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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 14th February, 2023

+ **W.P.(C) 12071/2022 and CM APPL. 7098/2023**

JINDAL EXPORTS AND IMPORTS
 PRIVATE LIMITED.

..... Petitioner

Through: Mr. Kishore Kunal & Mr. Parth,
 Advocates (M- 9643164668).

versus

DIRECTOR GENERAL OF FOREIGN
 TRADE & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC
 with Mr. Kushagra Kumar, Advocate
 for R-1.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The Petitioner - M/s Jindal Exports and Imports Private Limited has filed the present petition challenging the Directorate General of Foreign Trade's ('DGFT') stand of non-issuance of Advance Authorization for the import of Gold bars and export of manufactured Gold Jewellery and Gold Medallions by the Petitioner.
3. The Petitioner is a company engaged in manufacturing and export of gold jewellery, articles, medallions, bars, plates and rods and trading of gold, silver, platinum and palladium. It has been a recognized export house since 2017. The case of the Petitioner is that in terms of Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Respondent - DGFT is to issue Advance Authorizations for import of gold bars in order to enable manufacturing of gold jewelry and medallions. It is the case of the Petitioner that between 2015 to 2019, the Petitioner had been granted such

authorizations regularly for importing gold bars and export of gold medallions.

4. On 26th June, 2019, the Petitioner applied for issuance of an Advance Authorization. However, the same was rejected. The Respondent issued Public Notice No.35/ (2015-2020) dated 26th September 2019 to the effect that Advance Authorization would not be issued where the items for export were ‘Gold Medallions and Coins’ or ‘Any other jewelry/articles manufactured by a fully mechanized process.’

5. Pursuant to the said public notice, a rejection letter dated 30th September, 2019 was issued which is set out below:

“REJECTION LETTER

To,

*Jindal Exports & Imports Pvt. Ltd.
110, Babar Road, Opp Hotel Hilton
New Delhi-110001*

Sub: Rejection Letter

Sir/Madam,

Your Application has been rejected due to following reasons:

1. The Advance Authorisation cannot be issued for the export item Gold Meddallions Purity 91.6% as per Public Notice no. 35/2015-2020 dt. 26.09.2019. Hence, your case has been rejected.

Your case stands closed

Your’s faithfully,

(Ramesh Kumar Verma

Dy. Director General of Foreign Trade

Place: New Delhi

Date: 30.09.2019”

6. The case of the Petitioner is that another similarly placed export house, namely, M/s M.D. Overseas Limited had challenged an identical public notice which was issued by the Respondents. In this case as well, the

public notice was considered by the Id. Division Bench in *W.P.(C) 12197/2019* titled '*M.D. Overseas Limited v. Union of India & Ors.*' The rejection was based on the same public notice no. 35/ (2015-2020). It is the case of the Petitioner that the basis of the rejection being public notice no. 35 / (2015-2020), was challenged before this Court in *W.P.(C) 12197/2019* wherein the Id. Division Bench quashed the said public notice. The operative portion of the said judgement dated 11th February 2020 reads as under:

“30. In view of the aforesaid decision, categorisation or recategorization cannot be done by the policy circulars, such exercise has to be undertaken by specific amendment to the Foreign Trade Policy under Section 5 of the Act. Hence also, the public notice No.35/2015-2020 dated 26th September, 2019 (Annexure P-1) is beyond the power, jurisdiction and authority of DGFT.

31. In view of the aforesaid decision also, the power exercised by DGFT under paragraph 1.03 of the Foreign Trade Policy 2015-2020 is illegal and the same deserves to be quashed and set aside.

32. In view of the aforesaid facts, reasons and judicial pronouncements, we hereby quash and set aside the public notice dated 26th September 2019 issued by respondent No.1 and consequential letters dated 1st November, 2019 which are Annexure P-2 and Annexure P-3 respectively to the memo of writ petition are directed to be decided by respondent No.1 as early as possible and practicable.

33. In view of the aforesaid, the writ petition stands allowed and disposed of.”

7. SLP No. 11088/2021 against the said judgment was dismissed on 27th August, 2021. When the Petitioner learnt of the judgment of the Id. Division Bench, it sought a review of the decision dated 30th September 2019 by which the Petitioner's Advance Authorization was rejected. This review was

not considered and was rejected again on the ground that the Petitioner was not a party to the said writ petition. The operative portion of the review order dated 7th June 2022 is extracted herein below:

“6. I have gone through the records and facts carefully. Notification No.25/2015-20 dated 10.08.2020 disallows issue of Advance Authorization where export item is ‘Gold Medallions and Coins’ or ‘Gold jewellery/articles’ manufactured by fully mechanised process. The Petitioner’s application dated 26.06.2019 for grant of advance authorization was rejected by invoking Public Notice No.35 dated 26.09.2019. The Hon’ble Delhi High Court quashed and set aside Public Notice dated 26.09.2019 and allowed the WP(C) No. 12197/2019 filed by M/s MD Overseas Limited vs. UOI and others vide its order dated 11.02.2020. The Petitioner was not a party to the WP and therefore cannot be granted benefits of the Court’s order dated 11.02.2020.”

8. In addition, in the review notice, reliance is placed by the DGFT on a notification dated 10th August, 2020 to argue that subsequent to the Id. Division Bench’s judgment, a fresh notification has been issued clarifying that Advance Authorization shall not be issued where the item of export is ‘Gold Medallions and Coins’, or ‘Gold jewelry/articles manufactured by a fully mechanized process’.

9. It is submitted by the Id. Counsel for the Petitioner that both the grounds on which the rejection has been premised would be untenable inasmuch as the subsequent circular/notification cannot have retrospective effect. The Petitioner’s case can only be processed on the basis of the legal position that existed on the day when the Advance Authorization was sought and was rejected.

10. He further submits that the Id. Division Bench's judgment squarely covers the issue, as the public notice is a notice which would apply to the entire industry, and once the same has been quashed, a rejection of the Petitioner's Advance Authorization on the basis of the said public notice would also not stand. He finally submits that the notification also, cannot be applicable retrospectively as held by the Supreme Court in '*Director General of Foreign Trade v. Kanak Exports, 2015 (326) ELT 26 (SC).*'

11. Ld. counsel for the Respondents submits that vide notification dated 10th August, 2020, the same public notice has been reiterated and therefore the same would be applicable to the Petitioner. It is also the submission of Id. Counsel for the Respondents that the review petition was filed belatedly.

12. Heard. A perusal of the order rejecting the review petition shows that the review has been primarily rejected only on two grounds. First, that the Petitioner was not a party to the writ petition which led to the decision of the Ld. Division Bench. This ground would be completely untenable inasmuch as the public notice which was under challenge was the identical public notice which was the basis of the Petitioner's rejection. The said public notice upon being quashed, any action taken consequential to the said public notice, would also not stand in the eyes of law. The Id. Division Bench's judgment would squarely apply to the facts of the Petitioner's case as well. A quashed public notice cannot be relied upon by the department to refuse the Advance Authorization.

13. Insofar as the second ground with respect to retrospective application of the notification dated 10th August, 2020 is concerned, the Advance Authorization of the Petitioner was applied for on 26th June, 2019 and the same would have to therefore, be considered in terms of the legal position

prevalent on the said date. The subsequent notification cannot be applied retrospectively to reject the said Advance Authorisation. Under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, it is the settled legal position as held in *Kanak Exports (supra)*, that a retrospective application of a later notification, cannot be made by the Central Government. Relevant portions of *Kanak Exports (supra)* are set out below:

“95. In fact, the Government itself realised the same, namely, the DGFT had no such power. It is for this reason that what was sought to be achieved by the said Public Notice, was formalised by the Central Government by issuing Notifications dated April 21 and 23, 2004 in exercise of powers conferred on the Central Government by Section 5 of the Act and the same four items were excluded.

96. Therefore, we hold that public notice dated January 28, 2004 issued by DGFT, so far it excludes the aforesaid four items, is ultra vires.

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99. We start with the premise that there was complete justification for excluding the four items insofar as grant of benefit under scheme is concerned. The Union of India has been able to demonstrate the same in full measure. This aspect has already been discussed in detail at the outset itself.

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108. We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless rule making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this Section confer powers upon the Central Government to ‘amend’ the policy which has been

framed under the aforesaid provision. However, that by itself would not mean that such a provision empowers the Government to do so retrospective.

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128. We have already discussed these aspects in detail. To recapitulate, it is held by us that Section 5 of the Act does not empower the Government to make amendments with retrospective effect, thereby taking away the rights which have already accrued in favour of the exporters under the Scheme. No doubt, the Government has, otherwise, power to amend, modify or withdraw a particular Scheme which gives benefits to a particular category of persons under the said Scheme. At the same time, if some vested right has accrued in favour of the beneficiaries who achieved the target stipulated in the scheme and thereby became eligible for grant of duty credit entitlement, that cannot be snatched from such persons/exporters by making the amendment retrospectively. In the present case, we find that Section 5 of the Act does not give any specific power to the Central Government to make the Rules with retrospective effect. The Central Government is authorised to make Rules/Schemes under the said provision as a delegatee, which means that the EXIM Policy/Scheme framed under the said provision is by way of delegated legislation. There has to be specific power to make the amendments with retrospective effect, which are lacking in the instant case. Moreover, even if there is such a power, it cannot take away vested rights which have accrued in favour of particular persons/exporters. We have already enlisted number of judgments of this Court taking such a view. A few such cases laying down the aforesaid principle are:

(i) Regional Transport Officer, Chittoor & Ors. v. Associated Transport Madras (P) Ltd. & Ors. - (1980) 4 SCC 597

(ii) Accountant General & Anr. v. S. Doraiswamy & Ors. - (1981) 4 SCC 93

(iii) *A.A. Calton v. Director of Education & Anr. - (1983) 3 SCC 33*
(iv) *Chairman, Railway Board & Ors. v. C.R. Rangadhamaiah & Ors. - (1997) 6 SCC 626*”

14. In view of the above legal position, the benefit of the Id. Division Bench’s judgment in *W.P.(C) 12197/2019* would enure to the benefit of the Petitioner. The rejection of the Advance Authorization accordingly stands quashed and set aside. The DGFT shall now proceed in accordance with law and give the benefit to the Petitioner within a period of six weeks.

15. The writ petition and all pending applications, if any, are disposed of in the above terms.

FEBRUARY 14, 2023
Rahul/RP

PRATHIBA M. SINGH
JUDGE



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