M/S. HINDUSTAN GRANITES

v.

UNION OF INDIA AND ORS.

APRIL 3, 2007

[DR. ARIJIT PASAYAT AND S. H. KAPADIA, JJ.]

Import-Export:

Foreign Trade Policy 2004-2005—Para 6.8(a) and para 6.8(h)—Circular dated 30.8.2005 and Notification 24 dated 31.8.2005—By impugned circular/Notification, EOU's prevented from making DTA sales of finished marble from imported rough marble—Validity of circular/Notification—Held, valid as it fulfils the test of public interest and reasonableness qua restriction imposed on 100% EOU—DTA sales not an integral part of EOU scheme—Director General also found that over the years, entire export of marble tiles made out of poor quality indigenous rough marble blocks for achieving NFE—On account of above practice, Restricted Import Policy of marble during EOU scheme(unamended) circumvented—Marble is in restricted category because mining industry depends on that resource as it generates employment—Unamended policy had no correlation between input imported and finished product exported.

EOU scheme—Object of—Discussed.

The challenge in this appeal is to the validity of policy Circular dated 30.8.05 and Notification No. 24 dated 31.8.05 which has the effect of amending para 6.8(a) and para 6.8(h) of the Foreign Trade Policy 2004-2009. Para 6.8(a) of the 2004-2009" provided that goods, upon 50% of FOB Value of exports, could be sold on payment of concessional rate of duty in the DTA subject to fulfillment of positive NFE. Under para 6.8(h), sale of finished products could be made in DTA against payment of full duty, provided the said good was freely importable under the Policy. Further, under para 6.8(h) sale of by-products and sale of waste beyond the entitlement of para 6.8 was permissible on payment of full duty.

On 31.8.05, the impugned Notification was issued amending para 6.8(a) and para 6.8(h) of FTP 2004-2009 . By the impugned Notification the EOUs

A were prevented from making DTA sales of the finished marble from imported rough marble, with immediate effect.

The contention of petitioners was that on account of the impugned notification, the quantity of marble sold by it in the DTA stood reduced; that the quantity which could be imported by Special Import License Units (SIL B Units) was arbitrarily increased resulting in unreasonable discrimination between 100% EOUs and SIL Units; that the quantity of Marble sold by the EOUs in the domestic area has been reduced and the quantity of marble sold by SIL Units from the same imported rough marble stood significantly increased which has resulted in the loss to the EOUs; that the impugned C circular/notification was against public interest since the SIL Units had no Export Obligations, they were not Foreign Exchange Earners and they were required to pay lesser rate of duty; that DTA sales constituted essential feature of the EOU Scheme since vide para 6.1, 100% EOUs undertook to export their entire production of goods, except permissible sale in the DTA, and, therefore, the DTA sales constituted an integral part of EOU Scheme; that in the absence D of DTA sales, an EOU would be compelled to sell its entire production in the export market and that the impugned Circular/Notification has been published with the view to protect the SIL Units at the cost of 100% EOUs.

Disposing of the IAs, appeals, transfer petitions and transfer cases, the Court

E

HELD: 1. There is no merit in the challenge to the impugned Circular/ Notification for the following reasons: Firstly, it is important to note that under para 6.1 of the unamended FTP 2004-2009 , 100% EOUs undertook to export their entire production except permissible sales in DTA. Therefore, DTA sales F constituted an exception or an incidental facility. DTA sales were not an integral part of the EOU Scheme. Para under 6.1, EOUs were allowed to be set up on the condition that they would export their entire production. It is on this condition that 100% EOUs should avail of various benefits under Customs and Excise Act. The said DTA sales or sales of rejects were exceptions. DTA sales were not an integral part of the EOU Scheme in the sense that if for G reasonable reasons if these exceptions are eliminated, as in this case, the Scheme would become unworkable. Secondly, 100% EOUs have been importing rough marble blocks from which they are producing marble tiles/ slabs and what they are exporting is the said marble tiles/slabs. However, the Director General found, in the course of last seven years, that the entire export of marble tiles/slabs is made out of the poor quality indigenous rough marble H

A

blocks. On the other hand, it is found that the entire sale of marble tiles/ slabs in DTA is from rich good quality imported rough marble blocks. Therefore, the DTA sales by 100% EOUs are now disallowed under the impugned Circular/Notification. Thirdly, on account of the above practice, the Director General has found that four to five 100% EOU have been importing rough marble ostensibly for export but in effect after slightly polishing the same are sold in DTA. Marble is a restricted item. On account of the above practice, the Director General has found circumvention of the Restricted Import Policy of marble during 100% EOU Scheme (unamended). The concept of Net Foreign Exchange earning is very important. On account of the price differential, under the impugned practice, there is substitution of imported inputs by domestic inputs. The rational behind allowing imports of rough marble blocks by 100% EOUs was that the raw material would be used for export production and that it will not be diverted in DTA defeating the very purpose of putting marble in the restricted category. The object behind the EOU Scheme is consumption of imported raw material for manufacture of finished products which are to be exported. If that facility leads to substitution of imported inputs by domestically procured inputs then the facility has to be discontinued. This discontinuation has been done by the impugned Circular/ Notification. Fourthly, marble is an item under restricted category. It is put in the restricted category since it is not treated as only revenue-generating resource. It is put in the restricted category because the mining industry depends on that resource. It generates employment. Marble is an input required in the mining industry. As a result of impugned substitution, the Indian market gets flooded by the imported goods resulting in unemployment in the mining industry. Fifthly, by the impugned Circular/Notification, the Government has stopped procurement of domestic rough marble blocks for achieving NFE earnings. This is the major object behind the impugned Circular/Notification. It is true that the unamended Policy had no co-relation between the in-put imported and the finished product exported. That was the loophole. To stop the procurement of domestic rough marble blocks for achieving NFE, the DTA sales had to be prohibited. By the amended Policy 100% EOUs are now required to produce marble tiles/slabs (finished products) out of imported rough marble blocks and thereby the amended Policy stops the procurement of domestic rough marble blocks for achieving NFE by these 100% EOUs. Lastly, there are 20 to 25 SIL Units (found to be eligible) *vis-a-vis* 4 to 5 100% EOUs and, therefore, the volume has been increased from 68,000 MT to 1.30 Lakhs MT.

B C D E F G

[Para 20] [755-G-H; 756-A-H; 757-A-B] H

A *Union of India & Ors.* **v.** *M/s. Asian Food Industries,* **(2006) 12 SCALE 105, held inapplicable.**

Bannari Amman Sugars Ltd. **v.** *Commercial Tax Officer & Ors.,* **[2005] 1 SCC 625 and** *Union of India & Anr.* **v.** *International Trading Co. & Anr.,* **[2005] 5 SCC 437, referred to.**

B

2. The impugned amendment fulfills the test of public interest and it also fulfills the test of reasonableness qua the restrictions imposed on 100% EOUs. [Para 22] [757-F]

3. Hand Book of Procedure merely implements the policy. It does not
C **prevent the Central Government from changing the policy. Nothing prevents the Central Government, in public interest, to plug the loophole by tinkering with the existing policy. [Para 24] [758-B-C]**

CIVIL ORIGINAL JURISDICTION : I.A. Nos. 1 & 2.

D

IN

T.C. (C) No. 165/2006.

WITH

E I.A. Nos. 2,4,5,6,7,& 10 in TP(C) No. 579 of 2006

T.P. (C) No.1067 of 2006

I.A. No. 1& 2 in T.C. (C) No. 168 of 2006

SLP (C) No. 13670 of 2006

F SLP (C) No. 13671 of 2006

C.A. No. 1802 of 2007

C.A. No. 1803 of 2007

C.A. No. 1804 of 2007

G T.C. (C) No. 166 of 2006

W.P. (C) No. 600 of 2006

T.C. No. 167 of 2006

T.C. No. 1 of 2007

G W.P. (C) No. 22 of 2007

SLP (C) No. 5376 of 2007 A

G.E. Vahanvati, S.G., F.S. Nariman, Gourab K. Banerji, Dr. R.G. Padia, Chetan Sharma and Dr. A.M. Singhvi, Brijesh Kalappa, Ray Vikram Nath, N. Ganpathy, Krishan Mahajan, V.K. Verma, A.D.N. Rao, Amit Kumar, Nikhil Goel, Sheela Goel, Rohit Alex, T. Momo Singh, Dinesh Kumar, Joydeep Mazumdar, Gautam Jha, Arjun K., Gaurav Agrawal, Saurav Agrawal, Ruby Singh Ahuja, B P.H. Parekh, Sameer Parekh, Ajay Jha, Deeksha Rai (for P.H. Parekh & Co.), Pallav Shishodia, Hemant Sharma, D.N. Mishra, Rahul Kaushik, B. Krishna Prasad, Priyadarshi Manish, Anjali Manish (for Mahalakshi Balaji & Co.), Rajendra Singhvi, M.S. Singhvi, Amit Bhandary, Surya Kant, Madhur Dadlani, Brij Bhushan, Sanjay R. Hedge, Shamim Hadiar, Amit Kr. Chawla, and Vikrant C Yadav for the appearing parties and Deepak Khosla Respondent-in-person.

The Judgment of the Court was delivered by

KAPADIA, J. 1. In this batch of matters, the central question which we are called upon to decide is regarding the validity of Policy Circular dated D 30.8.05 and Notification No.24 dated 31.8.05 which has the effect of amending para 6.8(a) and para 6.8(h) of the Foreign Trade Policy 2004-2009.

2. This judgment is confined to Domestic Tariff Area sales (DTA sales) by 100% Export Oriented Unit (EOU).

E

3. Leave granted in special leave petitions filed by Union of India against various EOUs.

4. The basic issue which we need to decide in this batch of cases is: whether DTA sales by 100% EOUs form an integral part of EOU Scheme?

F

5. For the sake of convenience we reproduce hereinbelow the facts as reproduced in the case of *Union of India & Ors.* v. *M/s. Abhishek Exports* [Civil Appeal No. of 2007 arising out of S.L.P. (C) No....(CC9879 of 2006)].

6. The concept of EOU was introduced in 1980 in the EXIM Policy. The EOU Scheme was framed in order to boost the Indian exports. Under the said G Scheme, EOU could be located at any place. In 1992, statutory recognition was given to EXIM Policy vide Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. In 1991, EOU was permitted to sell rejects upto 5% and goods in the DTA after obtaining permission from the Export Commissioner. In 1997, under EXIM Policy 1997-2002, EOU was permitted to H

A sell rejects as well as goods upto 50% of the FOB Value of exports subject to payment of duty and fulfillment of minimum Net Foreign Exchange Earnings (NFE). Over and above this limit, EOU could sell finished products *which were freely importable* against payment of full duty.

7. On 24.3.2000 M/s. Abhishek Exports was granted the Letter of B Permission (LOP) by the Development Commissioner, NOIDA, to manufacture and export marble tiles and finished marble blocks. In the LOP it was stipulated that M/s. Abhishek Exports had to maintain NFE percentage and they were required to achieve minimum Export Obligations. In the said LOP it was further stipulated that M/s. Abhishek Exports cold make domestic sales as per the C provisions of EXIM Policy 1997-2002.

8. M/s. Abhishek Exports started exporting finished marble made out of rough imported marble and rough indigenous marble. The rough marble so imported was duty-free. Under the LOP, M/s. Abhishek Exports had the right to make sales in DTA, subject to payment of concessional and full duty as D the case may be.

9. On 1.4.04 FTP 2004-2009 came into force. We quote herein below paras 6.1, 6.5, 6.8(a), 6.8(b), 6.8(d), 6.8(e), 6.8(g) and 6.8(h) of the FTP 2004-2009 which read as under:

E "CHAPTER- 6

EXPORT ORIENTED UNITS (EOUs), ELECTRONICS HARDWARE TECHNOLOGY PARKS (EHTPs), SOFTWARE TECHNOLOGY PARKS (STPs) AND BIO-TECHNOLOGY PARKS (BTPs)

F Eligibility	6.1	Units undertaking to export their entire production of goods and services (except permissible sales in the DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronic Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering, and rendering of services. Trading units, however, are not covered under these schemes.
G		
Net Foreign H **Exchange**		6.5 EOU/EHTP/STP/BTP unit shall be a positive net foreign exchange earner. Net Foreign Exchange Earnings

Earnings (NFE) (NFE) shall be calculated cumulatively in blocks of five years, starting from the commencement of production. A

DTA Sale of Finished Products/ Rejects Waste/Scrap/ emnants and By-products

6.8 The entire production of EOU/EHTP/STP/BTP units shall be exported subject to the following:

(a) Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of exports subject to fulfillment of positive NFE on payment of concessional duties . Within the entitlement of DTA sale, the unit may sell in DTA its products similar to the goods which are exported or expected to be exported from the units. No DTA sale at concessional duty shall be permissible in respect of motor cars, alcoholic liquors, books and tea (except instant tea) or by a packaging/ labeling /segregation/ refrigeration unit/ compacting/micronisation/pulverization/granulation / conversion of mono-hydrate form of chemical to anhydrous form or vice-versa and such other items as may be notified from time to time. Sales made to a unit in SEZ shall also be taken into account for the purpose of arriving at FOB value of export by EOU provided payment for such sales are made from EEFC Account. Sale to DTA would also be subject to mandatory requirement of registration of pharmaceutical products (including bulk drugs). B C D E

(b) For services, including software units, sale in the DTA in any mode, including on line data communication shall also be permissible up to 50% of FOB value of exports and /or 50% of foreign exchange earned, where payment of such services is received in foreign exchange. F

(d) Unless specifically prohibited in the LOP, rejects may be sold in the Domestic Tariff Area (DTA) on payment of duties as applicable to sale under paragraph 6.8(a) on prior intimation to the Customs authorities. Such sales shall be counted against DTA sale entitlement. Sale of rejects upto 5% of FOB value of exports shall not be subject to achievement of NFE. G

(e) Scrap/ waste/ remnants arising out of production process or in connection therewith may be sold in the DTA as per the Standard Input-Output norms notified under the H

A Duty Exemption Scheme on payment of concessional duties as applicable within the overall ceiling of 50% of FOB value of exports. Such sales shall not, however, be subject to achievement of positive NFE. In respect of items not covered by the norms, the Development Commissioner may fix ad-hoc norms on the basis of data for a period of six months and within this period, he shall get the norms fixed by the BOA. Sale of waste/ scrap/remnants by units not entitled to DTA sale or sales beyond the DTA sale entitlement, shall be on payment of full duties. The scrap/waste/remnants may also be exported.

(g) By-products included in the LOP may also be sold in the DTA subject to achievement of positive NFE on payment of applicable duties within the overall entitlement of paragraph 6.8(a). Sale of by-products by units not entitled to DTA sales or beyond the entitlements of paragraph 6.8 (a) shall also be permissible on payment of full duties.

(h) EOU/ EHTP/ STP/BTP units may sell finished products, which are freely importable under the Policy in the DTA under intimation to the Development Commissioner against payment of full duties provided they have achieved the positive NFE."

10. To sum up, para 6.8(a) of the FTP provided that goods, upto 50% of FOB Value of exports, could be sold on payment of concessional rate of duty in the DTA subject to fulfillment of positive NFE. The ceiling, therefore, included sale of rejects under para 6.8(d) as well as sale of waste under para 6.8(e) and by-products under para 6.8(g). Under para 6.8(h), sale of finished products could be made in DTA against payment of full duty, provided the said good was freely importable under the Policy. Further, under para 6.8(h) sale of by-products and sale of waste beyond the entitlement of para 6.8 was permissible on payment of full duty. The above quoted paragraphs are relevant extracts of FTP 2004-2009 in respect of EOU.

11. On 16.12.04, the Development Commissioner, NOIDA, approved the Renewal Application made by M/s. Abhishek Exports for next five year that is from 2005-2006 to 2009-2010, under LOP dated 24.3.2000.

12. The approval dated 16.12.04 stipulated that M/s. Abhishek Exports should have NFE of Rs.9.90 crores in the next five years. Under the LOP, the exporter was required to maintain positive NFE. A

13. On 31.8.05 the impugned Notification was issued amending para 6.8(a) and para 6.8(h) of FTP 2004-2009. By the impugned Notification the EOUs were prevented from making DTA sales of the finished marble from imported rough marble, with immediate effect. It is this Notification which is the subject-matter of challenge. B

14. According to M/s. Abhishek Exports, an investment of Rs.300 lakhs had been made; that, it had taken a loan from State Bank of Bikaner & Jaipur to the tune of Rs.2.30 lakhs on the basis of the Policy of Government of India and that by making the above investments it had changed its position substantially. According to M/s. Abhishek Exports, on account of the impugned Notification, the quantity of marble sold by it in the DTA stood reduced. According to M/s. Abhishek Exports such an amendment to the FTP 2004-2009 by the impugned Notification was devoid of any element of public interest. According to M/s. Abhishek Exports, the impugned Notification was against the basic feature of the EOU Scheme. C D

15. The Notification was challenged before the Rajasthan High Court. Vide Order dated 29.09.06 the writ petition filed by M/s. Abhishek Exports in the Rajasthan High Court stands transferred to this Court vide Transfer Case (C) No.165 of 2006. E

16. According to M/s. Abhishek Exports, by the impugned Circular dated 30.8.2005 the quantity which could be imported by Special Import License Units (SIL Units) was arbitrarily increased from 80,000 MT to 1.30 Lakh MT. The Circular dated 30.8.05 has been challenged on the ground that it discriminates unreasonably between 100% EOUs and SIL Units; that, the impugned Circular gives benefit to selected importers; that, the effect of the impugned Circular was to increase the availability of imported rough marble blocks for use in the domestic market and that for no reason the right to import has been unreasonably limited only to SIL Units by the impugned Notification dated 31.8.05. According to M/s. Abhishek Exports, by reason of the impugned Circular/Notification the quantity of marble sold by the EOUs in the domestic area has been reduced and the quantity of marble sold by SIL Units from the same imported rough marble stood significantly increased which has resulted in the loss to the EOUs. According to M/s. Abhishek Exports, the impugned Circular/Notification was against public interest since F G H

A the SIL Units had no Export Obligations, they were not Foreign Exchange Earners; they were required to pay lesser rate of duty and consequently according to M/s. Abhishek Exports the impugned Circular/Notification was not in public interest. Further, according to M/s. Abhishek Exports, DTA sales constituted essential feature of the EOU Scheme since vide para 6.1, 100% B EOUs undertook to export their entire production of goods, except permissible sale in the DTA, under the EOU Scheme and, therefore, the DTA sales constituted an integral part of EOU Scheme. It was submitted that the DTA sales were permitted only if the EOU fulfilled its Export Obligations and achieved positive NFE and, therefore, the intention was to grant benefit to the EOU on achieving positive NFE and it had no co-relation with the imported C raw material out of which the exports are made. According to M/s. Abhishek Exports, in the absence of DTA sales, an EOU would be compelled to sell its entire production in the export market. According to M/s. Abhishek Exports, on account of total restriction on DTA sales their inventory of marble tiles is likely to get accumulated in the factory blocking the working capital and funds, which otherwise would have been disposed of in the local market. D According to M/s. Abhishek Exports, the unamended Policy had provided an insulation/hedge against the fall in the export business in the international market. According to M/s. Abhishek Exports, an EOU could sell the marble tiles in the domestic market in the slump season so that production and business activity of an EOU was not adversely affected. According to M/s. E Abhishek Exports on account of impugned Circular/Notification an idle capacity during the slump season would accrue. Further, under the unamended Policy, in case of loss, an EOU could make good the loss by DTA sales and, therefore, such sales constituted an essential feature of the EOU Scheme. According to M/s. Abhishek Exports, DTA sales were essential to run the plant at maximum capacity, to minimize the cost of production in the competitive F export market, to deal with export surplus and to provide for disposal of export products on cancellation of export orders. According to M/s. Abhishek Exports, the impugned Circular/Notification has been published with the view to protect the SIL Units at the cost of 100% EOUs. According to M/s. Abhishek Exports, the impugned amendments would disrupt the business of EOUs and it would G flood the domestic market with 1.30 lakhs MT of finished marble product made from imported rough marble which would not serve the public interest. According to M/s. Abhishek Exports, the impugned Circular/Notification has been issued to protect the marble industry of Gujarat which is the primary beneficiary of the SIL based import policy of marble. M/s. Abhishek Exports further submitted that Article 14 of the Constitution of India is violated in the H present case since the impugned Circular/Notification has been issued to give

concession to SIL importers at the cost of EOUs. A

17. On 10.1.07 when the above matters came for hearing before this Court, the following order was passed:

> "Ban on DTA sales by 100% EOU under OGL licence and limiting the issuance of licences to those applicants who have imported crude B marble between 1999-2001 under SIL scheme vide impugned policy circulars Nos. 24 dated 30.8.2005, No. 34 dated 30.11.2005 and notification Nos. 23 and 24 dated 31.8.2005 (hereinafter referred to as the impugned new policy) was the subject matter of challenge vide writ petitions filed in various High Courts.
>
> C
>
> By order dated 29.9.2006, the said writ petitions stood transferred to this Court.
>
> Having regard to the arguments advanced before us and in view of the fact that the entitlement of Domestic Users for financial year 2005-06 is going to lapse on 31.3.2007 the following interim order is D passed.
>
> DGFT would be entitled to grant licences to the applicants who are so entitled under policy circular No. 24 dated 30.8.2005. To that extent our order dated 29.9.2006 stands vacated.
>
> E
>
> In T.P. (C) No. 579/06 filed by the Director General of Foreign Trade it has been *inter alia* stated that on account of representations received from the traders and the material (including complaints) gathered by DGFT, the impugned new policy came to be enacted. This was after detailed discussions with the Trade. The broad features of the new policy and the reasons for enacting the policy are given in F paragraphs 15, 16 and 17 of T.P. (C) No. 579/06. However, it appears that the requisite material was not supplied to the affected 100% EOUs. who have complained before us that the changes have been made in FTP vide the impugned policy without giving any opportunity to the affected Units. At this stage we may point out that learned G Solicitor General of India stated before us that the impugned policy decision is taken on certain material (including complaints/ representations received) which he is prepared to disclose to the concerned EOUs. Accordingly, we direct DGFT to supply the material in its possession to the affected EOUs., who have filed the writ petitions, on or before 15.1.2007. The said petitioners (EOUs.) who H

A have filed writ petitions in the High Court shall thereafter make representations to the DGFT within 10 days on and from the receipt of the material (including complaints) from DGFT. Thereafter, DGFT will decide the matter in accordance with law. We make it clear that it will be open to DGFT to equitably work out the matter, if possible. One point, however, needs to be mentioned. It is stated on behalf of M/s Hindustan Granites that they have accumulated wastes which they are entitled to sell in DTA under the unamended policy. It is contended on behalf of M/s Hindustan Granites that they have fulfilled the benchmark of Net Foreign Exchange earnings and, therefore, they were entitled to sell the accumulated wastes in the domestic market (DTA) under para 6.8 (h) on payment of full duty. On this point, M/s Hindustan Granites can also make the representation giving facts and figures regarding the quantity of waste which has accumulated and it will be open to DGFT if possible to decide the question regarding sale of the said waste in the DTA.

D The question as to whether the impugned circulars/notifications constitutes a change in the policy or whether it is a matter of detail within the existing policy is the question which will be decided on the next date of hearing when we will examine the merits of the case.

On receiving the report from DGFT, we shall hear the matter on E merits on the next occasion. In the meantime, the ban on EOU Units undertaking DTA sales shall continue to remain in operation. Consequently, interim order of the Rajasthan High Court dated 26.10.2005 in DB Civil Writ Petition No. 5811/05 shall remain stayed.

Stand over to 31.1.2007."

F

18. On 7.2.07, the Director General of Foreign Trade after hearing the parties and after considering their representations passed an order rejecting the various representations made by *M/s. Hindustan Granites Ltd., M/s. Abhishek Exports, M/s. Pacific Industries Limited, M/s. Jain Grani Marmo Pvt. Limited, M/s. Marble Art* (all 100% EOUs). The said order is also under G challenge before us.

19. The said order has re-affirmed the decision taken on 31.8.05 *qua* 100% EOUs and *qua* SIL Units without any change. In this connection, it is submitted on behalf of M/s. Abhishek Exports that the Director General had H erred in holding that the EOUs were misusing the DTA facility by making

finished products from indigenous marble and exporting the said finished products rather than making finished products from the imported marble and exporting the same. According to M/s. Abhishek Exports, FTP 2004-2009 specifically allow EOUs to sell finished products made from imported marble in the DTA, upto 50% of FOB value on payment of concessional rate of duty vide para 6.8(a). That, the said Policy permitted EOUs to sell anything above 50% of the FOB value of exports in the DTA on payment of full duty [para 6.8(h)] subject to the EOUs maintaining a positive NFE. According to M/s. Abhishek Exports, the above system operated for seven years. According to M/s. Abhishek Exports, the above system is allowed in the Hand Book of Procedure under which there was no requirement to co-relate every import consignment with exports. According to M/s. Abhishek Exports, for last seven years the Implementing Authority has not objected to the manufacture of finished goods from indigenous marble and that the said Authority has never objected to such finished goods being exported as breach or misuse of the Policy. According to M/s. Abhishek Exports, the Director General had erred in holding that the impugned amendment was to protect the domestic marble industry. According to M/s. Abhishek Exports, on account of change in Policy the EOUs which were previously buying rough marble from the domestic market to make finished products and exporting the same would not be now able to do so. That, under the amended Policy the EOUs are now required to export finished products made from imported marble. According to M/s. Abhishek Exports, on account of change in Policy qua SIL Units permitting them imports of marble to the order of 1.30 Lakhs MT as compared 68,000 MT would effect the domestic mining industry. According to M/s. Abhishek Exports, the Director General had erred in holding that there was diversion of the imported rough marble in DTA which defeated the very purpose of putting marble as under the restricted category. In this connection, M/s. Abhishek Exports contend that there was no diversion because DTA sales was specifically permitted under paras 6.8(a) and 6.8(h) of FTP 2004-2009 prior to its amendment on 31.8.05 and, therefore, there was no misuse as found by the Director General of Foreign Trade.

20. We find no merit in the challenge to the impugned Circular/Notification for the following reasons. *Firstly,* it is important to note that under para 6.1 of the unamended FTP 2004-2009, 100% EOUs undertook to export their entire production except permissible sales in DTA. Therefore, DTA sales constituted an exception or an incidental facility. DTA sales were not an integral part of the EOU Scheme. Under para 6.1, EOUs were allowed to be set up on the condition that they would export their entire production. It is on this condition

A that 100% EOUs could avail of various benefits under Customs and Excise Act. The said DTA sales or sales of rejects were exceptions. DTA sales were not an integral part of the EOU Scheme in the sense that if for reasonable reasons if these exceptions are eliminated, as in this case, the Scheme would become unworkable. In fact, *M/s. Hindustan Granites* even today after the B impugned amendment works without use of domestic raw material. Hence, DTA sales is not an integral part of the EOU Scheme. *Secondly,* it is important to note that 100% EOUs have been importing rough marble blocks from which they are producing marble tiles/slabs and what they are exporting is the said marble tiles/slabs. However, the Director General found, in the course of last seven years, that the entire export of marble tiles/slabs is made out of the poor C quality indigenous rough marble blocks. On the other hand, it is found that the entire sale of marble tiles/slabs in DTA is from rich good quality imported rough marble blocks. Therefore, the DTA sales by 100% EOUs are now disallowed under the impugned Circular/Notification. *Thirdly,* on account of the above practice, the Director General has found that four to five 100% D EOUs have been importing rough marble ostensibly for export but in effect after slight polishing the same are sold in DTA. Marble is a restricted item. On account of the above practice, the Director General has found circumvention of the Restricted Import Policy of marble during 100% EOU Scheme (unamended). As stated above, the concept of Net Foreign Exchange earning is very important. On account of the price differential, under the impugned E practice, there is substitution of imported inputs by domestic inputs. The rational behind allowing imports of rough marble blocks by 100% EOUs was that the raw material would be used for export production and that it will not be diverted in DTA defeating the very purpose of putting marble in the restricted category. The object behind the EOU Scheme is consumption of imported raw material for manufacture of finished products which are to be F exported. If that facility leads to substitution of imported inputs by domestically procured inputs then the facility has to be discontinued. This discontinuation has been done by the impugned Circular/Notification. *Fourthly,* as stated above, marble is an item under restricted category. It is put in the restricted category since it is not treated as only revenue-generating resource. It is put G in the restricted category because the mining industry depends on that resource. It generates employment. Mining generates employment. Marble is an input required in the mining industry. As a result of impugned substitution, the Indian market gets flooded by the imported goods resulting in unemployment in the mining industry. *Fifthly,* by the impugned Circular/ Notification, the Government has stopped procurement of domestic rough H marble blocks for achieving NFE earnings. This is the major object behind the

impugned Circular/Notification. It is true that the unamended Policy had no co-relation between the input imported and the finished product exported. That was the loophole. To stop the procurement of domestic rough marble blocks for achieving NFE, the DTA sales had to be prohibited. By the amended Policy 100% EOUs are now required to produce marble tiles/slabs (finished products) out of imported rough marble blocks and thereby the amended Policy stops the procurement of domestic rough marble blocks for achieving NFE by these 100% EOUs. Lastly, there are 20 to 25 SIL Units (found to be eligible) vis-a-vis 4 to 5 100% EOUs and, therefore, the volume has been increased from 68,000 MT to 1,30 Lakhs MT.

21. Before concluding, we would like to refer to the authority cited on behalf of 100% EOUs.

22. In the case of *Bannari Amman Sugars Ltd.* v. *Commercial Tax Officer and Ors.*, [2005] 1 SCC 625, the Division Bench of this Court speaking through one of us, Pasayat, J., has held that exemption from purchase tax on sugarcane granted in favour of sugar mills established in public sector whose production exceeded Rs.300 lakhs was entitled to tax benefit and that the Government was not right in withdrawing that benefit, particularly, when the industry stood established on basis of representation made by the Government. While explaining the doctrine of promissory estoppel it has been observed vide paras '16' and '17' that if the State acts within the bounds of reasonableness to be decided in an objective manner and from the stand point of public interest then the restriction cannot be said to be unreasonable, merely because it ope.ates harshly. In our view, on the facts of the present case, we are satisfied that the impugned amendment fulfills the test of public interest and it also fulfills the test of reasonableness qua the restrictions imposed on 100% EOUs.

23. Similarly, in the case of *Union of India and Anr.* v. *International Trading Co. and Anr.*, [2003] 5 SCC 437, the Division Bench of this Court speaking through one of us, Pasayat, J., has held that if State acts reasonably keeping in mind national priority and good trade policies then it cannot be said that the restrictions imposed in economic interest are unreasonable even though they operate harshly [See: paras '22' and '23'].

24. In the case of *Union of India & ors.* v. *M/s. Asian Food Industries,* (2006) 12 Scale 105, on which reliance is placed by counsel for M/s. Abhishek Exports, the Division Bench of this Court has held that Foreign Trade Policy under Foreign Trade (Development and Regulation) Act, 1992 along with the

A Hand Book of Procedure constituted a composite Scheme. We do not dispute with this proposition. Hand Book of Procedure merely implements the policy. It does not prevent the Central Government from changing the policy. Vide paras '29' and '30' of the said judgment it has been held specifically that the Central Government can, in exercise of its powers under Section 5 of the 1992 B Act, prohibit exports. In that case, this Court was concerned with the question of banning of exports. It is not so in this case. In the matter before us there was an incidental. Facility given to 100% EOUs to hedge the losses which may arise on account of changes in foreign exchange rates which facility is removed. In our view, nothing prevents the Central Government, in public interest, to plug the loophole by tinkering with the existing policy as is done C in the present case. Disallowing DTA sales by 100% EOUs for above reasons cannot be compared with total ban on export of pulses which was the case in the matter of *M/s. Asian Food Industries* (supra). As held hereinabove, DTA sales did not constitute an integral part of the EOU Scheme, hence the above judgment has no application.

D 25. For the above reasons, we do not see any merit in the challenge to the impugned Circular dated 30.8.05 and the Notification dated 31.8.05 by the above 100% EOUs. Accordingly, we uphold the validity of the Circular dated 30.8.05 and the Notification dated 31.8.05. Interlocutory Applications, civil appeals, transfer petition, writ petition and transfer cases are disposed of E accordingly with no order as to costs.

26. As stated above, this judgment is confined to the challenge to the impugned Circular/Notification by 100% EOUs and has nothing to do with the challenge by SIL Units who have instituted separate petitions which will be heard in normal course.

F D.G. I.As, Appeals, Transfer Petition Writ Peition &

Transfer cases disposed of.