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

% **Judgment reserved on: 14 August 2024**
Judgment pronounced on: 22 November 2024

\+ W.P.(C) 14477/2022 & CM APPL. 44224/2022 (Stay)

DESIGNCO .....Petitioner

Through: Mr. P. C. Patnaik, Mr. Hemant Mishra & Ms. Ankita Sarangi Advs.

versus

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

Through: Mr. Rakesh Kumar, CGSC with Mr. Sunil and Mr. Rahul Kumar Sharma, GP for UOI.
Mr. Jitesh Vikram Srivastava, SPC with Mr. Prajesh Vikram Srivastava, Adv.
Mr. Raghav Bakshi, Adv. for Mr. Aditya Singla, SSC for R-2, R-4 & R-5.

\+ W.P.(C) 17314/2022 & CM APPL. 55055/2022 (Interim Relief)

M /S AMIT EXPORTS .....Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Madhav Bhatia, Mr. Shreshth Arya, Mr. Shreuss Shankar Joshi and Mr. Rohan Anand, Advs.

versus

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

Through: Mr. Rakesh Kumar, CGSC with Mr. Sunil and Mr. Rahul Kumar Sharma, GP for UOI.
Mr. Satish Aggarwala, SSC along with Mr. Aman Tripathi, Ms. Neha Aggarwala Ms. Pooja

Bhaskar, Advs.
Mr. Rajeev Kumar Mishra and Mr. Apoorva Singh, Advs. for R-11.

\+ W.P.(C) 17328/2022 & CM APPL. 55093/2022 (Interim Relief)

M/S SHARMA INTERNATIONAL .....Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Madhav Bhatia, Mr. Shreshth Arya, Mr. Shreuss Shankar Joshi and Mr. Rohan Anand, Advs.

versus

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

Through: Mr. Rakesh Kumar, CGSC with Mr. Sunil and Mr. Rahul Kumar Sharma, GP for UOI.
Mr. Rajeev Kumar Mishra and Mr. Apoorva Singh, Advs. for R-11.
Mr. Tribhuvan & Mr. Gokul Sharma, GP for R-2,4,5,8, 9 & 12.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

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A. FACTUAL BACKGROUND

1. This batch of writ petitions assail the action initiated by the respondents seeking to deprive the benefits claimed and derived by the writ petitioners under the **Merchandise Exports from India Scheme**[1]. The dispute itself emanates from the export of what the petitioners contend to be handcrafted articles of stone during the period in question and entitled to benefits under the MEIS by virtue of being classifiable under **Harmonised System of Nomenclature**[2] Code 681599. The dispute appears to have arisen in the backdrop of a letter issued by the **Central Board of Indirect Taxes and Customs**[3] dated 31 May 2019 alluding to a discrepancy in the HSN Code liable to be ascribed to stone and marble handicraft products. Based on a reading of that communication of the CBIC, the respondent No. 6, the Commissioner of Customs, appears to have issued a Public Notice No. 57/2019 in terms of which it was apprised to all that stone and marble handicraft products are liable to be classified under **Custom Tariff Heading**[4] 6802, subject to compliance being affected with the other conditions comprised in the various Explanatory Notes attached to that heading. It

[1] MEIS
[2] HSN
[3] CBIC
[4] CTH

was on a purported reading of the aforesaid communications and the portend of the view taken by the CBIC that action appears to have been initiated against the petitioners. The principal allegation appears to be that the petitioners had illegally obtained benefits under the MEIS and were, therefore, liable to refund the amount of benefit claimed under that scheme. It is this action which also led to the issuance of various summons under Section 108 of the **Customs Act, 1962**[5] which are impugned before us.

2. In order to render a context to the issues that arise for our consideration we, for the sake of brevity, propose to take note of the facts as they obtain in W.P. (C) No. 17328 of 2022 and which was designated as the lead writ petition.

3. The petitioner, M/s Sharma International, claims to be a reputed exporter from Agra engaged in the export of handicraft articles made of marble and other material. It avers that it had been exporting those articles since 1991 treating them as classifiable under **Indian Trade Classification (Harmonised System)**[6] 68159990, including during the operation of the MEIS scheme, which held the field between 2015 upto 2020. The products themselves are described to be handcrafted articles of stone popularly known as '*Chakla Belan*' (Rolling Board and Rolling Pin), mortar and pestle and other allied articles. According to the writ petitioner, those products are prepared by combining marble and stone with steel, wood, glass and the composite material being thereafter bound together with the use of adhesives.

4. According to the disclosures made in the writ petition, the shipping bills of the petitioner submitted for the period 2007 to 2009,

[5] Customs Act
[6] ITC (HS)

and in terms of which the products were classified under ITC(HS) 68159990, were duly accepted and cleared. Apart from the aforesaid exports, the petitioner had also exported those articles during the operation of the MEIS during the period 2015 and right up to 2020. It is asserted that various governmental organizations had, from time to time, duly certified the exported articles as being handicraft products and thus no question ever being raised with respect to their classification under CTH 6815.

5. Proceeding on that basis, shipping bills classifying the products under ITC(HS) 68159990 were duly submitted at the out ports and assessed by the customs authorities. Basis the above, the petitioners also claimed benefits under the MEIS and which were duly availed of. For the purposes of evaluating the controversy which arises, this would appear to be an appropriate juncture to briefly advert to the salient provisions of the MEIS.

6. Under the prevailing **Foreign Trade Policy**[7] of 2015-20, the Union Government, in order to promote exports of Indian handicrafts, had introduced the MEIS. With the avowed objective of providing an impetus to such exports, the FTP provided incentives for the export of notified goods and products and the calculation of corresponding rewards being tagged to the realized **Free On Board**[8] value of exports.

7. In terms of the MEIS, the exporters were also provided duty credit scrips which were transferable. Those duty credit scrips could be used for payment of basic customs duty, additional customs duty, payment of central excise duties on domestic procurement of inputs or goods.

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[7] FTP
[8] FOB

8. The FTP made the following important provisions insofar as the MEIS is concerned: -

"**3.01 Exports from India Schemes**

There shall be following two schemes for exports of Merchandise and Services respectively:

(i) Merchandise Exports from India Scheme (MEIS).
(ii) Service Exports from India Scheme (SEIS).

3.02 Nature of Rewards

Duty Credit Scrips shall be granted as rewards under MEIS and SEIS. The Duty Credit Scrips and goods imported/domestically procured against them shall be freely transferable. The Duty Credit Scrips can be used for :

(i) Payment of Customs Duties for import of inputs or goods, including capital goods as per DOR notification, except items listed in Appendix 3A. (Amended vide Notification No. 8/2015-20 dated 4th June 2015).
(ii) Payment of excise duties on domestic procurement of input or goods, including capital goods as per DoR notification.
(iii) Payment of service tax on procurement of services as per DoR notification.
(iv) Payment of Customs Duty and fee as per paragraph 3.18 of this Policy.

Merchandise Exports from India Scheme (MEIS)

3.03 Objective

Objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

3.04 Entitlement under MEIS

Exports of notified goods/products with ITC[HS] code, to notified markets as listed in Appendix 3B, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports

as given in the Shipping Bills in free foreign exchange, whichever is less, unless otherwise specified.

3.05 Export of goods through courier or foreign post offices using e-Commerce

(i) Exports of goods through courier or foreign post office using e-commerce, as notified in Appendix 3C, of FOB value upto Rs. 25000 per consignment shall be entitled for rewards under MEIS.

(ii) If the value of exports using e-commerce platform is more than Rs 25000 per consignment then MEIS reward would be limited to FOB value of Rs.25000 only

(iii) Such goods can be exported in manual mode through Foreign Post Offices at New Delhi, Mumbai and Chennai.

(iv) Export of such goods under Courier Regulations shall be allowed manually on pilot basis through Airports at Delhi, Mumbai and Chennai as per appropriate amendments in regulations to be made by Department of Revenue. Department of Revenue shall fast track the implementation of EDI mode at courier terminals.

3.06 Ineligible categories under MEIS

The following exports categories/sectors shall be ineligible for Duty Credit Scrip entitlement under MEIS

(i) EOUs/ EHTPs / BTPs/ STPs who are availing direct tax benefits / exemption.

(ii) Supplies made from DTA units to SEZ units

(iii) Export of imported goods covered under paragraph 2.46 of FTP;

(iv) Exports through trans-shipment, meaning thereby exports that are originating in third country but transshipped through India;

(v) Deemed Exports;

(vi) SEZ/EOU/EHTP/BPT/FTWZ products exported through DTA units;

(vii) Items, which are restricted for export under Schedule-2 of Export Policy in ITC (HS), unless specifically notified in Appendix 3B.

(viii) Service Export.

(ix) Red sanders and beach sand.

(x) Export products which are subject to Minimum export price or export duty

(xi) Diamond Gold, Silver, Platinum, other precious metal in any form including plain and studded jewellery and other precious and semi-precious stones.

(xii) Ores and concentrates of all types and in all formations.
(xiii) Cereals of all types.
(xiv) Sugar of all types and all forms, unless specifically notified in Appendix 3B.
(xv) Crude / petroleum oil and crude / primary and base products of all types and all formulations.
(xvi) Export of milk and milk products, unless specifically notified in Appendix 3B.
(xvii) Export of Meat and Meat Products, unless specifically notified in Appendix 3B.
(xviii) Products wherein precious metal/diamond are used or Articles which are studded with precious stones.
(xix) Exports made by units in FTWZ.
(xx) Items, which are prohibited for export under Schedule-2 of Export Policy in ITC (HS).

(Para 3.06 amended vide Notification No 8/2015-20 dated 4th June, 2015)."

9. For the purposes of implementation of the MEIS, a Public Notice No. 02/2015-2020 was issued by the **Director General of Foreign Trade**[9] specifying the eligible countries to which exports could be made for availing benefits under the scheme as well as the ITC(HS) code wise list of products with reward rates. Appendix 3B which formed a part thereof, listed out the products which were recognized to be eligible under the MEIS and included products classifiable under CTH 6815. CTH 6815 was concerned with "*articles of stone or of other mineral substances (including carbon fibres, articles of carbon fibres and articles of peat), not elsewhere specified or included*".

10. The petitioners were classifying the exported article specifically under ITC(HS) 68159990 and which constituted the residual clause and read as "*others*". By virtue of the inclusion of articles falling within the ambit of ITC(HS) 68159990, those products became entitled to claim MEIS rewards @ 5%. The aforenoted Public Notice No. 02/2015 was thereafter amended from time to time including by way of Public

[9] DGFT

Notice No. 44/2015-2020 dated 05 December 2017 in terms of which the MEIS reward was increased from 5% to 7%.

11. The petitioners aver that on 26 July 2018 the Ministry of Finance, in exercise of powers conferred under Section 11 of the **Central Goods and Services Tax Act, 2017**[10] issued Notification No. 21/2018, which exempted the intra-state supply of handicraft goods from tax. Amongst the various goods which came to be included in that Notification were those which would be classifiable under CTH 6802 and ITC(HS) 68159990. The said Notification carried the following Explanation which defined handicraft goods as under:-

> "*Explanation* - For the purpose of this notification, the expression "handicraft goods" means –Goods predominantly made by hand even though some tools or machinery may also have been used in the process; such goods are graced with visual appeal in the nature of ornamentation or in-lay work or some similar work of a substantial nature; possess distinctive features, which can be aesthetic, artistic, ethnic or culturally attached and are amply different from mechanically produced goods of similar utility."

12. On the basis of the aforesaid statutory regime which prevailed, the petitioners assert that they had continued to classify their products as falling under ITC(HS) 68159990 since 1991 and which practice continued right up to October 2018. However, in December 2018, the sixth respondent, the Commissioner of Customs, appears to have raised a question with respect to the classification of those goods. The said respondent took the position that the goods being exported by the petitioners were liable to be classified under CTH 6802**.** CTH 6802 deals with articles of stone, plaster, cement, asbestos, mica or similar materials and carries the following heading: -

> "WORKED MONUMENTAL OR BUILDING STONE (EXCEPT SLATE) AND ARTICLES THEREOF, OTHER THAN GOODS OF

[10] CGST Act, 2017

HEADING 6801; MOSAIC CUBES AND THE LIKE, OF NATURAL STONE (INCLUDING SLATE), WHETHER OR NOT ON A BACKING; ARTIFICIALLY COLOURED GRANULES, CHIPPINGS AND POWDER, OF NATURAL STONE (INCLUDING SLATE)"

13. Aggrieved by the stand so taken, various representations appear to have been made by trade associations requesting the respondents to resolve the doubts which had come to be raised in respect of the classification of these handicraft articles. The matter is stated to have been escalated to various authorities up the policy chain including the Ministry of Textiles as well as the Office of the Development Commissioner (Handicrafts).

14. A detailed representation is also stated to have been made in this regard on 11 February 2019 by the Handicraft Exporter Association Agra to the Department of Commerce and Industry. In terms of the said representation, that Association asserted that if the stand of the respondents were to be accepted, it would become ineligible to claim the benefits of the MEIS and which had already been passed on to the buyers. This, according to the Association, would inevitably cause grave hardship and financial loss to its members-exporters.

15. The representation of the Association is stated to have been taken up for consideration in the third meeting of the Board of Trade which was chaired by the Minister of Commerce and Industries and was convened on 15 February 2019. Pursuant to the discussion which ensued in that meeting, the Joint Director of Foreign Trade issued an Office Memorandum dated 26 February 2019 requesting the Department of Revenue as well as other concerned stakeholders in the Union Government to furnish their comments and views. This is evident from a reading of the said Office Memorandum and which

enclosed with it a gist of the minutes of the discussion which had been held by the Board of Trade. The said Office Memorandum reads thus: -

"**OFFICE MEMORANDUM**

Subject: Minutes of the 3rd meeting of the Board of Trade chaired by Hon'ble Minister of Commerce and Industry held on 15.2.2019 at Vigyan Bhawan, New Delhi.

The undersigned is directed to forward herewith a copy of minutes of the 3rd Board of Trade meeting held on 15.2.2019 under the Chairmanship of Hon'ble Minister of Commerce & Industry

2. It is requested to furnish comments/views of the concerned Ministry/Departments on the issues raised by the participant in the said meeting **by 8th March, 2019** for the preparation of the Action Taken Report.

(Soumya Chattopadhyay)
Joint Director General of Foreign Trade
Tel: 011-23061562 Ext.391
E-mail. soumya.c@nic.in "

16. Insofar as the export of the goods in question is concerned, the minutes of the aforenoted meeting dated 15 February 2019 which was appended to the aforenoted Office Memorandum carried the following pertinent observations: -

"**Minutes of the 3rd meeting of the Board of Trade chaired by Hon'ble Minister of Commerce and Industries Shri Suresh Prabhu held on 15.2.2019 at Vigyan Bhawan, New Delhi**

Shri Suresh Prabhu, Minister for Commerce and Industry chaired the 3rd meeting of Board of Trade (BOT) on 15 02.2019 at Vigyan Bhawan. The meeting was attended by Secretaries and other senior officials of key line ministries including, Commerce and Industry, External Affairs, Chemicals & Petro-Chemicals, Posts. CBIC, EXIM ECGC, all major trade and industry bodies, Export Promotion Councils and industrialists. List of Participants is at Annexure A.

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DGFT, Shri Alok Chaturvedi, made a detailed presentation explaining the present trade scenario, existing export promotion schemes, and measures taken since last Board of Trade Meeting in

consultation with various stakeholders including exporters and industry association to address the issues of exporters. Few notable measures taken since last BoT meetings are as follows

- Interest Equalization rate increased from 3% to 5% w.e.f 2nd November, 2018 for exports being made by MSME sector.
- From 2nd January 2019 merchant exporters have been included under the Interest Equalisation Scheme @ 3% subvention
- In January, 2019, Pre-Import condition on advance authorization licenses to avail exemption of IGST was removed and exemption of Integrated Tax and Compensation Cess extended to deemed supplies.
- Exemption granted on 3% IGST on gold sourced by exporters from nominated agency w.e.f. 1.1.2019 to help Gems and Jewellery sector by freeing blocked capital.
- Freight subsidy for exports of agricultural and marine products.
- In the Mid-Term Review MEIS rates increased by 2% for MSMEs/labour intensive industries involving an additional outlay of Rs. 7310 crore per annum.
- SEIS (Service Export from India Scheme) incentive rate was increased by 2% for all notified services amounting to Rs 1140 crore of additional reward per annum.
- MEIS allocation enhanced from 21000 Crorcs in 2014-15 to 39000 Crores in 2018-19
- GST exemption was restored in October 2017 under the Advance Authorization Scheme, Export Promotion Capital Goods Scheme and 100% Export Oriented Unit for sourcing inputs from abroad without payment of IGST.
- GST refunds were expedited through several rounds of Refund Fortnight
- The validity period or the Duty Credit Scrips was increased from 18 months to 24 months to enhance their utility in the GST framework
    - The upper limit of FOB value of goods for exports through courier or foreign post office for obtaining benefits enhanced from Rs. 25,000 to Rs. 5,00,000 in July 2018
    - The restriction that benefits would be granted to e-commerce exports only from 3 airports has been removed in July 2018.
- Exports of Religious Gold idols of 22k and above allowed by modifying restriction on export of gold articles of more than 22 carats.
- Exports of Gold findings of 3k and above allowed
- Engaging states for promotion of India's trade. Through coordination with States, State Export Promotion Committees and State specific Export Promotion Strategies are in place.
- Additional Towns of Export Excellence: Bhadohi (UP) and Panipat (Haryana) announced for carpets and related products.
- Exports of all agricultural commodities (except mustard oil) made “free” without any restrictions. Earlier. export of pulses

and edible oils were prohibited.

- Export incentives under MEIS increased in respect of certain agricultural items:
- Non Basmati: 5% tor four months in Nov 2018
- Milk products: 10% increased to 20% in September 2018
- Onions: 5% for six months in July 2018; enhanced on 28 12.2018 to 10% for exports up to 30th June 2019
- De-oiled soya cake 7% enhanced in July 2018 lo 10%
- New Agricultural Export Policy Issued and initial outreach with Slates done.

He emphasised that Government is committed to end to end IT enablement and make all processes completely paperless. In this regard, Department of Commerce has approved a project for the revamp of entire IT system of DGFT. He slated that however, in the meanwhile, DGFT has taken many measures lo bring ease of doing business with DGFT like

- Same day issue of IEC (Importer Exporter Code) online.
- Auto approval or MEIS scripts within 24 hours
- Contact @ DGFT grievance redressal service for Exporters/Importers
- Redemption of Export Obligation of Exporters expedited through a drive.
- Consequently over 13000 Advance Authorisation and 9500 EPCG cases have been redeemed.
- Revamp of DGFT's IT System initiated to make all DGFT processes paperless and provide end-to-end IT enablement for all services.

DGFT highlighted that due to these initiatives of the Government, India has jumped to 30th place in 2018 from 1146th place in "Trading across Borders Ranking" as released by the World Bank.

The representatives of industry, while welcoming steps taken by the Government proposed many constructive measures to boost exports The issues/suggestions put forth by the members of Board of Trade are as under·

1. President, FIEO Shri G.K.Gupta :

- A new Incentive scheme may be introduced for branded exports- both at country level and Company level
- Budget for MAI and TIES may be increased significantly for promoting trade in new countries.
- The scheme for sales to foreign tourist must be started immediately for handicrafts and textiles items Foreign tourist sale for allowed 20-25 years back. Now if a person is making counter sale to foreign tourist he must get MEIS and GST refund
- Interest Equalization Scheme must be introduced for every sector at least for all agricultural commodities
- FIEO must continue to be recognized as EPC for service exports

other than the 13 services earmarked for SEPC

- E-wallet facility may be provided from 01.04.2019.
- ITC refund mechanism may be made completely online to save time and cost
- Pre import condition should be resolved and uniformity in views 1s expected from the RAs of DGFT
- MEIS benefits should be granted as per the Trade Circular released by DGFT to similarly placed exporters and lastly
- ECGC may be requested to pursue a liberal view while processing and sanctioning claims of exporters and DGFT may a proposal/policy accordingly

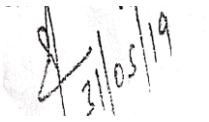
xxxx xxxx xxxx

18. Shri Sagar Mehta, Chairman, EPCH

- He requested for enhancing the MEIS limit for the handicraft sector and propose that the MEIS benefits should be granted as per the export performance of the EPCs.
- Since they promote reverse buyer seller meet and as per the prevailing provisions of the MAI scheme cost of air tickets hotel accommodation are not reimbursed for the traditional markets such as EU, America, Japan and their request is that MAI benefits be granted for partIc1pants from these countries as well.
- Further, he pointed out that exporters exporting to Iran are facing problems and no EBRC is being released to the exporters in absence of which the exporter is unable to claim the MEIS and other benefits.
- Due to introduction of GST the duty drawback rates on handicraft items have been reduced by 50 to 70% To compensate the loss the handicraft sector may be included in the ROSL scheme and 2 to 4% may be refunded.
- He also pointed out that members from Agra are facing difficulties in obtaining MEIS benefits with reference to specific codes namely 6802 21 90 and 6815 99 90 as there are certain ambiguities. Customs is denying MEIS benefits of 7% on 6815 99 90 and insisting on putting 6802 21 90 on the shipping bills."

17. It is, however, the case of the writ petitioners that till date no concrete action has been taken despite the issuance of the aforenoted Office Memorandum dated 26 February 2019 and the opinion which was voiced by various parties as recorded in the minutes of the meeting held on 15 February 2019. This led to the Association addressing further communications to the CBIC as well as the Ministry of Finance to accord clarification.

18. On 31 May 2019, the CBIC acting through its Tariff Unit issued the following communication:-

> "To
> Chairman, EPCH, "EPCH House" Pocket 6 & 7,
> Sector-C, L.S.C., Vasant Kunj,
> New Delhi
>
> **Subject: Discrepancy in the HSN Code Classification of Stone & Marble Handicrafts:-**
> reg.
> Sir,
>
> Undersigned is directed to refer your letter no. EPCH- 3/1(3)/2018-19 Customs, dated 05.02.2019 wherein while referring to the discrepancy in the classification of Stone & Marble Handicrafts under CTH 6802 or 6815, it has been emphasized that MEIS @ 7% is available under HS Code 6845 99 90 whereas the benefit is not available on HS Code 6802 21 90
>
> 2. Issue has been examined in detail in this office. It has been concluded that the said item is rightly classifiable u/h 6802 subject to compliance to other conditions given in the ENs to this heading, however, classification at 8-digit level will be decided by the concerned Customs formation in light of the factual specifications of individual items at hand. This clarification is formation in light of the factual specifications of individual items at hand. This clarification is germane as far as the classification choice was between CTH, i.e., 6802 and 6815 is concerned.
>
> 3. DGFT is also being requested in review the MEIS schedule with regard to above said items.
>
> **Your's sincerely,**
>
> 
>
> **Rachna Tanwar**
> **OSD, Tariff Unit**"

19. The CBIC, while taking note of the conflicting stand taken by parties pertaining to the classification of stone and marble handicrafts under CTH 6802 or 6815 observed that those items would be classifiable under CTH 6802. However, and as is evident from a reading of that communication, the aforesaid conclusion was itself hedged by various caveats. The clarification was firstly qualified with

the CBIC observing that its view would be subject to compliance with the other conditions given in the Explanatory Notes accompanying that heading. It was further observed that classification would be decided by the concerned customs formations in light of the factual specifications of individual items.

20. It was pursuant to the said communication of the CBIC that Public Notice No. 57/2019 dated 19 June 2019 came to be issued and which is reproduced hereinbelow in its entirety: -

> "**PUBLIC NOTICE NO. 57/2019**
> **Subject: Discrepancy in the HSN Code Classification of Stone & Marble Handicrafts- reg**
>
> Attention of all exporters, custom brokers and all other stakeholders is invited to the Board Letter F. No. 528/24/2017-S.T.O.(TU)(Vol.II) dated 31.05.2019 on the above mentioned subject.
>
> 2. In pursuance of Board Letter F. No. 528/24/2017-S.T.O.(TU) (Vol.II) dated 31.05.2019, wherein, while referring to the discrepancy in the classification of Stone & Marble Handicrafts under CTH 6802 or 6815, it has been concluded that the said items are rightly classifiable under heading 6802 subject to compliance to other conditions given in the explanatory notes to this heading. However, classification at 8-digit level shall be decided by the concerned Customs Officers in light of the factual specification of individual items at hand. This clarification is germane as far as the classification choice between CTH, i.e. 6802 and 6815 is concerned.
>
> 3. Difficulty, if any, may also be brought to the notice of the Deputy/ Assistant Commissioner in charge of Appraising Main (Export) through mail/ Phones (email address: apmainexp@jawaharcustoms.gov.in, Phone No. : 022-27244959).
>
> **-Sd-**
> **(Sunil Kumar Mall)**
> **Commissioner of Customs, NS-II,**
> **JNCH, Nhava Sheva**"

21. On the basis of the aforesaid, the respondents proceeded to issue the audit objection letter dated 18 November 2019 which is impugned before us. It becomes relevant to extract the following passages from

that communication:-

> "2. The items "Artistic & Decorative Stone products (Handicraft)" which had been exported under various Shipping Bills to US, Denmark, etc. should have been rightly classified under CTH 68022190 / 68029900 wherein the MEIS benefits is prescribed @ 0% of FOB value (From 01.04.2015 till date). However, it has been observed that the goods had been wrongly classified by you under CTH 68159990 with an intention to claim higher MEIS benefit@ 5% of FOB value (From 01.04.2015 to 31.10.2017) instead of 0%; @ 7% of FOB value (From 1.11.2017 till date) instead of 0%. Therefore, it appears that the goods had been mis-classified by you under CTH 68159990 with an intention to claim higher MEIS benefit instead of correct classification under CTH 68022190 or 68029900.
>
> **xxxx xxxx xxxx**
>
> 4. It is informed that after introduction of self-assessment vide Finance Act, 2011, it is the onus on the Exporter/Importer to make true and correct declaration in all aspects like classification, valuation, including calculation of duty & claim of benefit, etc. Further, as per provisions of section 50(2) of the Customs Act, 1962, the Exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents. As per substantive provisions of section 50(3) of the Customs Act, 1962, the exporter who presents a shipping bill or bill of export under this section shall ensure the following, namely;
>
> (a) the accuracy and completeness of the information given therein;
>
> (b) the authenticity and validity of any document supporting it, and
>
> (c) compliance with the restrictions or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.
>
> 5. However, in the instant case, you have not fulfilled your statutory obligation of correct and truthful declaration of the material facts of the export document i.e. shipping bills, and thereby mis-classified the gcods with an intention to claim higher export benefits in the form of the MEIS as explained above.
>
> 6. Therefore, in terms of the provisions of section 28(4) or 28AAA of the Customs Act, 1962, you are advised to pay the undue MEIS benefit amounting to INR 1,23,99,605/- (Rupees One Crore Twenty Three Lakh Ninety Nine Thousand Six Hundred and Five) as detailed in Annexure-A, which has been wrongly claimed by you along with applicable interest within 15 days of receipt of this letter.
>
> 7. Further, you are also advised not to apply to DGFT for issuance of

> MEIS Scrips (if not already issued) in respect of all such Shipping Bills, wherein exports have already been done by you in similar manner by wrongly classifying the goods to avail ineligible higher MEIS benefit."

22. Close on the heels of that communication, the petitioner also received summons purporting to be under Section 108 of the Customs Act requiring it to appear and lead evidence. The petitioner is thereafter stated to have been served with yet another summons on 24 January 2022 followed by another summons requiring the representative of the petitioner to appear before the respondents on 17 May 2022. The petitioner further alleges that during the course of those proceedings it was also forced to pay an amount of INR 5,00,000/- to the ninth respondent under duress and threat. This deposit is stated to have been made even though no **Show Cause Notice**[11] or adjudicatory proceedings had been commenced. It is in the aforesaid backdrop that the petitioners had approached this Court for a declaration classifying handicraft articles made of stone and marble under ITC(HS) 68159990 as well as to hold the petitioner to be a valid beneficiary under the MEIS. The petitioners also raise a challenge to the letter of the CBIC dated 31 May 2019 as well as the Public Notice No. 57/2019 dated 19 June 2019 issued by respondent no. 6. A direction is also sought for quashing of the summons which have been issued and are dated 15 November 2021, 24 January 2022, 17 May 2022, 06 June 22 and 30 September 2022.

B. ARGUMENTS RENDERED BY THE PETITIONERS

23. Appearing in support of the writ petitions, Mr. Gulati, learned senior counsel, addressed the following submissions. At the outset, it was submitted that admittedly the petitioners had right from 1991 been

[11] SCN

placing the exported articles under ITC (HS) 68159990 without any protest or objection being raised by the respondents. It was Mr. Gulati's contention that the validity of the MEIS scrips which were issued had never been questioned by the respondents at any point of time. In fact, according to learned senior counsel, the record would bear out that the self-declarations as made by the petitioner had been duly accepted by the respondents consistently right from 1991.

24. Turning then to the issue of classification itself, Mr. Gulati submitted that the goods were liable to be legitimately placed under the broad generic heading of articles of stone and which formed the subject matter of CTH 6815. Mr. Gulati submitted that apart from the specific articles which are noticed in CTH 6815, handicraft articles made of stone were liable to be placed in the residuary entry represented by ITC(HS) 68159990.

25. According to Mr. Gulati, CTH 6802 principally relates to stone and articles thereof which are used or liable to be employed in monuments and buildings. This since according to learned senior counsel the entry uses the expression "*worked monumental or building stone*".

26. Our attention was also drawn to the Chapter Notes which find place in Chapter 68 and specifically to Note 2 which reads as follows:-

> "2.- In heading 68.02 the expression "worked monumental or building stone" applies not only to the varieties of stone referred to in heading 25.12. or 25.16 but also to all other natural stone (for example, quartzite, flint, dolomite and stealite) similarly worked; it does not, however, apply to slate."

27. The Explanatory Notes to CTH 6802 as it stood at the relevant time are extracted hereinbelow: -

"68.02 - Worked monumental or building stone (except slate) and

articles thereof, other than goods of heading 68.01; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially coloured granules, chippings and powder,. of natural stone (including slate).

6802.10 - Tiles, cubes and similar articles, whether or not rectangular (including square), the largest surface area of which is capable of being enclosed in a square the side of which is less than 7 cm; artificially coloured granules, chippings and powder

- Other monumental or building stone and articles thereof, cut or sawn, with a flat or even surface:

6802.21 - - Marble, travertine and alabaster
6802.23 - - Granite
6802.29 - - Other stone

- Other:

6802.91 -- Marble, travertine and alabaster
6802.92 - - Other calcareous stone
6802.93 - - Granite
6802.99 - -Other stone

This heading covers natural monumental or building stone (except slate) which has been worked beyond the stage of the normal quarry products of Chapter 25. There are, however, certain exceptions where goods are covered more specifically by other headings of the Nomenclature and examples of these are given at the end of this Explanatory Note and in the General Note to the Chapter.

The heading therefore covers stone which has been further processed than mere shaping into blocks, sheets or slabs by splitting, roughly cutting or squaring, or squaring by sawing (square or rectangular faces).

The heading thus covers stone in the forms produced by the stone-mason, sculptor, etc., viz.:

(A) Roughly sawn blanks; also non-rectangular sheets (one or more faces triangular, hexagonal, trapezoidal, circular, etc.).

(B) Stone-of any shape (including blocks, slabs or sheets), whether or not in the form of finished articles, which has been bossed (i.e., stone which has been given a "rock faced" finish by smoothing along the edges while leaving rough protuberant faces), dressed with the pick, bushing hammer, or chisel, etc., furrowed with the drag-comb, etc., planed, sand dressed, ground, polished, chamfered, moulded, turned, ornamented, carved, etc."

28. Mr. Gulati, while taking us through those Explanatory Notes laid

emphasis on that heading being intended to cover natural monumental or building stone which may have been worked upon beyond the stage of normal quarry products. Learned senior counsel also laid emphasis on the Explanatory Notes speaking of stone which may have been further processed therefrom by mere shaping into blocks, sheets or slabs. According to Mr. Gulati, all of the above when examined holistically would lead one to the irresistible conclusion of CTH 6802 being confined to stone which is used for purposes of construction and erection of monuments and buildings.

29. Contrary to the above Mr. Gulati took us through the Explanatory Notes of CTH 6815 and as that article stood at the relevant time and is reproduced hereunder: -

> "68.15 - Articles of stone or of other mineral substances (including carbon fibres, articles of carbon fibres and articles of peat), not elsewhere specified or included.
> 6815.10 - Non-electrical articles of graphite or other carbon ^
> 6815.20 - Articles of peat ; .
> - Other articles:
> 6815.91 - Containing magnesite, dolomite or chromite
> 6815.99 – Other.
>
> This heading covers articles of stone or of other mineral substances, not covered by the earlier headings bf this Chapter and not included elsewhere in the Nomenclature; it therefore excludes, for example, ceramic products of Chapter 69.
>
> The heading covers, *inter alia*:
>
> (1) Non-electrical articles of natural or artificial graphite (including nuclear grade), or other carbons for example: filters; discs; bearings; tubes and sheaths; worked bricks and tiles; moulds for the manufacture of small articles of delicate, design (e.g., coins, medals, lead soldiers for collections).
>
> (2) Carbon fibres and articles of carbon fibres. Carbon fibres are commonly, produced by carbonising organic polymers in filamentary forms. The products are used; for example, for reinforcement.
>
> (3) Articles made of peat (for example, sheets, cylinder shells, pots for raising plants). Textile articles of peat fibre are, however, excluded (Section XI).

(4) Unfired bricks made of dolomite agglomerated with tar.

(5) Bricks and other shapes (in particular magnesite or chrorne-magnesite products), chemically bonded but not yet fired. These articles are fired during the first heating of the furnace in which they are installed. Similar products presented after firing are excluded (**heading 69.02 or 69.03**),

(6) Unfired silica or alumina vats (e.g., as used for melting glass).

(7) Touchstones for testing precious metal; these may be of natural stone (e.g.; lyddite, a hard, fine-grained dark stone resistant to acids).

(8) Paving blocks and slabs obtained by moulding fused slag without a binder, but excluding those having the character of heat-insulating goods of heading 68.06.

(9) Filter tubes of finely crushed and agglomerated quartz or flint.

(10) Blocks, slabs, sheets and other articles of fused basalt; these are used, because of their great resistance to wear, as linings for pipes, belt-conveyors, chutes for coke, coal, ores, gravel, stone, etc."

30. It was submitted that the first Explanatory Note itself prescribes that the said heading would not cover articles of stone or of other mineral substances which may be covered by the earlier headings of that Chapter. According to learned senior counsel, this itself is indicative of articles of stone falling within the ambit of CTH 6815 being those which are not used in monuments or buildings. Viewed in the aforesaid light, it was his submission that the stand as taken by the respondents is rendered wholly untenable, since handicraft articles sculpted out of stone and of the kind exported by the petitioner cannot possibly be countenanced as answering to the description of articles which are spoken of in CTH 6802.

31. Mr. Gulati then questioned the view that was expressed by the CBIC and which, according to learned senior counsel, made a broad and sweeping declaration that stone and marble handicrafts were classifiable under CTH 6802. This, according to Mr. Gulati, is an opinion expressed by the Board which is not supported by any

reasoning or detailed analysis of the two competing entries falling in Chapter 68.

32. Insofar as the Public Notice is concerned, Mr. Gulati submitted that respondent No. 6 has blindly followed and reproduced the contents of the communication of the Board dated 31 May 2019 while issuing Public Notice No. 57/2019. It was submitted that the aforesaid exercise of classification of handicrafted articles runs contrary to the consistent stand which had been taken by the respondents themselves right from 1991 and had continued even during the currency of the MEIS.

33. Mr. Gulati submitted that the stand as taken is also contrary to Notification No. 21/2018 issued by the Department of Revenue and which had defined '*handicraft goods*' as those made predominantly by hand, although they may have been worked upon to some extent by tools or machinery. It was submitted that the aforesaid notification was a clear and categorical acceptance and affirmation of the stand of the writ petitioners that stone handicraft products exported by them would fall under ITC(HS) 68159990. It was submitted that the aforesaid Notification had come to be issued after the matter had been duly discussed by the Goods and Service Tax Council and was based upon its recommendations. According to Mr. Gulati, that explanation clearly dispels all doubts that may have been possibly harboured insofar as handcrafted products were concerned.

34. Proceeding then to the audit objection itself, it was Mr. Gulati's contention that the said communication proceeds on the basis that the petitioners had wrongly classified the exported articles under ITC(HS) 68159990 with an intent to claim higher MEIS benefits. Mr. Gulati submitted that without affording even a rudimentary opportunity of

hearing, the audit objections proceed to hold the petitioners liable to refund what is described to be the undue benefits which were claimed by them under the MEIS. It is in aforesaid light that it was submitted that the audit objection clearly deprives the petitioner of even contesting the position that has been taken and the view as expressed.

35. According to learned senior counsel, the impugned communication and which is described to be a '*post clearance audit objection*' is also contrary to the spirit of Section 99A of the Customs Act. It is in the aforesaid context that Mr. Gulati drew our attention to the decisions of the Supreme Court in **Metal Forgings and Another v. Union of India and Others**[12] and **Gorkha Security Services v. Government (NCT of Delhi) and Others**[13] and where the following pertinent observations came to be rendered with respect to the ingredients of a SCN. Drawing our attention firstly to the decision in *Metal Forgings*, Mr. Gulati placed reliance upon paras 12 and 20 of the report and which are reproduced hereinbelow:-

> "**12.** It is an admitted fact that a show-cause notice as required in law has not been issued by the Revenue. The first contention of the Revenue in this regard is that since the necessary information required to be given in the show-cause notice was made available to the appellants in the form of various letters and orders, issuance of such demand notice in a specified manner is not required in law. We do think that we cannot accede to this argument of the learned counsel for the Revenue. Herein we may also notice that the learned technical member of the Tribunal has rightly come to the conclusion that the various documents and orders which were sought to be treated as show-cause notices by the Appellate Authority are inadequate to be treated as show-cause notices contemplated under Rule 10 of the Rules or Section 11-A of the Act. Even the judicial member in his order has taken almost a similar view by holding that letters either in the form of a suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note of as show-cause notices for the recovery of demand, and we

[12] (2003) 2 SCC 36
[13] (2014) 9 SCC 105

are in agreement with the said findings of the two members of the Tribunal. This is because of the fact that issuance of a show-cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show-cause notice. For this reason the above argument of the Revenue must fail.

xxxx xxxx xxxx

20. For the reasons stated above, we are of the opinion that in the absence of a show-cause notice it is not open to the Revenue to make a demand on the appellants even assuming that the contention of the Revenue in regard to classification as held by the Tribunal is correct."

36. In *Gorkha Security Services*, the Supreme Court had made the following observations, albeit in the context of blacklisting: -

"**27.** We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.

28. In the instant case, no doubt the show-cause notice dated 6-2-2013 was served upon the appellant. Relevant portion thereof has already been extracted above (*see* para 5). This show-cause notice is conspicuously silent about the blacklisting action. On the contrary, after stating in detail the nature of alleged defaults and breaches of the agreement committed by the appellant the notice specifically mentions that because of the said defaults the appellant was "as such liable to be levied the cost accordingly". It further says "why the action as mentioned above may not be taken against the firm, besides other action as deemed fit by the competent authority". It follows from the above that main action which the respondents wanted to take was to levy the cost. No doubt, the notice further mentions that the competent authority

> could take other actions as deemed fit. However, that may not fulfil the requirement of putting the defaulter to the notice that action of blacklisting was also in the mind of the competent authority. Mere existence of Clause 27 in the agreement entered into between the parties, would not suffice the aforesaid mandatory requirement by vaguely mentioning other "actions as deemed fit". As already pointed out above insofar as penalty of blacklisting and forfeiture of earnest money/security deposit is concerned it can be imposed only, "if so warranted". Therefore, without any specific stipulation in this behalf, the respondent could not have imposed the penalty of blacklisting.
>
> **29.** No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice."

37. We then proceed to take note of the more fundamental challenge which was mounted by Mr. Gulati insofar as the impugned action of the respondents seeking to review the benefits which were claimed under the MEIS was concerned. Mr. Gulati firstly took us through the provisions contained in Section 28AAA of the Customs Act and which came to be introduced in the statute by virtue of Finance Act, 2012 w.e.f. 28 May 2012. That provision is extracted hereinbelow: -

> "**28AAA. Recovery of duties in certain cases.—**
>
> (1) Where an instrument issued to a person has been obtained by him by means of —
>
> (a) collusion; or
>
> (b) wilful mis-statement; or
>
> (c) suppression of facts,
>
> for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992, [or any other law, or any scheme of the Central Government, for the time being in force, by such person] or his agent or employee and such instrument is utilised under the provisions of this Act or the rules [or regulations] made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such

utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued:

PROVIDED that the action relating to recovery of duty under this section against the person to whom the instrument was issued shall be without prejudice to an action against the importer under section 28.

Explanation 1: For the purposes of this sub-section, "instrument" means any scrip or authorisation or licence or certificate or such other document, by whatever name called, issued under the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), with respect to a reward or incentive scheme or duty exemption scheme or duty remission scheme or such other scheme bestowing financial or fiscal benefits, which may be utilised under the provisions of this Act or the rules made or notifications issued thereunder.

Explanation 2: The provisions of this sub-section shall apply to any utilisation of instrument so obtained by the person referred to in this sub-section on or after the date on which the Finance Bill, 2012 receives the assent of the President, whether or not such instrument is issued to him prior to the date of the assent.

(2) Where the duty becomes recoverable in accordance with the provisions of sub-section (1), the person from whom such duty is to be recovered, shall, in addition to such duty, be liable to pay interest at the rate fixed by the Central Government under section 28AA and the amount of such interest shall be calculated for the period beginning from the date of utilisation of the instrument till the date of recovery of such duty.

(3) For the purposes of recovery under sub-section (2), the proper officer shall serve notice on the person to whom the instrument was issued requiring him to show cause, within a period of thirty days from the date of receipt of the notice, as to why the amount specified in the notice (excluding the interest) should not be recovered from him, and after giving that person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of duty or interest or both to be recovered from such person, not being in excess of the amount specified in the notice, and pass order to recover the amount of duty or interest or both and the person to whom the instrument was issued shall repay the amount so specified in the notice within a period of thirty days from the date of receipt of the said order, along with the interest due on such amount, whether or not the amount of interest is specified separately.

(4) Where an order determining the duty has been passed under section 28, no order to recover that duty shall be passed under this section.

> (5) Where the person referred to in sub-section (3) fails to repay the amount within the period of thirty days specified therein, it shall be recovered in the manner laid down in sub-section (1) of section 142."

38. Mr. Gulati would contend that an '*instrument*' as defined, would include the MEIS authorization or certificate that was issued to the writ petitioners under the MEIS and the provisions of the **Foreign Trade (Development and Regulation) Act, 1992**[14]. According to Mr. Gulati, it is only in a case where the respondents had found that the MEIS scrip had been obtained by the petitioners by way of collusion, wilful misstatement or suppression of facts, that the proceedings impugned before us could have sustained. According to Mr. Gulati, there is no allegation laid against the writ petitioners which would evidence collusion, wilful misstatement or suppression of facts. In view of the aforesaid, learned senior counsel submitted that the entire action as initiated by the respondents is liable to be quashed on this ground alone.

39. Mr. Gulati then submitted that in the absence of any determination by a competent authority on the issue of whether the MEIS scrip could be said to have been obtained by way of collusion, wilful misstatement or suppression, the action as initiated by the respondents cannot be sustained. Learned senior counsel submitted that even the audit objection letter as issued would not be liable to be viewed as referable to Section 28AAA, since the same in any event would be traceable only to the power to conduct an audit and which stands embodied in Section 99A. An audit, according to Mr. Gulati, would inherently be guided by considerations which would be wholly independent and distinct from those which could form the subject

[14] FTDR Act

matter of an inquiry or determination under Section 28AAA. Tested on that score also the petitioners, according to Mr. Gulati, are entitled to succeed.

40. It was then submitted that the MEIS scheme and the benefits claimed by the writ petitioners thereunder is traceable to the provisions made by the Union under the provisions of the FTDR Act. Mr. Gulati firstly took us through the provisions embodied in Sections 3 and 5 of the FTDR Act and which are extracted hereinbelow: -

> "**3. Powers to make provisions relating to imports and exports.—** (1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.
>
> (2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the [import or export of goods or services or technology]:
>
> [Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.]
>
> (3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.
>
> [(4) Without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder.
>
> [**5. Foreign Trade Policy.—**The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy:
>
> Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions,

modifications and adaptations, as may be specified by it by notification in the Official Gazette."

41. It was contended by Mr. Gulati that a prohibition, restriction or regulation of import or export of goods would be primarily governed by the orders which the Union may promulgate under the FTDR Act. According to Mr. Gulati, as long as the export is shown to be compliant with the regulations as framed under the FTDR Act, there would exist no jurisdiction for the customs authorities to question the classification of goods or the claim of benefits under a particular scheme formulated in terms thereof.

42. Mr. Gulati submitted that as would be evident from a reading of Section 5, the FTP which the Union Government frames is clearly imbued with statutory flavour and thus all provisions forming part thereof being liable to be viewed as prescriptions standing at par with those which may otherwise and ordinarily form part of any statutory enactment or subordinate legislation.

43. Taking us through the FTP 2015-2020 itself, Mr. Gulati invited our attention to Para 2.57 thereof and which reads as follows:-

"**2.57 Interpretation of Policy**

(a) The decision of DGFT shall be final and binding on all matters relating to interpretation of Policy, or provision in Handbook of Procedures, Appendices and Aayat Niryat Forms or classification of any item for import export in the ITC (HS).

(b) A Policy Interpretation Committee (PIC) may be constituted to aid and advise DGFT. The composition of the PIC would be as follows:

(i) DGFT: Chairman

(ii) All Additional DGFTs in Headquarters : Members
(iii) All Joint DGFTs in Headquarters looking after Policy matters: Members
(iv) Joint DGFT (PRC/PIC): Member Secretary
(v) Any other person/representative of the concerned Ministry / Department, to be co-opted by the Chairman."

44. According to learned senior counsel, Para 2.57 of the FTP 2015-2020 is a recognition and acknowledgement of the well-settled position of eminence which stands conferred upon the **Director General of Foreign Trade**[15] and other officers and authorities enjoined with administering and regulating all aspects pertaining to the FTP as statutorily framed. The submission in essence was that in the absence of the DGFT having raised any doubt or having questioned the eligibility of the writ petitioners to claim benefits under the MEIS, it would be wholly impermissible for the customs authorities to undertake such an inquiry. In support of the aforesaid submission, Mr. Gulati relied upon various decisions which are noticed hereinafter.

45. Mr. Gulati firstly referred to the decision of the Supreme Court in **Zuari Industries Limited vs Commissioner of Central Excise & Customs**[16]. *Zuari Industries* was a case where the Supreme Court was called upon to evaluate the stand of the customs authorities who had sought to question the essentiality certificate which had been granted to the importer in terms of the then existing Project Import Regulations, 1986. The essentiality certificate was, in terms of those Regulations, required to be issued by the appropriate Ministry in the Union Government enabling a person to claim benefits of project import assessment and in the facts of that case claim a right to import goods required for establishment of a fertilizer plant at a '*nil*' rate of duty. The customs authorities in *Zuari Industries* had sought to doubt whether a power plant which had been imported by virtue of the recognition accorded to that import in terms of the essentiality certificate would be eligible for benefits. The customs authorities had sought to contend that

[15] DGFT
[16] (2007) 14 SCC 614

the import of a power plant would not constitute an integral part of a fertilizer project and thus not entitled to the benefits of project import assessment.

46. While negating that contention, the Supreme Court had pertinently observed as follows: -

> "**13.** Firstly, on the facts we find that the assessee had given to the sponsoring Ministry its entire project report. In that report they had indicated that for the expansion of the fertilizer project they needed an extra item of capital goods, namely, 6 MW captive power plant. In their application, the assessee had made it clear that the fertilizer project was dependent on continuous flow of electricity, which could be provided by such captive power plant. Therefore, it was not open to the Revenue to reject the assessee's case for nil rate of duty on the said item, particularly when the certificate says so. In the judgment of this Court in *Tullow India Operations Ltd.* this Court held that essentiality certificate must be treated as a proof of fulfilment of the eligibility conditions by the importer for obtaining the benefit of the exemption notification. We may add that, the essentiality certificate is also a proof that an item like captive power plant in a given case could be treated as a capital goods for the fertilizer project. It would depend upon the facts of each case. If a project is to be installed in an area where there is shortage of electricity supply and if the project needs continuous flow of electricity and if that project is approved by the sponsoring Ministry saying that such supply is needed then the Revenue cannot go behind such certificate and deny the benefit of exemption from payment of duty or deny nil rate of duty.
>
> **xxxx xxxx xxxx**
>
> **17.** The essentiality certificate given by the sponsoring Ministry has treated captive power plant, in this case, as "capital goods" along with 13 other items. The assessee has also treated the captive power plant as one of the capital goods required for the expansion of the fertilizer project. In the above circumstances, all the items in the list annexed to the certificate have been certified and recommended by the sponsoring Ministry as the entire capital goods required for the substantial expansion of the fertilizer project. Therefore, in our view, the assessee is right in its contention that, in this case, 6 MW captive power plant is one of the items out of 14 items constituting capital goods required for the substantial expansion of the fertilizer project and, therefore, it fell under Serial No. 226(i) as goods required for the fertilizer project entitled to the benefit of nil rate of duty."

47. Proceeding along this line, Mr. Gulati then invited our attention to the decision of the Supreme Court in **Titan Medical Systems (P)**

Ltd. v. Collector of Customs, New Delhi[17]. *Titan Medical* was a decision rendered in the context of an advance license for import which was held by the appellant assessee and its claim for the grant of protection in terms of an exemption notification. The authorities of customs appear to have doubted the eligibility of the appellant assessee to claim those exemptions and thus question the grant of the license itself. Negating that stand, the Supreme Court in *Titan Medical Systems* held thus: -

> "**12.** As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement for issuance of a licence that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a licence, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. To be, noted that the licensing authority has taken no steps to cancel the licence. The licensing authority has not claimed that there was any misrepresentation. Once an advance licence was issued and not questioned by the licensing authority, the Customs Authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps in that behalf."

48. Proceeding then to the interplay between the FTDR Act and the Customs Act as also the extent of the jurisdiction which authorities independently empowered in terms of those statutes could exercise, Mr. Gulati had submitted that absent any adverse finding with respect to eligibility under the MEIS having been rendered by the competent authorities under the FTDR Act, it would be wholly impermissible for the customs authorities to draw the proceedings impugned before us.

49. In order to buttress the aforesaid submission, Mr. Gulati firstly

[17] (2003) 9 SCC 133

relied upon a decision of the Gujarat High Court in **Alstom India Ltd. v. Union of India and Another (No. 2)**[18] and where the said High Court had held as follows:-

> "**31.** On going through the provisions of the Foreign Trade (Development and Regulation) Act, 1992, we find that those do not grant power to the respondent No. 2 or its subordinates to redetermine or reverify the deemed export benefits if such benefits have been approved or granted as per the provisions of the Foreign Trade (Development and Regulation) Act, 1992 except by way of review as provided in Section 16. In the absence of any power under Foreign Trade (Development and Regulation) Act, 1992, the Respondent No. 2 or its subordinates cannot assume quasi-judicial power for instance, the power to redetermine or reverify under the administrative guidelines i.e. paragraph 7 of the ANF 8 Form. Therefore, by virtue of paragraph 7 of the ANF 8, the respondent No. 2 is deriving the quasi-judicial power which is beyond the provisions of Foreign Trade (Development and Regulation) Act, 1992. We have already pointed out that according to section 6 of the Foreign Trade (Development and Regulation) Act, 1992, the respondent No. 2 or the officer subordinate to him cannot usurp the power under sections 3, 5, 15, 16 and 19 of the FTDR Act. According to section 3, it is for the Central Government which may, by order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. The Central Government may also, by order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology. According to sub-section (3) of section 3 all goods to which any order under sub section (2) of the said section applies should be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly. According to section 5, it is for the Central Government which may, from time to time, formulate and announce, by notification In the Official Gazette, the Foreign Trade Policy and may also, in like manner, amend that policy. The proviso to the said section provides that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette."

[18] 2014 SCC OnLine Guj 15952

50. A more elaborate consideration on the interplay between the two statutes with which we are concerned appears in a judgment rendered by a Division Bench of our Court in **Simplex Infrastructure Ltd. v. Union of India and Others**[19]. Mr. Gulati drew our attention to the following passages of that decision and which had noticed the judgment of the Gujarat High Court in *Alstom*:-

> "**6.** At this juncture, the attention of the court is also drawn to the decision of the Gujarat High Court in Alstom India Ltd. v. Union of India (No. 2) [2014] 26 GSTR 449 (Guj), Special Civil Application No. 11031 of 2013, where various provisions of the policy were challenged. One of the ground of challenge in that case was that (page 458 in 26 GSTR):
>
> > "The Foreign Trade (Development and Regulation) Act, 1992 or the Foreign Trade Policy does not grant power to respondent No. 2 and its subordinates to redetermine or reverify the deemed export benefits once such benefits have been approved or granted as per the provisions of the Foreign Trade Policy. In the absence of power under the Foreign Trade (Development and Regulation) Act, 1992 or the Foreign Trade Policy, respondent No. 2 and its subordinates cannot assume quasi-judicial power such as power to redetermine or reverify under administrative guidelines, i.e., paragraph 7 of the ANF 8 Form. Therefore, paragraph 7 of the ANF 8 is usurpation of quasi-judicial power by respondent No. 2 and its subordinates and thus, travels beyond the provisions of the Foreign Trade (Development and Regulation) Act, 1992 as well as Foreign Trade Policy and hence, liable to be struck down."
>
> **7.** The court accepted the submission, and held that there is no power to review previous refunds, otherwise than under section 16 of the Foreign Trade (Development and Regulation) Act. The court held as follows (page 512 in 26 GSTR) :
>
> > "We find that respondent No. 2, namely, the Director General of Foreign Trade, through paragraph 8.3.6 of the Handbook of Procedures has incorporated by reference the provisions of the Duties Drawback Rules mutatis mutandis to the Foreign Trade Policy and Handbook of Procedures. We find substance in the contention of Mr. Ghosh that the Handbook of Procedures is nothing but an administrative guideline as would appear from a combined reading of

[19] 2014 SCC OnLine Del 7747

paragraph 2.4 of the Foreign Trade Policy and section 6 of the Foreign Trade (Development and Regulation) Act, 1992. We have already pointed out that section 3 of the Foreign Trade (Development and Regulation) Act, 1992 grants power to respondent No. 1 to make provisions relating to imports and exports and respondent No. 1 under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 can formulate and announce the Foreign Trade Policy. It further appears from section 6(3) of the Foreign Trade (Development and Regulation) Act, 1992 that of the powers

conferred upon respondent No. 1 under the Foreign Trade (Development and Regulation) Act, 1992, except those provided in sections 3, 5, 15, 16 and 19, all others can be delegated to respondent No. 2 by order published in the Official Gazette. We find that respondent No. 2 through paragraph 8.3.6 of the Handbook of Procedures has sought to incorporate the provisions of the Duties Drawback Rules to deemed exports mutatis mutandis which is not permissible in view of the fact that no power has been granted to the Director General of Foreign Trade under the Foreign Trade (Development and Regulation) Act, 1992 to legislate either directly or by way of incorporation by reference. It is now a settled law that the separation of power between the Legislature and executive forms part of the basic structure of the Constitution of India and any attempts by the executives to legislate without appropriate authority under the law would amount to violation of the basic structure of the Constitution of India. The power to legislate is incorporated under article 246 of the Constitution of India and such power has been conferred on Parliament and the State Legislature. Moreover, the power to frame Duties Drawback Rules under the Foreign Trade (Development and Regulation) Act, 1992 can be legislated by the Central Government only in exercise of power conferred under section 19 in the manner prescribed under the Foreign Trade (Development and Regulation) Act, 1992 and the same cannot be delegated to respondent No. 2 as expressly prohibited by section 6 (3) of the above Act.

We, thus, find that any attempt by the executives to legislate

without the authority of law should be branded as a colourable device and therefore, the same is in violation of article 246 of the Constitution of India. If we accept the contention of Mr. Raval that respondent No. 2 is authorised to incorporate the Duties Drawback Rules by reference, it would amount to acceptance of the proposition that respondent No. 2 is authorised to deal with under the Foreign Trade (Development and Regulation) Act, 1992, the

similar matters relating to duty and tax refunds as provided under section 75 of the Customs Act, section 37 of the Central Excise Act and section 93A read with section 94 of the Finance Act, 1994 although not authorised under the Foreign Trade (Development and Regulation) Act, 1992. We are in agreement with Mr. Ghosh, the learned advocate for the petitioner, that the conferment of such power to respondent No. 2 to adopt the Duties Drawback Rules without any power to legislate either expressly or otherwise would amount to permitting the levy or collection of tax without authority of law in violation of article 265 of the Constitution of India ...

On going through the provisions of the Foreign Trade (Development and Regulation) Act, 1992, we find that those do not grant power to respondent No. 2 or its subordinates to redetermine or reverify the deemed export benefits if such benefits have been approved or granted as per the provisions of the Foreign Trade (Development and Regulation) Act, 1992 except by way of review as provided in section 16. In the absence of any power under the Foreign Trade (Development and Regulation) Act, 1992, respondent

No. 2 or its subordinates cannot assume quasi-judicial power for instance, the power to redetermine or reverify under the administrative guidelines, i.e., paragraph 7 of the ANF 8 Form. Therefore, by virtue of paragraph 7 of the ANF 8, respondent No. 2 is deriving the quasi-judicial power which is beyond the provisions of the Foreign Trade (Development and Regulation) Act, 1992. We have already pointed out that according to section 6 of the Foreign Trade

(Development and Regulation) Act, 1992, respondent No. 2 or the officer subordinate to him cannot usurp the power under sections 3, 5, 15, 16 and 19 ...

Section 15 of the Foreign Trade (Development and Regulation) Act, 1992 provides for appeal and, according to the said section, any person aggrieved by any decision or order made by the adjudicating authority may prefer an appeal where the decision or order has been made by the Director General, to the Central Government; or where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the adjudicating authority authorised by the Director General to hear the appeal within a specified period mentioned therein. The said section, however, gives power to the appellate authority to condone the delay in preferring the appeal on sufficient cause being shown. The said section puts certain other restrictions on preferring the appeal.

> Section 16, on the other hand, authorises the Central Government, in the case of any decision or order made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, to act on its own motion or otherwise, by calling for and examining the records of any proceeding for the purpose of satisfying itself or himself, as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit. The proviso, however, says that no decision or order shall be varied under section 16 so as to prejudicially affect any person unless such person has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied and has been given a reasonable opportunity of making representation and, if he so desires, of being heard in defence."
>
> **8.** In this case, the impugned order-in-original, which acted upon the decision taken by the Policy Interpretation Committee, is of the Joint Director General of Foreign Trade, dated March 30, 2012. Clearly, in terms of the decision in Alstom (2014] 26 GSTR 449 (Guj), with which this court concurs, there can be no review of an earlier refund except in accordance with the provision of section 16 of the Foreign Trade (Development and Regulation) Act which only permits the Director General of Foreign Trade or the Central Government (in case the original order was by the Director General of Foreign Trade) to exercise the power of review. The declaration in paragraph 7 of ANF 8, that Simplex will return any excess duty refunded, cannot eclipse the narrow statutory power to review provided under the Act. Thus, the impugned order of March 30, 2012, and subsequent recovery proceedings on the basis of this order, exceeds the authority granted by law under the Foreign Trade (Development and Regulation) Act. Taking this view of the matter, the court does not return any findings as to the legality of the decisions of the Policy Interpretation Committee, or the legality of paragraph 2.3 of the Policy."

51. The authority and jurisdiction of customs authorities to question a benefit claimed under the FTDR Act or to delve into issues of classification then appears to have fallen for consideration of the Allahabad High Court in **PTC Industries Ltd. v. Union of India and Others**[20]. The said High Court, after noticing Para 2.3 of FTP 2004 – 2009 which vested DGFT with the authority to rule on all questions or

[20] 2009 SCC OnLine All 2138

allay doubts with respect to the interpretation of any provision in the FTP, had pertinently observed: -

> "**16.** The scheme of the Customs Act, 1962 and the Foreign Trade (Development and Regulation) Act, 1992, provide that whereas the officers on the check-post or port and the point of entry and exit, have powers to prevent or detect the illegal exports of goods, and also confiscate the goods attempted to be improperly exported, which includes dutiable or prohibited goods, they do not have powers to question the classification of goods. If a dispute arises as to classification of the goods entitled for the DEPB, the powers for adjudication for penalty or confiscation, in the event of contravention of the provisions of the Foreign Trade (Development and Regulation) Act, 1992, or any Rules or order made thereunder, is with DGFT. Section 12 of the Act provides that powers to impose penalty or confiscation under section 11 of the Act does not prevent the imposition of any other punishment, under any other law for the time being in force. If a person is liable under any other law, which may include the Customs Act, 1962 for levy of penalty or confiscation, the same may be in addition to penalty or confiscation provided under section 11 of the Foreign Trade (Development and Regulation) Act, 1992 and is also in addition to the suspension or cancellation of the licence under the Act.
>
> **17.** The Department of Revenue, Ministry of Finance, Government of India in its circular dated June 3, 1997 had clarified that the role of the Customs authorities in the matter of the DEPB scheme introduced in the new export and import policy for the period 1997-2002 was confined to verification of the correctness of exporter's declaration regarding description, quantity, and FOB value of the export product. It is for the licensing authority to ensure that the credit is permitted at the correct rate as notified by the DGFT. The word "description" occurring in this circular, does not extend to adjudication on description or classification. If there is any doubt as to the description or classification at the time of verification, the matter has to be referred to the DGFT for declaration under section 13 of the Foreign Trade (Development and Regulation) Act, 1992. If the DGFT decides after giving an opportunity to the owners of the goods that the goods do not meet the description and classification for DEPB, the owner of the goods may, in addition to the confiscation and penalty under the Foreign Trade (Development and Regulation) Act, 1992, be punished with penalty under the Customs Act, and that he may also be liable for suspension or cancellation of the licence. The customs authority, however, are not entitled to adjudicate over description and classification of the goods for DEPB.
>
> **18.** In Pradip Polyfils Pvt. Ltd. v. Union of India (2004) 173 ELT 3 (Bom) a somewhat similar question arose for consideration. The

petitioner had exported filter plates and accessories made with polypropylene under the DEPB Scheme through the Bombay coastal area at Bombay for which DEPB licences were issued by the DGFT Surat. The customs authorities rejected the claim for credit of duty on the grounds that the goods exported did not fall under Chapter 39 of ITC (HS) classification of export import item, which is a precondition for claiming credit under SI. No. 14, of Public Notice No. 6, dated April 15, 1998. It was not in dispute that the DEPB licences were issued against export of polypropylene filter plates and accessories as contained in the shipping bills, which was required to be forwarded to the customs for verification of the particular set out in the shipping bills and necessary endorsements. The verification of the customs authorities under Circular No. 15 of 1997 dated June 3, 1997 was restricted to the description, quantity, and FOB value of the export products set out in the shipping bills. The customs authorities did not allege that there was any discrepancy in the description, quantity and FOB value. Under the circumstances, the Bombay High Court held that when DEPB licence is issued, the petitioners are entitled to DEPB in respect of polypropylene filter plates and accessories. The customs authorities were not justified in rejecting the claim on the ground that the articles exported were not covered under Chapter 39 ITC (HS) classification. Whether an item falls under Chapter 39 of ITC classification or not is for the licensing authority to consider before issuing the licence. Even after issuance of the licence the licensing authority has powers to decide if the licenses were wrongly issued. The orders of the customs authorities were quashed and set aside.

19. In this case the customs authorities alleged on the basis of a report of CRCL that the goods produced for export were not manufactured through forging process, but were welded or clipped. The report of the CRCL was obtained ex parte without issuing notice or associating the petitioner in the inspections. The report verifies that the "sample" appears to be machine part made by different components by welding or clipping. The different components of the sample conform to the composition of stainless steel, 18/8, except one component (nut part) ; one component (nut part) composition is other than stainless steel. The carbon contained in sample is less than 1.2% by weight, in each component of the sample. The description of the goods at the time of presenting them for export was not reported by CRCL to be non-conforming to the classification of the goods. The contents of the stainless steel was not in dispute. The customs authorities were concerned with the fact whether the goods meet the licence classification, namely, whether the DE-343-5, 19 inches raised hatch (SS) Code No. 74 964, was required to be a forged machine part or a fabricated machine part in which different components could be welded or clipped. The goods would not become prescribed goods just because they did not meet the

classification, which according to the customs authorities could only be obtained by forging and not by welding or clipping. The customs authorities have thus observed on their own satisfaction that the goods do not meet the classification for which the petitioner was given licence for DEBP credit.

20. It is not a case of misdescription or false declaration of goods. At best it is case in which it was to be found whether the welding or clipping could be included, or can be taken to be forging, when according to the DGFT the hatch was to be made predominantly of stainless steel of not less than 90 per cent. by weight. It is not the case of the customs authorities that the item produced for consideration before the DGFT and subjected to the DEPB Committee (inter-ministerial committee) which discussed the components was not the same, which was produced for export. The Committee of Experts in the office of DGFT included the representatives of Ministry of Steel; Joint DGFT Industrial Advisory, Joint Industrial Advisor and DGFT and three other DGFT. The representatives of Department of Steel explained the forging process in general and that the committee opined that the item produced was licensed item falling in the classification SI. No. 530B of the Schedule of DEPB.

21. On the aforesaid discussion, we find from the scheme of the Customs Act, 1962 and the Foreign Trade (Development and Regulation) Act, 1992 that whenever a dispute may arise as to the classification of the goods, other than its description, quantity and FOB value, the customs authorities have to refer the dispute for adjudication to DGFT under section 13 of the Act. It is only if the DGFT as the licensing and also adjudicating authority decides against the licensee, that the customs authorities will get jurisdiction to confiscate and levy penalty on such goods."

52. The view which was expressed by the Allahabad High Court also finds resonance in a decision handed down by the Bombay High Court in **Autolite (India) Ltd. v. Union of India**[21]. Mr. Gulati relied upon the following observations as appearing in that decision: -

"**8.** Having heard the Counsel on both the sides, we are of the opinion that the Customs authorities below were not justified in refusing to allow the duty free clearance of the goods on the ground that die steel imported by the petitioner is capital goods and capital goods did not fall within the scope of the Notification No. 116/1988. Admittedly, under the advance licence issued, the petitioner was entitled for duty free import of die steel as a material required in the

[21] 2003 SCC OnLine Bom 1313

manufacture of export product. Once the Licensing Authority has accepted that die steel is a material required in the manufacture of the export product, it is not open to the Customs Authorities to go behind the licence and deny duty free clearance of the goods. The exemption Notification No. 116/1988, dated 30th March, 1988 specifically states that the materials that are required to be imported for the purpose of manufacture of resultant products shall include such items as are imported into India against the advance licence for subsequent exportation. In the instant case, the licence specifically states that the petitioner is entitled to import die steel as a material required for the manufacture of resultant products. The Apex Court in the case of *Titan Medical Systems Pvt. Ltd. v. Collector of Customs* reported in 2003 (151) E.L.T. 254 (S.C.) has held that once an advance licence is issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegations that there was any misrepresentation. In the present case also, the licensing authorities have not found fault with the statement of the petitioner that the die steel is a material required in the manufacture of resultant product and have granted advance licence to the petitioner. Assuming that the licensing authorities have wrongly accepted the statement of the petitioner, so long as the licence is valid and subsisting the import of materials set out in the advance licence are liable to be cleared duty free, under Notification No. 116 of 1988 and the Customs authorities cannot deny duty free clearance of the materials set out in the licence. It is open to the Customs authorities to sit in appeal and hold that the licensing authorities have erroneously endorsed advance licence to permit import of die steel as a material required in the manufacture of the resultant product. In this view of the matter, we are of the opinion that the impugned orders passed by the Customs authorities below cannot be sustained."

53. In yet another decision of the Bombay High Court in **Commissioner of Customs (E.P.) v. Jupiter Exports & Ors.**[22], the following pertinent observations came to be rendered in the context of a license issued by the DGFT and whether the same could be appraised or inquired into by the authorities of customs. Answering the aforesaid in the negative, the Bombay High Court had held as follows: -

"**21.** With regard to the issue as to whether a license issued by the D.G.F.T. is valid on not is an issue that has to be determined by the D.G.F.T. and not the Customs Authorities. It is now well settled that until the licenses are cancelled by the licensing authority they are

[22] 2007 SCC OnLine Bom 467

> deemed to be valid. The Hon'ble Supreme Court in case of *(Titan Medical System Pvt. Ltd. v. Collector of Customs, New Delhi)* , 2002 DGLS 895 : 2003 (151) E.L.T. 254 (S.C.) has held that once an advance licence was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was no misrepresentation. If there was any misrepresentation, it was for the licensing authorities to take steps in that behalf. In the present case, the licensing authority sought to cancel the licenses, but in appeal, the order was set aside and remanded for *denovo* consideration. No further order has been passed thereafter. In the circumstances, till today the licenses are valid. Even if the license was subsequently cancelled, the Supreme Court in the case of (*Sampat Raj Duggar v. Union of India*) , 1992 (58) E.L.T. 163 (S.C), following (*East India Commercial Co. Ltd. v. Collector*), 1962 DGLS 206 : 1963 (3) S.C.R. 338 has held that on the date of the import the goods were covered by a valid import license. The subsequent cancellation of a licence is of no relevance nor does it retrospectively render the import illegal."

C. SUBMISSIONS OF THE RESPONDENTS

54. Appearing for the respondents, learned counsels at the outset drew our attention to the procedure of self-assessment under the Customs Act, which finds place in Section 17, whereby importers and exporters are required to self-assess the duty leviable on the goods so imported or exported. In the event of any verification, examination or testing of goods revealing that the self-assessment so done was incorrect, Section 17(4) vests the 'proper officer' with the right to re-assess the duty so leviable on such goods. Section 17 requires importers and exporters to make a conscious effort to declare the correct classification, applicable rate of duty, value, benefit of exemption notification claimed, if any, in respect of imported or exported goods while presenting their respective Bills of Entry or shipping bills. However, according to the respondents, the petitioners have deliberately run afoul of the requirement under Section 17 to correctly self-assess their exported goods in order to obtain MEIS benefits that they were not entitled to.

55. According to learned counsel, MEIS was a scheme intended to incentivise exporters of certain kinds of goods and the benefits whereof would be accorded to products exported under a certain CTH and calculated based on the FOB value of goods exported. The benefits afforded to exporters under the MEIS was thus provided in the form of scrips of a certain value, constituting a certain percentage of the FOB value of the goods so exported. This scrip could thereafter be utilised for the payment of duty on goods imported by the exporters of a value equivalent to that of the scrip. In the alternative, the scrip could have also been sold by exporters to other importers who are entitled to use the same for payment of import duty.

56. The petitioners, according to learned counsel, had been exporting handicraft articles of stone and marble classifying the same under CTH 6815 only with the intent of illegally obtaining benefits under the MEIS. Learned counsel based his submission upon the purported "*intelligence*" received by the respondents that "*certain unscrupulous exporters*" were deliberately misclassifying their export goods with the view to obtain benefits under the MEIS scheme. It was therefore the contention of learned counsel that the petitioner had, in contravention of Section 17, deliberately misclassified their goods under ITC(HS) 68159990 so as to obtain reward rates under the MEIS that they were not entitled to.

57. The factum of the stated misclassification being deliberate was further corroborated, as per learned counsel, by the factum of the petitioner classifying the exported goods "*correctly*" at the Nhava Sheva Port under CTH 6802. It was on the basis of this "*intelligence*" that various summons had come to be issued to the writ petitioner.

58. Learned counsel submitted that the challenge made to the legality of the summons so issued should not be countenanced bearing in mind the undisputed fact that the summons had been issued by gazetted officers under Section 108. It was further contended that since the summons so issued were not established to have transgressed any statutory provision this Court would be justified in refusing to interfere with the same.

59. Learned counsel additionally drew our attention to Section 97 of the Finance Act, 2022 which had proposed changes in the Customs Act and which essentially stated that "*anything done or any duty performed or any action taken or purported to have been taken*" under the Customs Act as it stood prior to its amendment shall be "*deemed to have been validly done*" and that any notifications issued shall be "*deemed to have been validly issued for all purposes*". The respondents further contended that notwithstanding any challenge made to the constitutional validity of the provisions of Finance Act, 2022, this would not constitute a valid ground to prevent statutory authorities from exercising their powers of enquiry and investigation.

60. We may note in this regard that although the writ petitioners had questioned the authority of the respondents on grounds which are refuted by learned counsel for the respondents and noticed above, the same would no longer survive for consideration in light of the recent decision of the Supreme Court in **Commissioner of Customs Vs. Canon India Pvt. Ltd**[23]. We, therefore, do not propose to deal with this aspect.

61. Learned counsel, in response to the arguments put forth by the

[23] 2024 SCC OnLine SC 3188

petitioner with regard to the audit objection letter dated 18 November 2019 being ultra-vires Section 99A, contended that the legislative intent behind the introduction of Section 99A was to provide a statutory framework for the conduct of a post-clearance audit and that the **Customs Audit Regulations, 2018**[24] were introduced appointing customs officers of specified ranks for the purpose of carrying out audits under Section 99A. The said officers are statutorily empowered to send SCNs' based on the findings of an audit conducted by a proper officer. Learned counsel submitted that the proceedings initiated by way of the audit objection and the enquiries made on the basis of intelligence gathered by customs officials were distinct and independent and ought not be conflated with the other. Accordingly, learned counsel argued that the submissions addressed by the writ petitioners with regards to the untenability of the audit objection letter in the absence of any SCN is misconceived.

62. Turning then to the issue of the purported deliberate misclassification of goods by the petitioner, learned counsel placed reliance upon the CBIC communication dated 31 May 2019 and the Public Notice No. 57/2019 to buttress his submissions. Learned counsel submitted that since the exported goods of the petitioner were made of natural stone, which is covered by CTH 6802, the classification of those goods under CTH 6815 would be inevitably foreclosed, particularly when CTH 6815 covers those articles of stone or other mineral substances that are "*not covered by earlier headings and are not included elsewhere in the nomenclature*". Therefore, if articles of natural stone as exported by the petitioner are in fact explicitly covered under CTH 6802, it would necessarily follow that CTH 6815, which

[24] Audit Regulations 2018

encompasses substances that are not covered by any other nomenclature, would not be applicable. It is in the aforesaid backdrop that the respondents drew our attention to the powers vested in customs officers under sub-section (4) of Section 17 to re-assess the duties on the classified imported or exported goods in the event of the importer or exporter failing to declare the correct classification in their respective self-assessed shipping bills or bills of entry.

63. Learned counsel accordingly took the position that notwithstanding the right of the petitioner to self-assess the goods to be exported, the ultimate authority to adjudge the correct classification of goods exported under the **Customs Tariff Act, 1975**[25] vests with the customs officer and no other.

64. The role of Respondent No. 11, the **Export Promotion Council for Handicrafts**[26], was explained as being limited to providing its members with guidance in respect of classification of goods imported or exported. However, this according to learned counsel would not detract from the authority of the customs officer to question the classification of goods. That according to learned counsel is a power which the statute places squarely within the domain of customs officers.

D. ASSESSMENT UNDER THE CUSTOMS AND FTDR ACT

65. In order to evaluate the rival submissions noticed above, it would be appropriate to firstly deal with the scope of the assessment power that stands conferred upon the competent authorities under the FTDR Act and the Customs Act. While examining the ambit and reach of the two statutes in question, if we were to turn our gaze firstly upon the Customs Act, it would be important to firstly take note of how that

[25] Tariff Act
[26] EPCH

statute proceeds to define the word 'assessment'. Section 2(2) as it stands presently reads as follows:-

> "**2. Definitions.**
>
> **xxxx xxxx xxxx**
>
> [(2) ―assessment means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to—
>
> (a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;
>
> (b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;
>
> (c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;
>
> (d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;
>
> (e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;
>
> (f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods,
>
> and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;]"

66. The provision as it exists in its present avatar came to be introduced and inserted in the Customs Act by virtue of Finance Act, 2018. However and prior to those amendments being introduced, the word 'assessment' was defined as follows: -

> "(2) "assessment" includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;"

67. As is manifest from the above, a process of 'self-assessment' was ordained to form part of an 'assessment' as contemplated under the

Customs Act. This change had essentially come to be introduced in 2011 and pursuant to which self-assessment was acknowledged to be one of the modes of assessment as contemplated under the Customs Act. The procedure for assessment of duty is prescribed in Section 17 of that enactment. We deem it apposite to extract hereinbelow a table which would highlight the various amendments which have been made to that provision from time to time and as it has come to be modified from 2011 and onwards: -

SECTION 17: PRE-AMENDMENT	**SECTION 17: POST-AMENDMENT**
Substituted by the Finance Act, 2011, w.e.f. 8-4-2011. Prior to its substitution, section 17, as amended by the Taxation Laws (Amendment) Act, 2006, w.e.f. 13-7-2006, read as under: "17. *Assessment of duty*.- (1) After an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer. (2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed. (3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such	**[Assessment of duty.** **17.** (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods. (2) The proper officer may verify [*the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1)*] and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary. [**Provided** *that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.*] [(3) For [*the purposes of verification*] under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document

ascertainment which it is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information. (4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or other wise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty. (5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefor under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be."	or furnish such information.] (4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods. (5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter [***] and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be. (6) [***] *Explanation*.—For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.]

68. For the purposes of the question which stands posited for our consideration, suffice it to note that post the introduction of a system of

self-assessment being adopted and thus a bill of entry as submitted being liable to be accepted unless questioned in accordance with the procedure stipulated in Section 17, the declaration as made by the importer or the exporter, as the case may be, attains finality unless refuted or reopened in accordance with the statutory provisions enshrined in the Customs Act. It was in extension of the said power that the proper officer stood empowered to require the importer or the exporter to produce all relevant material and which may have a bearing on the duty leviable for its consideration. Section 17 also confers a power on the proper officer to subject the goods to verification and testing and thus evaluate the correctness of the disclosures made in the course of self-assessment. In terms of Section 17(4), if it were found on verification, examination or testing that the self-assessment had not been undertaken correctly, the proper officer stands empowered, without prejudice to any other action that it could have taken, to reassess the duty leviable on goods.

69. Prior to the amendments which came to be introduced in Section 17 by virtue of Finance Act, 2018, the Proviso to Section 17(2) while identifying the criteria relevant for selection of cases for purposes of verification, had recognised that power being guided by factors such as the valuation of goods, classification, exemption or concessional duties availed in terms of a notification issued under that Act. The Proviso had at the relevant time and prior to the passing of Finance Act, 2018 included the following phraseology "*regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefore under this Act*".

70. Section 17 also included a sub-section (6) in terms of which a

proper officer was empowered to undertake an audit in respect of duty in case it had failed to undertake a reassessment or pass a speaking order in respect thereof. The aforesaid sub-section (6) as it existed in Section 17 came to be omitted by Finance Act, 2018. Parallelly, Finance Act, 2018 inserted Section 99A and which is extracted hereinbelow: -

> "**99A. Audit.**
>
> The proper officer may carry out the audit of assessment of imported goods or export goods or of an auditee under this Act either in his office or in the premises of the auditee in such manner as may be prescribed.
>
> *Explanation*: For the purposes of this section, "auditee" means a person who is subject to an audit under this section and includes an importer or exporter or custodian approved under section 45 or licensee of a warehouse and any other person concerned directly or indirectly in clearing, forwarding, stocking, carrying, selling or purchasing of imported goods or export goods or dutiable goods."

71. The Supreme Court, in a batch of appeals in **ITC Ltd. v. Commissioner of Central Excise, Kolkata IV**[27] had an occasion to deal with the issue of whether refund applications against assessed duty could be entertained in the absence of any challenge made to an order of assessment. The lead appellant was a paper manufacturer that had been paying duty on the paper cleared from its factory and had filed a refund claim in respect of duty paid by it during the period of July 2001 to March 2002 in light of the exemption Notification No. 67.95-CE, which it had not been aware of at the relevant time. However, the said refund application came to be rejected and which lead to the filing of an appeal before the Supreme Court. The Supreme Court, while deliberating whether self-assessment falls within the ambit of assessment as envisaged under Sections 2(2) and 17(1) of the Customs

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Act prior and post the amendment of 2011, rendered the following pertinent observations:-

> "**32.** Coming to the procedure of assessment of duty as prevailed before the amendment of the Act prior to the amendment made in Section 17(1) by the Finance Act of 2011, the imported goods or exported goods were required to be examined and tested by the proper officer. After such examination, he had to make an assessment of the duty, if any, leviable on these goods. Under sub-section (3) of Section 17, the proper officer was authorised to require the importer, exporter or any other person to produce any contract, broker's note or any other document as specified in the proviso and to furnish any required information. Notwithstanding that the statements made in the bill of entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it was found subsequently on examination or testing of the goods or otherwise that any statement in such bill of entry or document or any information so furnished was not true, he could have proceeded to reassess the duty. Where the assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of the goods, classification, exemption or concession, speaking order shall be passed within 15 days from the date of assessment of the bill of entry or the shipping bill as the case may be as provided in Section 17(5).
>
> **33.** Under the provisions of Section 17 as amended by the Finance Act of 2011, Section 17(1) has provided to self-assess the duty, if any, leviable on such goods by importer or exporter, as the case may be. Self-assessment is an assessment as per the amended definition of Section 2(2). It is further provided that proper officer may verify the self-assessment of such goods, and for this purpose, examine or test any imported goods or exported goods or such part thereof as may be necessary. The power to verify self-assessment lies with the proper officer and for that purpose under Section 17(3), he may require the importer, exporter or any other person to produce such document and furnish such information, etc. If the proper officer on verification has found on examination or testing of the goods or as part thereof or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under the Act, may proceed to reassess the duty leviable on such goods. Section 17(5) of the Act as amended provides that where reassessment done under Section 17(4) is contrary to the assessment done by the importer or exporter regarding the matters specified therein, the proper officer has to pass a speaking order on the reassessment, within 15 days from the date of reassessment of the bill of entry or the shipping bill, as the case may be. The Explanation to amended Section 17 has clarified that import or export before the amendment by the Finance Act, 2011

shall be governed by the unamended provisions of Section 17.

xxxx xxxx xxxx

41. It is apparent from the provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.

xxxx xxxx xxxx

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression "Any person" is of wider amplitude. The Revenue, as well as the assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of reassessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of reassessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no *lis*, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts"

72. *ITC Limited*, while observing that an order of self-assessment must follow in order for a claim of refund to be sustained, observed thus:-

"**44.** The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or reassessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, reassessment is not permitted nor conditions of exemption can be adjudicated. Reassessment is

permitted only under Sections 17(3), (4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or reassessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In *Hero Cycles Ltd. v. Union of India* though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in *Priya Blue Industries Ltd*.

xxxx xxxx xxxx

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under the Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

48. Resultantly, we find that the order(s) passed by the Customs, Excise and Service Tax Appellate Tribunal are to be upheld and that passed by the High Courts of Delhi and Madras 19 to the contrary, deserve to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred."

73. Subsequent to *ITC Limited*, this Court in **BT (India) Private Limited, v. Union of India and another**[28] had dealt with a challenge to the rejection of refund claims and the self-assessment done by the petitioners therein, albeit in the context of unutilised **Central Value Added Tax**[29] credit. While dealing with the challenge raised therein, the Court upon noticing the decision in *ITC Limited* in extenso had ultimately come to render the following pertinent findings:-

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"**52.** A comprehensive reading of the provisions of the Act would thus establish that a self-assessed return stands placed on a pedestal equivalent to that of an actual order of assessment, provisional or best judgment assessment or a reassessment. This issue in any case is liable to be answered against the respondent in light of the decision in ITC Limited.

xxxx xxxx xxxx

57. It becomes pertinent to note that both the Customs as well as the Excise Acts follow an identical procedure of self assessment. While section 17 of the Customs Act enables an importer or an exporter, as

the case may be, to self-assess and pay the duty leviable on goods, the said provision further empowers the proper officer to verify the self assessed return that may be submitted. In terms of section 17(4) of the said enactment, if the proper officer on verification, examination or testing of the goods comes to the conclusion that the self assessment is incorrect, it becomes entitled to reassess the duty leviable on goods. It is in extension of the aforesaid power that sub-section (5) of section 17 speaks of reassessment and the obligation of the proper officer to pass a speaking order in support of the exercise of reassessment.

58. Section 27 enables a person to claim refund of duty or interest which may have been either paid or borne by it. Section 27(2) of the

Customs Act, in terms identical to section 118(2) of the Excise Act, speaks of refunds being effected upon the proper officer being satisfied that the whole or any part of the duty paid is refundable. Section 27(2) is thus a provision which is pari materia with section 118(2) of the Excise Act.

59. The Supreme Court in ITC Limited. notwithstanding section 27 (2) employing the expression "satisfied" held that unless a self assessed return is revised or doubted in exercise of powers of reassessment, best judgment assessment or where it be alleged that duty had been short-levied, short- paid or erroneously refunded, those powers would not be available to be exercised at the stage of considering an application for refund. Having noticed the statutory position which prevails, we turn then to the decisions which would have a bearing on the question which stands posited.

60. Flock (India) was one of the earliest decisions which dealt with the aspect of a claim for refund emanating from a return which had been duly assessed. In Flock (India), the self-assessed returns had been duly assessed by the Assistant Collector and the issue of classification was answered against the assessee. The aforesaid order of the Assistant Collector came to be affirmed by the Collector (Appeals). It was thereafter and while seeking to prosecute a claim for refund that the assessee sought a review of the aforesaid decisions which had been rendered by the authorities. Negativing the

said contention, the Supreme Court observed that once an assessment filed had been duly adjudicated in accordance with the procedure prescribed under the statute, it would be impermissible for the said decision being reviewed or revisited at the stage of consideration of a refund claim.

61. In Priya Blue Industries, the Supreme Court was faced with a situation where a bill of entry had been duly assessed and the duty payable in terms of that assessment deposited under protest. It was thereafter that an application for refund came to be preferred. As would be evident from the conclusions ultimately recorded in that decision, the Supreme Court categorically held that once an order of assessment came to be made, the duty was liable to be paid in accordance with that order alone. Their Lordships pertinently observed that unless such an order of assessment is reviewed or modified in appeal, the duty as determined to be payable would remain untouched and it would not be open for an assessee to seek a review of the assessment order, bearing in mind the fact that the claim for refund is not akin to proceedings in appeal. It was further held that the authority which is enjoined to consider a refund claim can neither sit in an appeal over an assessment made nor can it review an order of assessment.

62. Both these decisions and the views expressed therein came to be specifically noticed and reaffirmed by three learned Judges of the Supreme Court in ITC Limited. The decision of the Supreme Court in ITC Limited assumes added significance, in so far as the present case is concerned, in light of it having found that a self-assessment return, even in the absence of a formal order dealing with the same, would nonetheless amount to an assessment. We had in this regard and in the preceding parts of this decision noticed the definition of the expression "assessment" as contained in rule 2(b) of the 1994 Rules which includes a self-assessment of service tax and thus being evidence of a position similar and akin to that which obtains under the Customs and Excise Acts.

63. Their Lordships in ITC Limited categorically held that notwithstanding a self-assessed bill of entry having been merely endorsed by the competent authority, the same would nonetheless amount to an "assessment". It was in that backdrop that it was held that once a self-assessed return had been duly accepted, the same could not be modified or varied by an authority while considering an application for refund.

64. It becomes pertinent to note that the appellant before the Supreme Court in that case, had sought to press the claim for refund asserting that it had due to inadvertence failed to submit a self assessment return taking into consideration an exemption notification. It was this claim which came to be ultimately negatived by the Supreme Court and which held that a claim for refund cannot

be entertained unless the order of assessment, and which would include a self-assessment return, is modified in accordance with the procedure prescribed in the statute. In our considered opinion, it is these principles enunciated in Flock (India), Priya Blue Industries and ITC Limited, which compel and convince us to observe that the impugned order is clearly rendered unsustainable.

65. Undisputedly, the petitioner had submitted self-assessment returns proceeding on the basis that the output services rendered by it would qualify as an "export of service" and thus it being not exigible to service tax. The aforesaid self-assessment returns remained untouched and had not been questioned by the respondents either in terms of section 72 or 73 of the Act. The application for refund of Cenvat credit was founded on the petitioner assessing that it was not liable to pay service tax on services so exported. The accumulation of Cenvat credit came about in light of the various input services received by the petitioner and it having availed credit of service tax paid thereon in terms of rule 3 of the CCR Rules. It was in respect of the accumulated Cenvat credit that the application for refund came to be made.

66. In our considered view, unless the self-assessed return, as submitted had been questioned, re-opened or re-assessed and the assertion of the petitioner of the services rendered by it qualifying as an "export of service" questioned or negatived in accordance with the procedure prescribed under the Act, its claim for refund could not have been negated. As was observed by the Supreme Court in ITC Limited, a self-assessed return also amounts to an "assessment" and unless it is varied or modified in accordance with the procedure prescribed under the relevant statute, the same cannot possibly be questioned in refund proceedings. As the Supreme Court had held in the decisions aforenoted, the authority while considering an application for grant of refund neither sits in appeal nor is it entitled to review an assessment deemed to have been made. In fact, the Supreme Court in ITC Limited had described refund proceedings to be akin to execution proceedings.

67. We thus come to the firm conclusion that in the absence of the self- assessed return having been questioned, reviewed or re-assessed, the claim for refund of Cenvat credit could not have been denied by the respondents. When confronted with the application for refund, all that the respondents could have possibly examined or evaluated was whether the provisions of rule 5 read along with the various prescriptions contained in the notification dated June 18, 2012 had been complied with. The respondents, at this stage of the proceedings, could not have doubted, questioned or undertaken a merit review of the self-assessed return which had been submitted."

74. The observations appearing in *ITC Limited* and *BT India* assume significance when viewed in light of the various Bills of Entry as

submitted by the writ petitioners on a self-assessment basis having been duly accepted and no questions in respect thereof having been raised. The Bills of Entry would thus be liable to be viewed as having been duly assessed and accepted. Undisputedly, it is decades after those exports had been affected and assessments completed that the respondents now seek to reopen those transactions and seek to question the benefits claimed by the writ petitioners.

75. Undisputedly, consequent to the self-assessed Bills of Entry having been accepted and thus liable to be viewed as assessed, the stage of enquiry contemplated in terms of Section 17 of the Customs Act has clearly passed. That then leaves us to identify and determine the avenues which would otherwise be available to the customs authorities to reopen or review an assessment duly made.

E. RECOVERY OF DUTY UNDER SECTION 28 AND 28AAA

76. This leads us firstly to Section 28 of the Customs Act and which deals with recovery of duties either not levied or paid, short levied or short paid or erroneously refunded. Section 28 reads thus: -

> "**28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded.**
>
> (1) Where any [duty has not been levied or not paid or short-levied or short-paid] or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts, —
>
> (a) the proper officer shall, within [two years] from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied [or paid] or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
>
> [PROVIDED that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;]

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of, —

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer,

the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid:

[PROVIDED that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.]

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest:

[PROVIDED that where notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section (1) shall be deemed to be concluded.]

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of 2 [two years] shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been [levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,—

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from

the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any [duty has not been levied or not paid or has been short-levied or short paid] or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to [fifteen per cent.] of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion —

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then, the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of [two years] shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of [two years] referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

[(7A) Save as otherwise provided in clause (a) of sub-section (1) or in sub-section (4), the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed, and the provisions of this section shall apply to such supplementary notice as if it was issued under the said sub-

section (1) or sub-section (4).]

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),—

(a) within six months from the date of notice, [***] in respect of cases falling under clause (a) of sub- section (1);

(b) within one year from the date of notice, [***] in respect of cases falling under sub-section (4):

[PROVIDED that where the proper officer fails to so determine within the specified period, any officer senior in rank to the proper officer may, having regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year:

PROVIDED FURTHER that where the proper officer fails to determine within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued;]

[(9A) Notwithstanding anything contained in sub-section (9), where the proper officer is unable to

determine the amount of duty or interest under sub-section (8) for the reason that—

(a) an appeal in a similar matter of the same person or any other person is pending before the

(b) Appellate Tribunal or the High Court or the Supreme Court; or

(c) an interim order of stay has been issued by the Appellate Tribunal or the High Court or the Supreme Court; or

(d) the Board has, in a similar matter, issued specific direction or order to keep such matter

(e) pending; or

(f) the Settlement Commission has admitted an application made by the person concerned,

the proper officer shall inform the person concerned the reason for

non-determination of the amount of

duty or interest under sub-section (8) and in such case, the time specified in sub-section (9) shall apply

not from the date of notice, but from the date when such reason ceases to exist.]

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

[(10A) Notwithstanding anything contained in this Act, where an order for refund under sub-section (2) of section 27 is modified in any appeal and the amount of refund so determined is less than the amount refunded under said sub-section, the excess amount so refunded shall be recovered along with interest thereon at the rate fixed by the Central Government under section 28AA, from the date of refund up to the date of recovery, as a sum due to the Government.

(10B) A notice issued under sub-section (4) shall be deemed to have been issued under sub-section (1), if such notice demanding duty is held not sustainable in any proceeding under this Act, including at any stage of appeal, for the reason that the charges of collusion or any wilful mis-statement or suppression of facts to evade duty has not been established against the person to whom such notice was issued and the amount of duty and the interest thereon shall be computed accordingly.]

[(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.]

Explanation 1: For the purposes of this section, "relevant date" means, —

(a) in a case where duty is [not levied or not paid or short-levied or short-paid], or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

Explanation 2: For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.]

[*Explanation* 3: For the removal of doubts, it is hereby declared that the proceedings in respect of any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where show cause notice has been issued under sub-section (1) or sub-section (4), as the case may be, but an order determining duty under sub-section (8) has not been passed before the date on which the Finance Bill, 2015 receives the assent of the President, shall, without prejudice to the provisions of sections 135, 135A and 140, as may be applicable, be deemed to be concluded, if the payment of duty, interest and penalty under the proviso to sub-section (2) or under sub-section (5), as the case may be, is made in full within thirty days from the date on which such assent is received.]

[*Explanation* 4: For the removal of doubts, it is hereby declared that in cases where notice has been issued for non-levy, not paid, short-levy or short-paid or erroneous refund after the 14th day of May, 2015, but before the date on which the Finance Bill, 2018 receives the assent of the President, they shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.] ”

77. As would be manifest from a reading of that provision, it creates two separate and independent streams of investigation and enquiry based upon whether, and in the opinion of the customs authorities, the transactions suffer from the vice of misdeclaration, misclassification or whether the declarations are tainted by suppression and wilful misrepresentation.

78. The authority of the respondents to demand a return of the amounts derived as benefits under the MEIS from the petitioners when tested on the anvil of Section 28(1) falters and disintegrates for two reasons. Firstly, Section 28(1) applies to cases where a reassessment or reopening is sought to be initiated for reasons other than collusion, wilful misstatement or suppression of facts and which is the suggestion

underlying the allegations levelled against the petitioners. Secondly, the action under Section 28(1) postulates action being initiated within two years from the "*relevant date*" and which expression stands defined in the provision itself. Undisputedly, the impugned action would fail to meet this threshold requirement.

79. That then takes us to examine the case set up by the respondents on the anvil of sub-section (2) of Section 28. Sub-section (2) enables demand of duty notwithstanding an assessment having been made in cases of collusion, wilful misstatement and suppression of facts. Those allegations would sustain only if we were to find that the respondents assert that the MEIS scrips are tainted by the aforenoted factors. However, the respondents do not even suggest or lay that charge against the writ petitioners at least in explicit terms. The respondents stop short of laying this allegation since that would necessarily entail it being urged that the DGFT office had colluded with the petitioners.

80. The invocation of Section 28 in the context of an MEIS scrip would also not sustain in light of the ambivalent stand taken by the DGFT who despite being a party to these proceedings has refrained from filing any affidavit or striking a principled stand. We take note of the following instructions that were provided by the DGFT to its counsel dated 11 January 2023 and which was placed on the record of these proceedings for our consideration: -

"**OFFICE MEMORANDUM**

Subject: - W.P (C) No. l7314 of 2022 in the matter of M/s Amit Exports v/s UOl & Others. filed before the Hon'ble High Court of Delhi.

Please refer to writ petition in the above mentioned subject matter, wherein, **UOI, Through Ministry of Finance, Department of Revenue, CBIC is Respondent No. 1.**

2. The matter pertains to Merchandise Export from India Scheme (MEIS) under FTP 2015-20, wherein petitioner firm had apparently exported under HSN Code 6815 9990 instead of HSN Code 6802 2190.

3. The correct classification of exported products are being examined at the relevant port of exports and is in the domain of Customs, CBIC. Therefore, DGFT Hqrs. May have no comments to offer in this writ. Therefore, it is requested that Respondent No. 1 (CBIC) may kindly file a counter affidavit on behalf of DGFT Hqrs also, with a view to protect the interest of the Consolidated Fund of India.

4. This is issued with the approval of Additional, DGFT.

(Shri Ramesh KumarVerma)
Deputy Director General of Foreign Trade
Tel. No. 23068767*8767"

81. We are thus faced with a situation where the DGFT has chosen to desist from even expressing its stand with respect to the validity of the MEIS scrips that had been issued in favour of the petitioners. We are thus constrained to proceed on the basis that at least the DGFT does not doubt the validity of the scrips which were issued and as of now has failed to initiate any action seeking to question the imports that were affected or the benefits that were derived by the petitioners under the MEIS.

82. Of pivotal significance to the challenge which the writ petitioners raise are the provisions enshrined in Section 28AAA. As was contended by Mr. Gulati, Section 28AAA clearly brings within its ambit situations where the statutory authorities may harbour a doubt with respect to the benefit that an exporter or importer may have claimed by virtue of an instrument. Explanation 1 to Section 28AAAA, in clear and unambiguous terms, while defining that expression had explained it to mean any scrip, authorization, license, certificate or other document by

whatever name called issued under the FTDR Act. Section 28AAA is thus clearly concerned with the validity of a scrip or certificate which may have been issued under the FTDR Act and on the basis of which a benefit may have been obtained. It thus now enables the respondents to cast aside the instrument issued under the FTDR Act and to initiate steps for recovery of duty benefits that may have been claimed by the person concerned while holding the instrument so issued. Section 28AAA thus and in furtherance of the aforesaid legislative objective, introduces a legal fiction by employing the phrase "*shall be deemed never to have been exempted or debited.....*".

83. The provisions of Section 28AAA are attracted where it is found that an instrument issued to a person under the FTDR Act was obtained by means of collusion, wilful misstatement or suppression of facts. While Section 28AAA does undoubtedly statutorily empower the respondents to recover duty benefits illegitimately claimed by virtue of an instrument, the larger question which merits consideration is of identifying the authority which could be recognized in law to undertake a determination with respect to whether an instrument could be said to have been obtained by way of collusion, wilful misstatement or suppression of facts.

84. While we propose to return to this principal question a little later and in the subsequent parts of this decision, suffice it to note that Section 28AAA is a provision which stands at the crossroads of the Customs Act and the FTDR Act. It constitutes, in that sense, a junction or an intersection where the two statutes meet. Section 28AAA deals with situations of convergence and where a demand of duty is predicated upon a doubt being raised with respect to an instrument

issued under the FTDR Act. Of critical significance, therefore, would be the issue of which authority should be recognised to have the jurisdiction to undertake the adjudication contemplated under that provision.

85. That an adjudication is warranted for the purposes of invoking Section 28AAA cannot possibly be doubted. This since the provision itself contemplates the withdrawal and reversal of a benefit that may have been obtained by an entity by usage of an instrument issued under the FTDR Act. Any doubt that could have been possibly harboured in this respect stands dispelled by sub-section (3) and which stipulates that before a demand relating to duty recoverable is raised, the proper officer would have to place the concerned entity on notice and provide an opportunity of hearing before the amount of duty and interest or both is determined. The usage of the expression *"proper officer"*, and which is defined in Section 2(34) of the Customs Act to mean an officer of customs, also cannot be accorded undue significance when one bears in mind Section 28AAA (1) speaking of an instrument issued to a person *".....for the purposes of this Act"* or the FTDR Act. The former undoubtedly is a reference to the Customs Act. Thus, Section 28AAA is clearly intended to encompass all contingencies arising out of or relating to an instrument issued for the purposes of the Customs Act or the FTDR Act as the case may be.

F. SCOPE OF THE AUDIT POWER

86. Let us then proceed to consider the scope of the audit power which came to be independently incorporated in the Customs Act. Section 99A, as noticed hereinabove, embodies the power conferred on the customs authorities to undertake an audit in respect of an

assessment of imported or exported goods. The power that stands enshrined in Section 99A stands further articulated in the Audit Regulations which have come to be framed. Those regulations define the word 'audit' as follows:-

> "**2. Definitions**
>
> **xxxx xxxx xxxx**
>
> (b) "audit" includes examination or verification of declaration, record, entry, document, import or export licence, authorisation, scrip, certificate, permission, etc., books of account, test or analysis reports, and any other document relating to imported goods or export goods or dutiable goods, and may include inspection of sample and goods, if such sample or goods are available and where necessary, drawl of samples;"

87. The procedure for the conduct of an audit is set out in some detail in Audit Regulation 5 and which reads thus: -

> "**5. Manner of conducting audit.**
>
> (1) The proper officer may conduct audit either in his office or in certain cases at the premises of an auditee.
>
> (2) The proper officer may, where considered necessary, request the auditee to furnish documents, information or record including electronic record, as may be relevant to audit.
>
> (3) The proper officer shall give not less than fifteen days advance notice to the auditee to conduct audit at the premises of the auditee.
>
> (4) The proper officer may, where considered necessary, inspect the imported goods or export goods or dutiable goods at the premises of the auditee or request the auditee to produce sample, if available with him.
>
> (5) The proper officer shall inform the auditee of the objections, if any, before preparing the audit report to provide him an opportunity to offer clarifications with supporting documents.
>
> (6) Where the auditee is in agreement with the audit findings, he may make voluntary payments of duty, interest or other sums, due, if any, in part or in full and the proper officer shall record the same in the audit report.
>
> (7) Where the proper office has asked the auditee to furnish information, document, record or sample for the purposes of audit, it shall be mandatory for the proper officer to inform outcome of such audit to the auditee.

> (8) The proper officer shall complete audit in cases where it is conducted at the premises of the auditee within thirty days from the date of starting of the audit.
>
> PROVIDED that the jurisdictional Commissioner of Customs may extend the period of completion of audit from thirty days to sixty days, by an order in writing."

88. The power to undertake an audit, as is evident from the language in which Section 99A stands couched, is in respect of an assessment of imported or exported goods. Pursuant to the exercise so undertaken, the proper officer is liable to apprise the auditee of the objections which according to it arise in respect of the assessment undertaken. By virtue of Audit Regulation 5(6), if the auditee be in agreement with the audit findings, it could voluntarily make additional payments of duty, interest or other sums that are found due and payable. However, and before such a report is finally drawn or issued, the proper officer by virtue of Audit Regulation 5(3) is obliged to place the auditee on notice of its intent to conduct such an audit. This is followed by the proper officer requiring the auditee to furnish requisite information, documents or for that matter even samples of the goods imported or exported. It is only thereafter and in terms of Audit Regulation 5(5) that the proper officer would proceed to formalise the objections in respect of the assessment.

89. As we read Audit Regulation 5, it becomes apparent that it is only after the disposal of any such objections that may have been invited that a final report containing the audit findings would come to be drawn. What however needs to be borne in mind is that the family of provisions pertaining to audit do not, at least in explicit terms, include a power to review, suspend or cancel an instrument issued either under the Customs or the FTDR Act. While hypothetically speaking an audit could contain findings or observations doubting a benefit or exemption claimed, we find ourselves unable to construe those provisions as

enabling the customs authorities to suspend or cancel an instrument itself, be it under the Customs or the FTDR Act.

G. THE POWERS OF THE DGFT

90. This then takes us to the provisions contained in the FTDR Act and which we had an occasion to review while noticing the submissions which were addressed by Mr. Gulati. Undoubtedly, it is the DGFT who is liable to be recognized as the pivotal authority and one who is enjoined to administer the provisions of that statute. With a view to develop and regulate foreign trade, the Union stands conferred with the power to issue appropriate orders prohibiting, restricting or regulating the import or export of goods. An order referable to Section 3(2) of the FDTR Act and all goods to which that statutory instrument may extend leads to those goods being deemed to be goods the import or export of which is prohibited under Section 11 of the Customs Act. As was noted by us hereinbefore, the FTP itself is a statutory instrument and derives that status by virtue of Section 5 of the FTDR Act. The word 'license' has been defined in the FTDR Act to mean a license to import or export as also to include within its ambit a customs clearance permit as well as any other permission issued or granted under that statute. The DGFT or an officer authorized by it further stands conferred with the jurisdiction to issue, suspend or cancel a license as defined. This becomes apparent from a reading of Section 9 of the FDTR Act and which reads thus: -

> "**9. Issue, suspension and cancellation of licence.**— (1) The Central Government may levy fees, subject to such exceptions, in respect of such person or class of persons making an application for [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] of in respect of any [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] granted or renewed in such manner as may be prescribed.
>
> [(2) The Director General or an officer authorised by him may, on an application and after making such inquiry as he may think fit,

grant or renew or refuse to grant or renew a licence to import or export such class or classes of goods or services or technology as may be prescribed and, grant or renew or refuse to grant or renew a certificate, scrip or any instrument bestowing financial or fiscal benefit, after recording in writing his reasons for such refusal.]

(3) A [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] granted or renewed under this section shall—

(a) be in such form as may be prescribed;

(b) be valid for such period as may be specified therein; and

(c) be subject to such terms, conditions and restrictions as may be prescribed or as specified in the [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] with reference to the terms, conditions and restrictions so prescribed.

(4) The Director General or the officer authorised under sub-section (2) may, subject to such conditions as may be prescribed, for good and sufficient reasons, to be recorded in writing, suspend or cancel any [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] granted under this Act:

Provided that no such suspension or cancellation shall be made except after giving the holder of the [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] a reasonable opportunity of being heard.

(5) An appeal against an order refusing to grant, or renew or suspending or cancelling, a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] shall lie in like manner as an appeal against an order would lie under section 15."

91. By virtue of amendments which came to be introduced by Act 25 of 2010, sub-section (3) of Section 9 came to be amended with the Legislature extending the width of its applicability beyond a mere license and thus including within its ambit a certificate, script or any instrument *"bestowing financial or fiscal benefits"*. Corresponding amendments are also found in Section 9(1) and which too added certificates, scrips and instruments bestowing fiscal benefits as falling within the ambit of that provision.

92. The power to suspend or cancel any of those instruments is then

spoken of in the **Foreign Trade (Regulation) Rules, 1993**[30]. It would thus be pertinent to notice Rules 7, 9 and 10 thereof and which are reproduced hereinbelow: -

> "**7. [Refusal to grant licence, certificate, scrip or any instrument bestowing financial or fiscal benefits and recovery of benefits].**— (1) The Director-General or the licensing authority may for reasons to be recorded in writing, refuse to grant or renew a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] if—
>
> (a) the applicant has contravened any law relating to customs or foreign exchange;
>
> (b) the application for the 43[licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] does not substantially conform to any provision of these rules;
>
> (c) the application or any document used in support thereof contains any false or fraudulent or misleading statement [or where any person makes or abets or attempts to make any export or import in contravention of any provision of the Act or any rules and orders made thereunder or the Policy];
>
> (d) it has been decided by the Central Government to canalise the export or import of 45[goods or services or technology] and distribution thereof, as the case may be, through special or specialised agencies;
>
> (e) any action against the applicant is for the time being pending under the Act or rules and orders made thereunder;
>
> [(f) the applicant is or was a partner in a partnership firm (including a limited liability partnership) or is or was a Director or a company or a proprietor of a proprietor ship firm having controlling interest against which any action is for the time being pending under the Act or rules and Orders made thereunder;]
>
> (g) the applicant fails to pay any penalty imposed on him under the Act;
>
> (h) the applicant has tampered with a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits];
>
> (i) the applicant or any agent or employee of the applicant with his consent has been a party to any corrupt or fraudulent practice for the purposes of obtaining any other [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits];

[30] FTDR Rules

(j) the applicant is not eligible for a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] in accordance with any provision of the policy;

(k) the applicant fails to produce any document called for by the Director-General or the licensing authority;

(l) in the case of a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] for import, no foreign exchange is available for the purpose;

(m) the application has been signed by a person other than a person duly authorised by the applicant under the provisions of the policy;

[(n) the applicant has attempted to obtain or has obtained or has erroneously claimed Terminal Excise Duty, duty drawback, cash assistance benefits admissible to Importer-exporter Code holder or any other similar benefits from the Central Government or any agency authorised by the Central Government in relation to exports made by him on the basis of any false, fraudulent or misleading statement or any document which is false or fabricated or tampered with.]

(2) The refusal of a 52[licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] under sub-rule (1) shall be without prejudice to any other action that may be taken against an applicant by the licensing authority under the Act.

[(3) In case of any erroneous payment of Terminal Excise Duty, duty drawback, cash assistance benefits admissible to importer-exporter Code holder or any other similar benefits from the Central Government or any agency authorised by the Central Government in relation to exports made by him, the Director General or the licensing authority may, after giving to that person a notice in writing informing him of the details of erroneous payment for which recovery or adjustment of arrears or claims is to be made and after giving a reasonable opportunity of making a representation in writing within such time, as specified therein and, if that person so desires, of being heard, authorise:

(a) recovery of benefits as arrears of land revenue; or

(b) by adjustment against future claims

after recording reasons in writing, provided the Adjudicating Authority is satisfied with the facts relating to erroneous payment.]

9. Suspension of a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits].— (1) The Director-General or the licensing authority may by order in writing, suspend the operation of a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] granted to—

[(a) any person, if an order of detention or conviction has been made against such person under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) or the Prevention of Money Laundering Act, 2002 (15 of 2003) or Foreign Exchange Management Act, 1999 (42 of 1999);]

[(b) a partnership firm (including a limited liability partnership) or a company or a firm or any other entity, if the person referred to in clause (a) is a partner or a whole time director or managing director or a proprietor, as the case may be, of such firm or company:]

Provided that the order of suspension shall cease to have effect in respect of the aforesaid person or, as the case may be, [a partnership firm (including a limited liability partnership) or company or a firm or any other entity], when the order of detention made against such person,—

(i) being an order of detention to which the provisions of section 9 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) do not apply, has been revoked on the report of Advisory Board under Section 8 of that Act or before receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or

(ii) being an order of detention to which the provisions of Section 9 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) apply, has been revoked on the report of the Advisory Board under Section 8 read with sub-section (2) of Section 9 of that Act or before receipt of such report;

(iii) has been set aside by a court of competent jurisdiction.

(2) The Director-General or the licensing authority may by an order in writing suspend the operation of any 62[licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] granted under these rules, where proceedings for cancellation of such [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] has been initiated under rule 10.

10. Cancellation of a [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits].—The Director- General or the licensing authority may by an order in writing cancel any [licence, certificate, scrip or any instrument bestowing financial or

fiscal benefits] granted under these rules, if—

(a) the [licence, certificate, scrip or any instrument bestowing

financial or fiscal benefits] has been obtained by fraud, suppression of facts or misrepresentation; or

(b) the [licensee or transferee] has committed a breach of any of the conditions of the [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits]; or

(c) the [licensee or transferee] has tampered with the [licence, certificate, scrip or any instrument bestowing financial or fiscal benefits] in any manner; or

(d) the [licensee or transferee] has contravened any law relating to customs or foreign exchange or the rules and regulations relating thereto."

93. The FDTR Rules thus confer a power on the DGFT or the licensing authority to regulate the grant, renewal, suspension and cancellation of licenses, certificates, scrips or any other instrument "*bestowing financial or fiscal benefits*". The MEIS certificate would undoubtedly be an instrument which bestows a fiscal benefit. What we seek to emphasize and highlight is Rules 7, 9 and 10, embody in clear and unequivocal terms, a conferral of jurisdiction and power to commence an adjudicatory process that the DGFT could undertake while evaluating whether a license, certificate, scrip or instrument was liable to be suspended or cancelled.

H. THE IMPUGNED AUDIT OBJECTION LETTER

94. Having outlined the statutory regime which prevails, we then and at the outset firstly take up for consideration the audit objection letter which has come to be drawn by the respondents and which stands impugned before us. As is manifest from the relevant parts of the audit objection letter, we find that the respondent has come to a definitive conclusion that the exported articles were liable to be classified under CTH 6802 as opposed to ITC(HS) 68159990. This conclusion is prefaced by the Assistant Commissioner holding that the goods had been "*wrongly classified*" and "*misclassified*" by the petitioners, with

an intent to claim higher benefits. A reading of the audit objection letter constrains us to observe that it clearly does not read as being the embodiment of the intent of the Assistant Commissioner to apprise the writ petitioners of any tentative conclusion that it may have arrived at. On the contrary, the audit objection letter is replete with definitive conclusions and thus clearly deprives the writ petitioners of the right to represent or establish that the issue of classification or the view harboured is incorrect or untenable. The petitioners would thus be clearly justified in asserting that they are essentially faced with a determination already made and a conclusion reached.

95. The tone and tenor of the audit objection letter and the language in which it is framed could legitimately be construed by the noticee of the issue having been predetermined and no useful purpose being served by representing or responding to the same. This we observe notwithstanding the audit objection letter neither feigning nor posturing itself to be a notice to show cause. This is evident from the said communication advising the petitioners to pay the amount as determined and thus closing all avenues of contestation.

96. The Supreme Court in **Oryx Fisheries Private Limited v. Union of India and Others**[31] while dealing with a challenge to the cancellation of the registration certificate of the appellant, had rendered the following illuminating observations with regard to the need for notices issued by any statutory authority to consist of reasoning as opposed to a simpliciter recordal of definitive conclusions and which would thus lead the noticee to arrive at the inevitable conclusion that a right of representation would be an empty formality. This becomes

[31] (2010) 13 SCC 427

evident from a reading of the following passages of that decision:-

> "**23.** Relying on the underlined portions in the show-cause notice, the learned counsel for the appellant urged that even at the stage of the show-cause notice the third respondent has completely made up his mind and reached a definite conclusion about the alleged guilt of the appellant. This has rendered the subsequent proceedings an empty ritual and an idle formality.
>
> **24.** This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show-cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.
>
> **25.** Expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in *Khem Chand v. Union of lndia*, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.
>
> **xxxx xxxx xxxx**
>
> **27.** It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.
>
> **28.** Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi-judicial authority has to inspire confidence in the minds of those subjected to its jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against.
>
> **xxxx xxxx xxxx**
>
> **31.** It is of course true that the show-cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling

> that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.
>
> **32.** Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.
>
> **xxxx xxxx xxxx**
>
> **37.** Therefore, the bias of the third respondent which was latent in the show-cause notice became patent in the order of cancellation of the registration certificate. The cancellation order quotes the show-cause notice and is a non-speaking one and is virtually no order in the eye of the law. Since the same order is an appealable one it is incumbent on the third respondent to give adequate reasons."

Tested on the aforesaid precepts, it becomes apparent that the audit objection letter teems with definitive and predetermined conclusions and would not sustain when tested on the principles enunciated by the Supreme Court in *Oryx Fisheries*.

97. We then find ourselves unable to sustain the audit objection letter even when tested on the anvil of the Audit Regulations which may be said to have been applied or invoked. As is evident from a reading of Regulation 5, the proper officer, after having apprised the exporter or the importer, as the case may be, of its intent to initiate an audit, is obliged to apprise the auditee of the objections before preparing the audit report. In case the auditee disagrees with the findings that appear in that report, a demand could be validly raised or created. Undisputedly, no such procedure appears to have been followed by the respondents in the facts of the present case. In fact, and contrary to the mandate of Regulation 5, the Assistant Commissioner has required the petitioners to pay sums representing amounts which according to that

authority had been wrongly claimed under the MEIS and having clearly failed to abide by the statutory procedure prescribed.

I. THE PURVIEW OF SECTIONS 28(4) AND 28AAA

98. It becomes pertinent to note that while the said audit objection letter dated 18 November 2019 is described to be a "*post clearance audit objection*", the Assistant Commissioner also alludes to the provisions of Sections 28(4) and 28AAA of the Act to sustain the direction for deposit as framed. Section 28(4) of the Act, as noted above, could have been invoked only if the Assistant Commissioner had come to the conclusion that the goods had escaped duty by reason of collusion, wilful misstatement or suppression of facts. It is only in those contingencies that Section 28(4) could have enabled the proper officer to reopen an assessment. However, all that is alleged in this respect is that the petitioners had failed to make a correct and truthful declaration and thereby mis-classified the goods with the avowed objective of claiming benefits under the MEIS.

99. We find ourselves unable to appreciate how the petitioners could have been charged of having failed to make a "*correct and truthful*" declaration when the imports were affected under the cover of MEIS certificates granted by the DGFT and which had never been questioned. In fact, the DGFT has not even and till date initiated any action against the writ petitioners alleging that the MEIS Certificate had been wrongly obtained. This too leads us to conclude that the impugned action is rendered wholly illegal, arbitrary and unsustainable.

100. Regard must also be had to the fact that the power under Section 28(4) additionally could have been invoked only within a period of five years from the relevant date, an expression which stands duly defined

in that provision by virtue of the Explanations appended to that section. The aforesaid provisions assume significance when we view the power that is sought to be invoked with the assistance of sub-section (4) of Section 28 in juxtaposition with the period during which the exports were affected and which in the facts of these cases was between 1991 to 2018. The earliest proceedings which appear to have been initiated by the respondents from the disclosures made in the writ petitions appears to be the issuance of the post clearance audit objection on 18 November 2019. The impugned action is thus rendered untenable on this score also.

101. While on Section 28(4), it becomes relevant to note that the said provision could have been invoked only if the statutory preconditions embodied therein were satisfied. As is manifest from a reading of sub-section (4), the exercise of power is predicated upon the respondents finding that an assessment made under the Customs Act suffered from the vice of collusion, wilful misstatement, or suppression of facts. However, the audit objection employs the expressions "*misclassified and wrongly classified*". Those are factors which could have been possibly countenanced to be relevant for the purposes of sub-section (1) of Section 28 alone. A misclassification or an incorrect classification would also not and *ipso facto* amount to collusion, wilful misstatement, or suppression of facts. The impugned proceedings are thus rendered untenable even when viewed in the aforesaid light.

102. We then proceed to consider whether the action of the respondents would sustain under Section 28AAA. We have already found that the respondents have failed to lay any foundation which may have established a charge of collusion, wilful misstatement, or

suppression of facts. However, and since they do advert to Section 28AAA, we propose to examine whether the view as expressed would sustain even if one were to proceed on the assumption that the preconditions which are envisaged by Section 28AAA existed.

103. Section 28AAA is principally concerned with the right vested in the respondents to initiate action for recovery of duty and interest where an instrument issued to a person is found to have been obtained by means of collusion, wilful misstatement, or suppression of facts. The word "*instrument*" is defined by Explanation 1 to Section 28AAA to include any scrip, authorization, license, certificate, or any other document by whatever name called issued under the FTDR Act. We have already held that the MEIS certificate would clearly fall within the ambit of that expression in the preceding parts of this decision.

J. THE CUSTOMS AND THE DGFT CROSSROAD

104. As we read the various provisions enshrined in the FTDR Act alongside the FTP as well as the FTDR Rules, we find ourselves unable to recognize a right that may be said to inhere in the customs authorities to doubt the issuance of an instrument. We, in the preceding parts of this decision, had an occasion to notice the relevant provisions contained in the FTDR Act and which anoint the DGFT as the central authority for the purposes of administering the provisions of that statute and regulating the subject of import and exports. The FTP 2015-20 in unequivocal terms provides in para 2.57 that it would be the decision of the DGFT on all matters pertaining to interpretation of policy, provisions in the Handbook of Procedures, Appendices, and more importantly, classification of any item for import/export in the ITC (HS) which would be final and binding. The FTP undoubtedly stands

imbued with statutory authority by virtue of Section 5 of the FTDR Act.

105. Of equal importance are the FTDR Rules and which too incorporate provisions conferring an authority on the Director General or the licensing authority to suspend or cancel a license, certificate, scrip or any instrument bestowing financial or fiscal benefits. Once it is held that the MEIS would clearly qualify as an instrument bestowing financial or fiscal benefits, the power to cancel or suspend would be liable to be recognized as being exercisable by the Director General on the licensing authority alone. It would thus be wholly impermissible for the customs authorities to either ignore the MEIS certificate or deprive a holder thereof of benefits that could be claimed under that scheme absent any adjudication or declaration of invalidity being rendered by the DGFT in exercise of powers conferred by either Rules 8, 9 or 10 of the FTDR Rules. The customs authorities cannot be recognised to have the power or the authority to either question or go behind an instrument issued under the FTDR in law.

106. Taking any other view would result in us recognizing a parallel or a contemporaneous power inhering in two separate sets of authorities with respect to the same subject. That clearly is not the position which emerges from a reading of Section 28AAA. Quite apart from the deleterious effect which may ensue if such a position were countenanced, in our considered opinion, if the validity of an instrument issued under the FTDR Act were to be doubted on the basis of it having been obtained by collusion, wilful misstatement or concealment of facts, any action under Section 28AAA would have to be preceded by the competent authority under the FTDR Act having come to the conclusion that the instrument had come to be incorrectly

issued or illegally obtained. The procedure for recovery of duties and interest would have to be preceded by the competent authority under the FTDR Act having so found and the power to recover duty being liable to be exercised only thereafter.

107. Section 28AAA would thus have to be interpreted as contemplating a prior determination on the issue of collusion, wilful misstatement or suppression of facts tainting an instrument issued under the FTDR Act before action relating to recovery of duty could be possibly initiated. A harmonious interpretation of the two statutes, namely, the Customs and the FTDR Acts leads us to the inescapable conclusion that the law neither envisages nor sanctions a duality of authority inhering in a separate set of officers and agents simultaneously evaluating and adjudging the validity of an instrument which owes its origin to the FTDR Act alone. It is these factors, as well as the role assigned to the DGFT which perhaps weighed upon courts to acknowledge its position of primacy when it come to the interpretation of policy measures referable to the FTDR Act as well as issues of classification emanating therefrom.

108. This clearly flows from what our High Court held in *Simplex Infrastructure* when it approved the view expressed by the Gujarat High Court in *Alstom India* and which had held that export benefits claimed and enjoyed pursuant to approvals granted as per the provisions of the FTDR Act could not be reviewed or redetermined except in accordance with the procedure prescribed therein. A similar view came to be expressed by the Allahabad High Court in *PTC Industries* and where it was held that any doubt with respect to the description or classification of exported goods would have to be referred for the consideration of the

DGFT. The Allahabad High Court had thus concurred with the view expressed by the Bombay High Court and which too had observed that benefits which could be claimed under a Duty Entitlement Pass Book license could not be denied by the customs authorities on the basis of their own perception on the subject of appropriate classification. The Bombay High Court had held that as long as the licensing authority had desisted from either reviewing the grant or cancelling the license, it would be wholly impermissible for the customs authorities to deprive the importer or the exporter of benefits. The view expressed by the Gujarat, Allahabad and the Bombay High Courts stands reiterated in the two subsequent decisions of *Autolite* and *Jupiter Exports*. The principles culled out in the aforenoted decisions are in line with what the Supreme Court had succinctly observed in **Titan Medical Systems (P) Ltd. Vs. Collector of Customs**[32]. We are thus of the firm opinion that it would be impermissible for the customs authorities to either doubt the validity of an instrument issued under the FTDR Act or go behind benefits availed pursuant thereto absent any adjudication having been undertaken by the DGFT. An action for recovery of benefits claimed and availed would have to necessarily be preceded by the competent authority under the FTDR Act having found that the certificate or scrip had been illegally obtained. We have already held that the reference to a proper officer in Section 28AAA is for the limited purpose of ensuring that a certificate wrongly obtained under the Customs Act could also be evaluated on parameters specified in that provision. However, the said stipulation cannot be construed as conferring authority on the proper officer to question the validity of a certificate or scrip referable to the FTDR Act.

[32] (2003) 9 SCC 133

K. PRE-REQUISITES UNDER SECTION 28AAA

109. We then find ourselves unable to countenance the invocation of Section 28AAA on a more fundamental ground. As was noticed by us earlier, action under Section 28AAA is to be founded upon a determination of an instrument having been obtained by means of collusion, wilful misstatement or suppression of facts. However, and as is evident from the stand taken by the respondents not just in these proceedings but as evidenced from the commencement of the audit proceedings itself, the solitary charge that stood laid against the writ petitioners was with respect to the alleged incorrect classification of the exported items. The petitioners had consistently taken the position that the exported articles were classifiable under ITC (HS) 68159990 and not CTH 6802.

110. It is this controversy which appears to have been raised from time to time with the respondents being urged by the writ petitioners as well as industry associations to lend clarity and lay all doubts at rest. The record further bears out that taking cognizance of the issues which were arising at different customs outposts, the industry associations had also approached the Ministry of Commerce and Industry and which had in turn convened a meeting of all concerned stakeholders so as to elicit their views. That process of deliberation, however, has yet not translated into a stated or principled view being expressed by that Ministry.

111. It is only much later and on 31 May 2019 that the CBIC issued a communication attempting to resolve questions pertaining to the classification of stone and marble handicraft items which were being exported. While that communication did hold that stone and marble

handicrafts were liable to be classified under CTH 6802, it too left various aspects pertaining to classification subject to verification and examination of individual items. As we read this communication of the CBIC, we find ourselves unable to construe the same as conclusively determining all possible issues concerned with the classification of stone and marble handicraft products. This since the communication itself is caveated and leaves various issues open to examination in individual cases. It is this communication of the CBIC which appears to have led to respondent no. 6 issuing Public Notice No. 57/2019.

112. Without going into the merits or otherwise of the position expressed by the CBIC at this stage, it is pertinent to note that the classification of the exported articles under ITC(HS) 68159990 has nowhere been alleged to have been prompted by collusion, wilful misstatement or suppression of facts. Regard must also be had to the undisputed provision which emerges from the record namely of these articles having been consistently placed under ITC(HS) 68159990 right from 1991 without any demur or protest being raised by the respondents.

113. The controversy with respect to classification appears to have been raised for the first time in December of 2018 when the respondent no. 6 raised a doubt as to whether the stone and marble handicraft articles were liable to be placed under ITC(HS) 68159990. As was noted hereinabove, the *sine qua non* for Section 28AAA getting attracted is the triumvirate of collusion, suppression and wilful misstatement which are spoken of in sub-section (1) being attracted. Even if it were assumed for the sake of argument that the writ petitioners had wrongly classified or placed articles in question under

ITC(HS) 68159990, the same would clearly not amount to it being *ipso facto* assumed that the same amounted to an act of suppression or wilful misstatement.

114. The rendering of a finding in favour of the respondents on the issue of collusion would have far greater ramifications. A finding on that score, if returned against the writ petitioners, would essentially require us to hold that the MEIS certificates had been obtained by the writ petitioners in collusion with the officers working under the DGFT. That too is not the allegation which is levelled by the respondents against the writ petitioners. The controversy, therefore, as to whether the subject articles were liable to be classified under CTH 6802 or 6815, would clearly not qualify the tests constructed by Section 28AAA.

L. DISPUTE OF CLASSIFICATION

115. Let us then proceed to briefly touch upon the issue of classification itself. Chapter 68 is principally concerned with articles of stone, plaster, cement, asbestos mica or similar materials. CTH 6802 deals with "*Worked Monumental or Building Stone*". CTH 6815, on the other hand, pertains to articles of stone or of other mineral substances "*not specified or included elsewhere*". As CTH 6815 stands, it clearly does not appear to be associated with stone that may be used in a monument or a building. Of equal significance are the Explanatory Notes which stand appended to CTH 6802 and which explain the scope of that entry as being intended to cover all natural, monumental or building stone which may have been worked upon beyond the stage at which they would be found at the mouth of a quarry. The Explanatory Notes proceed further to explain the width of that entry as being not

only confined to construction stone but also to articles such as steps, cornices, pediments balustrades and others.

116. CTH 6815 is the residual entry falling in Chapter 68. Although it too relates to articles of stone or of other minerals substances, it is clearly distinct and separate from what could be said to possibly fall under CTH 6802. The various products, minerals and materials which are spoken often in CTH 6802 appear to be those which would be found in buildings and monuments or used in the course of construction. It is perhaps on this reasoning, and since the articles were handicraft products that the writ petitioners chose to classify the exported articles under CTH 6815. The petitioners also appear to have borne in consideration the contents of Public Notice No. 02/2015, as well as subsequent notices issued for implementation of the MEIS Scheme and which had continued to include articles falling under CTH 6815.

117. Though not necessarily binding, the petitioners had also relied upon Notification No. 21/2018 issued by the Ministry of Finance, and which had exempted handicraft goods from the scope of intra-state supplies insofar as tax under the CGST Act was concerned. All of the above appears to have persuaded the writ petitioners to be confident in their stand of handicraft articles being liable to be classified as falling under HSN 6815.

118. The issue of classification was indelibly connected with the right of the writ petitioners to avail benefits under the MEIS. The MEIS scrip was issued by the office of the DGFT. The issuance of the MEIS scrip was dependent upon the exported article falling in the detailed list of products which came to be published by the DGFT on 01 April 2015. Table 2 set out the code wise list of products, as well as corresponding

reward rates under the MEIS Scheme. There was undisputedly a reference to CTH 6815 as well as ITC(HS) 68159990 in that table.

119. Once the DGFT had proceeded to issue the MEIS scrip to the writ petitioners, they would have been justified in assuming that the issue of classification was neither questioned nor doubted. It is on the aforesaid basis that exports were affected between the period 1991 to 2018.

120. In our considered opinion, in the absence of the DGFT having ruled upon the issue of classification or having expressed any doubt with respect to the eligibility of the writ petitioners to claim benefits under the MEIS, it would be wholly impermissible for the respondents to take punitive action against the writ petitioners. The subject of classification stands explicitly reserved for the consideration of the DGFT in terms of Para 2.57 of the FTP. This too convinces us to conclude that the action as initiated by the respondents is rendered arbitrary.

M. DETERMINATION

121. Accordingly, and for all the aforesaid reasons, we allow the present writ petitions on the following terms. We hereby quash the audit objection letters dated 27 August 2019 [W.P.(C) 17314/2022] and 18 November 2019 [W.P.(C) 17328/2022]. We consequently also quash the summons dated 07 October 2022 and 14 October 2022 [W.P.(C) 14477/2022]; 15 November 2021, 13 January 2022, 24 January 2022, 17 May 2022 and 30 September 2022 [W.P.(C) 17314/2022]; 15 November 2021, 24 January 2022, 17 May 2022, 06 June 2022 and 30 September 2022 [W.P.(C) 17328/2022].

122. As a consequence of the above and absent an adjudication

sustainable in law, we direct the respondents to refund the amounts collected from the writ petitioners being INR 5,47,000/- [W.P.(C) 17314/2022] and INR 5,00,000/- [W.P.(C) 17328/2022] forthwith.

123. Since we have desisted from rendering any final opinion on the aspect of classification, the present decision shall be without prejudice to the right of the DGFT to initiate proceedings pertaining to the validity of the MEIS certificates issued to the writ petitioners if so chosen and advised and if otherwise permissible in law.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

NOVEMBER 22, 2024/neha/RW/DR