensure that the laid down provisions regarding 'inputs', 'broad nexus' and 'use' and 'supporting manufacturer(s)' are complied with."

23. The Circular dated 01.8.2006 was withdrawn by the DGFT vide letter dated 09.5.2007. Public Notice No.9 dated 21.6.2007 was issued deleting the words "for the purposes of import entitlements under this scheme, 'broad nexus' would mean goods imported with reference to any of the product groups of the exported groups within the overall value of the entitlement certificate" from Para 3.2.5 of the HBP. Circular No.21/2007-Cus was issued by the Department finally clarifying the scope of "broad nexus" for the purposes of the Target Plus Scheme.
24. It is at this stage, the respondents filed Writ Petition (Civil) No.2497 of 2008 challenging the vires of:
- (i) Para 3.2.5 of the HBP
 - (ii) Circular NO.21/2007-Cus dated 08.5.2007
 - (iii) Public Notice No.9/2007 dated 21.6.2007
25. By final judgment and order dated 05.8.2010, the learned Single Judge granted the declaratory relief sought for by the respondents and struck down the above paragraph of the HBP and Circulars issued by the Department.
26. The contention of the respondents herein in the said writ petition was that the appellant had no power or jurisdiction to impose a condition of 'broad nexus' or to define the term 'broad nexus' where there was no such condition in Para 3.7.6 of the FTP. According to the respondent, it amounted to changing the conditions in FTP, which could be brought by notification under Section 5 of Foreign Trade (Development and Regulations), 1992. It was also contended that the members of the

respondent who were Star Export Houses had made incremental exports and had become entitled to duty free credit. However, the appellants were attempting to take away the same benefit that could be imported. It was also argued that the schedule of making imports was planned well in advance and exports had already taken place between 01.4.2004 to 31.3.2006. Any change in the HBP made long after the completion of those exports should not be permitted even on the ground of legitimate expectation and no case by means of circular and forms and the only recourse could be to issue notification under Section 5 of the FTDR Act and in no case by the DGFT which had no jurisdiction or power.

27. The contentions of the respondents herein have found favour with the learned Single Judge, giving, *inter alia*, the following reasons:

- (a) Similar attempt made by the DGFT to amend EXIM Policy of 2002-07 was invalidated by a Division Bench of the Bombay High Court in the case of **Narendra Udeshi Vs. Union of India** [2003 (156) ELT 819] holding that it was beyond the scope of the powers of the DGFT to bring out a change to the EXIM Policy.
- (b) Para 3.7.6 of FTP, by itself, does not indicate that the imported goods should constitute 'inputs' in the goods exported. In fact, the language of Para 3.7.6 is wide enough to include any kind of inputs: capital goods including spares, office equipment, professional equipment and office furniture, etc.

This could not be read restrictively as held by the Apex Court in ***Atul Commodities Pvt. Ltd. (supra)***.

- (c) Even if requirement of 'broad nexus' was justified keeping in view the overall FTP, further change by way of Circular dated 21.6.2007 to restrict the import to only that goods that constituted an 'input' in the exported product is indeed impermissible. The learned Single Judge, in this behalf, observed as under:

"The condition is unduly restrictive and has the effect of negating the accrued benefit retrospectively. If one went by the Public Notice dated 4th June 2005, then it was clear that "for the purpose of import entitlements under the Scheme, "broad nexus" would mean goods imported with reference to **any of the product groups of the exported goods** within the overall value of the entitlement certificate". It appears to this Court that while the above Public Notice dated 4th June 2005 was perhaps justified since it was issued during the time when the TPS was still continuing and it was, therefore, possible for the exporters to plan their exports and imports, the subsequent circular dated 8th May 2007 and Public Notice dated 21st June 2007 issued by the Respondents have, in the garb of clarifying the term „broad nexus“, unduly restricted the meaning of the word „inputs“ to mean only those inputs used in the manufacture of the goods exported. There is merit in the contention of the Petitioners that this was travelling far beyond what was provided in para 3.7.6 of the FTP and *ultra vires* the powers of the DGFT. Such a change to the FTP, if at all, could have been brought about only through a notification under Section 5 FTDR Act."

- (d) The learned Single Judge also noted that the stand taken by the Government was contrary to its counter affidavit dated 12.9.2006 filed in W.P.(C) No.12603 of 2006 (***Indo Afghan Chamber of Commerce Vs. Union of India***) as regard the incentive provided by the TPS and Para 3.7.6 of the FTP wherein the Government itself stated:

“.....However, it is clarified that ‘Broad Nexus’ means goods imported with reference to any of the product groups of the exported goods within the overall value of the entitlement certificate. (emphasis supplied)

24. Thereafter in para 8 it was stated: “It is submitted that the actual user is defined under Para 9.4 as “Actual User” means an actual user who may be either industrial or non-industrial. Para 9.5 *inter alia* reads as “Actual User (Industrial)” means a person who utilizes the imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit” and Para reads as “9.6 „Actual User (Non-Industrial)” means a person who utilizes the imported goods for his own use in- (i) any commercial establishment carrying on any business, trade or profession; or (ii) any laboratory, Scientific or Research and Development (R&D) institution, university or other educational institution or hospital; or (iii) any service industry.”

It is submitted that the Policy defines manufacturing under Para 9.37, which read as “Manufacture” means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labeling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-

engineering, Manufacture, for the purpose of this Policy, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining." Therefore, in view of the above it is submitted that in the instant case since the exporter will be processing the almond-in-shell to produce the final product i.e. either almond or roasted almond or salted almond, it will be taken to be in furtherance of the actual user condition."

28. Thus, it was not open to the Government to again introduce a change in the TPS with reference to the exports that had already been completed as on 31.3.2006.

29. In this backdrop, while quashing the impugned Circular dated 08.5.2007, Public Notice dated 21.6.2007 and further Circular dated 19.12.2007 as well as amended Para 3.4.5 of the HBP, the learned Single Judge has made following remarks:

"27. Given the objective of providing an incentive to exporters, para 3.7.6 of the FTP can reasonably be interpreted to require an exporter to show that the goods imported should have a "broad nexus" with reference to any product group of the exported goods within the overall value of the entitlement certificate. The word „nexus" obviously refers to a larger group of similar goods and not the very exported goods itself. Consequently the impugned circulars and notice that purported to „clarify" the term „broad nexus, i.e. the impugned circular dated 8th May 2007, the Public Notice dated 21st June 2007 and the further circular dated 19th December 2007, travelled beyond what was envisaged by para 3.7.6 of the FTP and severely restricted the benefit thereunder. It was a significant change that could be brought about only through a notification under Section 5 FTDR Act. The said circulars and public notice were, therefore, *ultra vires* para 3.7.6 of the FTP. Further they sought to retrospectively take away a benefit that had accrued to the exporters which cannot but be viewed as unreasonable in the context. The impugned circular dated 8th May 2007, the Public Notice dated 21st June 2007,

the further circular dated 19th December 2007 and the amended para 3.2.5 of the HBP are accordingly quashed.”

30. Assailing the aforesaid reasoning and conclusion in the impugned judgment, Mr. Mohan Parasaran, learned Additional Solicitor General argued that Para 3.2.5 of HBP, Circular No.21/2007 and Public Notice No.9/2007 were all clarificatory in nature and were seeking to clarify the scope of the word “inputs” in Para 3.7.6 of FTP. According to him, the clarification could always be issued and it did not amount to any amendment. He further argued that there is no vested right which accrued to the respondent or the members of its organisation from the Circular dated 01.8.2006 which has not only been withdrawn but also been accepted by the Government itself as stating the incorrect position of law as regards Para 3.7.6 of the FTP. It was open to the Government to correct its mistake which has subsequently been clarified as held in ***Videsh Sanchar Nigam Limited Vs. Ajit Kumar Kar*** [(2008) 11 SCC 591].
31. Mr. Parasaran also referred to the judgment of the Supreme Court in ***Atul Commodities (supra)*** in support of the submission that “amendment” and “clarification” were completely two different concepts and it is only in amendment that notification was required to be issued under Section 5 of the FTDR Act and therefore, there was no such requirement when clarification only was issued as happened in the present case. He also argued that the scope of Para 3.7.6 of the FTP was wrongly interpreted in Para 21 of the impugned judgment inasmuch as the term “inputs” does not include capital goods including spares, etc. He argued that this Court has not taken

into account the fact that there is a comma immediately after inputs, but not before 'inputs' indicating that inputs is part of a list of items being enumerated, not a term being explained. The correct interpretation therefore is:

- (a) The Duty Credit may be used for import of any
 - (i) Inputs,
 - (ii) Capital goods including spares,
 - (iii) Office equipment,
 - (iv) Professional equipment, and
 - (v) Office furniture provided the same is freely importable under ITC (HS) Classification of Export and Import items, for their own use and that of supporting manufacturers as declared in 'Aayat Niryaat Form'.
- (b) Furthermore, the learned Single Judge has failed to appreciate the condition indicated in the "proviso" contained in the relevant paragraph which clearly states that the goods which can be imported have to be freely importable, and they have to be imported 'for their own use' and that of supporting manufacturers.
- (c) It is, therefore, clear that the term "inputs" has to be read in conjunction with the term "for their own use" as contained in the same paragraph. The irresistible conclusion that follows from this is that a manufacturer may only use the duty credit obtained from export in importing inputs that are capable of being put to use and consequently the

term "broad nexus" as used in the impugned circular is merely clarificatory.

32. Learned counsel for the respondent, on the other hand, relied upon the reasons given by the learned ASG in support of decision in favour of the respondents hearing. He also submitted that the pivotal purpose of the scheme was to reward "Star Export Houses", i.e., manufacturing houses and "Merchant Export Houses", who achieved targeted export turn over stipulated in the said scheme. It is for this reason the scheme provided that duty credit earned by these exporters can be utilized for particular kind of imports stipulated in Para 3.7.6 of the scheme and the entire matter could be looked into from this perspective. He submitted that the expression "inputs", used therein did not attach any condition that it has to have any nexus to exporters, as was clear from Chapter IX of the FTP. Even if some nexus had to be established as mentioned in Appendix 17D, it had only to be "broad nexus". Broad nexus was explained in letter dated 01.8.2006 by DGFT itself to mean broad category, viz., 'product group'.
33. We have considered the respective submissions of both the parties and have minutely gone through the impugned judgment authored by the learned Single Judge. First and foremost focus has to be on the scheme itself. Para 3.7 of the scheme stipulates the targets which the Star Export Houses are supposed to achieve and on achieving these targets entitlement of duty credit is mentioned in that para. The companies who can avail this credit are not only those which have actually made exports, but are definitely 'companies

which are Star Exports Houses as well as a part of group company', who are given an option to apply as an individual company or as a group based on the growth in the groups turn over as a whole. This is a significant feature in the scheme where sister concerns of Star Export Houses are allowed to avail the import entitlement against duty credit earned by these Star Export Houses inasmuch as sister concern which is a part of group company may not necessarily have exactly the same export as that of the Star Export House, but still made applicant company to avail imports against the duty credit. It is in this light, we may have a relook at the imports which are allowed as per Para 3.7.6 of the scheme. Opening para of the scheme reads as under:

"3.7.6

The Duty Credit may be used for import of any inputs, capital goods including spares, office equipment, professional equipment and office furniture provided the same is freely importable under ITC (HS), for their own use or that of supporting manufacturers as declared in Appendix 17D....."

34. Reading of the aforesaid para makes it clear that credit can be used for import of any inputs, capital goods including spares, office equipments, professional equipment and office furniture. Such imports can be used not only by the exporter, but even by the supporting manufacturer. Obviously, office equipment, professional equipment and office furniture have no nexus with the exports, the question is about inputs. When the expression is "import of any inputs" whether it would mean only those inputs which have nexus with the nature of goods exported. That is not following from the scheme. When we read the later portion of this para dealing with import of agricultural products,

we find that some items which are allowed to be imported are specifically mentioned. Again, when those items are mentioned, it is not necessary that they will have nexus with the exports made by a particular export houses. When we look the matter from this angle and even proceed on the basis that 'broad nexus' criteria used in Handbook of Procedures Vol. I for the period from 01.9.2004 to 31.3.2009, the word 'broad' prefixed with nexus, the word 'nexus' has to be assigned same meaning. This meaning was given by the DGFT itself in its letter dated 01.8.2006 in the following words:

"It is hereby clarified that in terms of the Policy Circular No.27(RE-2005)/2004, 2009 dated 5.10.2005 read with Policy Para 87.6 and Handbook of Procedure (Vol.I) Para 3.2.5 (ii) broad nexus is to be maintained with Product Group in your case, your export products are covered under the Food category, you are required to maintain nexus with Food group of SION book, wherein you have the flexibility to import any input listed in the relevant product group category of the SION Book. As dry fruits (including almonds, as in your case) are listed as one of the inputs under SION E5, nexus with Food Products group is clearly established.

It is further clarified that you can get the imported goods processed and converted from any processor of your choice including the listed supporting manufacture job worker etc. if any, and thereafter you are free to sell the resultant product(s) in the market. There is no export obligation attached with the resultant product(s) obtained after processing of goods imported under the scheme. You are required to maintain proper account of the utilization of imported goods and abide by the Actual Condition. Moreover there is no requirement of endorsing the name(s) of soon processor(s) in the DFCE/IPS scripts and you are at liberty to choose any processor to convert you goods into value added resultant product(s).

Thus it is clarified that in your case, you are permitted to import Almonds (dry fruits) under the Target Plus Scheme and get the same processed/converted from any processor of your choice into possible resultant product(s) before selling in the domestic market.

This clarification is issued with the approval of DG on file.”

35. It was thus understood that the nexus has to be maintained that ‘product group’, viz., the category of the products which is exported. If the import also falls in the same category/group, it would be allowable. In the aforesaid letter, in relation to the export in food, it was clarified that it would be ‘food category’ with respect to which the exporter was required to maintain nexus. In that particular case, the exporter was exporting dry fruits, he was permitted to import almond which falls in the category of ‘dry fruits’. Initially, when Public Notice NO.16 dated 04.6.2005 was issued replacing earlier Appendix 17D with new one in Para 10 thereof, “broad nexus” was explained to mean goods imported with respect to any product group of the exported goods within the overall value of entitlement certificate. Same meaning was assigned in Para 3.2.5 of the HBP amended on 08.4.2005. Thus, Circular dated 01.8.2006 of the DGFT was in tune with the aforesaid. It is only thereafter that another Circular dated 08.5.2007 was issued bringing the concept of ‘use’ and ‘own used’ contained in the Policy to associate the same with ‘input’ and stating that the import was possible of those products only if the same had a ‘broad nexus’ with the product group as an input with the export group and **is required to be used as an input** in the product exported by which TPS benefit is sought. On this basis, Public Notice No.21.6.2007 was issued a this was departure of earlier understating, the respondents naturally felt aggrieved against the same.
36. We are, thus, in agreement with the view taken by the learned Single Judge that Para 3.7.6 of the FTP by itself does not

indicate that the imported goods should constitute 'inputs' in the goods exported relying upon **Atul Commodities (supra)**. We also agree with the interpretation of the expression 'broad nexus' undertaken by the learned Single Judge. In fact, Bombay High Court in the case of **Narendra Udeshi (supra)** and **Essel Mining & Industries Ltd. Vs. Union of India** [2011 (270) E.L.T. 308 (Bom.)] has taken identical view dealing with the identical issue. For our benefit, we may reproduce the following para from the said judgment:

"10. The Foreign Trade Policy, it is well settled, is referable to the provisions of Sections 4 and 5 of the Foreign Trade Development and Regulation Act, 1992. The policy cannot be amended by an administrative circular. The circular does not in this case supplement the policy or fill up an interstitial space. The circular imposes a substantive condition at variance with the policy. VBC 13 wp4499.07-14.6 Where the Central Government has considered it necessary to impose a requirement of physical incorporation, such a condition has been made expressly in other provisions of the Foreign Trade Policy. For instance, in relation to advance plus licences governed by the duty exemption scheme, it has been stipulated that an advance licence is issued to allow duty free importable inputs which are physically incorporated in the export products (paragraph 4.1.3 of the Foreign Trade Policy for April 2005). Similarly, while issuing an exemption notification in relation to imports covered by advance licences, the Union Government in its notification dated 10 September 2004 (Notification 93/04) has specifically defined materials to mean raw materials, components intermediates, consumables, catalysts and parts which are required for manufacture of resultant products. No such requirement was incorporated in paragraph 3.7.6 of the Foreign Trade Policy. In other words, the condition that the inputs which are imported must be used in the export of the resultant product was not incorporated as part of paragraph 3.7.6 of the Foreign Trade Policy. In that view of the matter, it is not possible

to accept the contention of the Respondent that the conditions which were imposed by the circular VBC 14 wp4499.07-14.6 date 8 May 2007 were implicit in paragraph 3.7.6 of the Foreign Trade Policy. We, therefore, come to the conclusion that the conditions which were stipulated by the circular dated 8 May 2007 were ultra vires paragraph 3.7.6 of the Foreign Trade Policy and Customs notification dated 8 April 2005 (Customs Notification 32/05).

11. Before concluding, it would be necessary to note that during the course of the hearing of the Petition, Counsel appearing on behalf of the Petitioner and the Respondent had placed before this Court, a judgment of a Learned Single Judge of the Delhi High Court in Indian Exporters Grievance Forum vs. Union of India (Writ Petition (Civil) 2497 of 2008 decided on 5 August 2010). An appeal against the judgment of the Learned Single Judge is pending before the Division Bench and the judgment of the Learned Single Judge has been stayed. In deciding this matter, we have independently interpreted the terms of the Foreign Trade Policy and the relevant notifications and circulars that hold the field. It is, therefore, not necessary for this Court to make any observation in relation to the view which has been expressed by the VBC 15 wp4499.07-14.6 Learned Single Judge of the Delhi High Court.”

37. The upshot of the aforesaid discussion would be that the appeal is devoid of any merit. This appeal is dismissed with costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

February 24, 2012

pmc