IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 8057 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 8058 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE SONIA GOKANI
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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ADANI WILMAR LIMITED
Versus
UNION OF INDIA

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Appearance:
GUPTA LAW ASSOCIATES(9818) for the Petitioner(s) No. 1
MR JITENDRA MOTWANI WITH MR PARITOSH R GUPTA (7583) for the Petitioner(s) No. 1
ADVOCATE NOTICE SERVED for the Respondent(s) No. 1
MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 2,3

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CORAM:**HONOURABLE MS. JUSTICE SONIA GOKANI**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 11/11/2022

CAV JUDGMENT

(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. Issues involved are identical and

therefore, both the petitions are being decided by a common judgment and order where the relevant facts for adjudication are essentially drawn from the Special Civil Application No.8057 of 2020.

2. By way of the present petition, the petitioner seeks following relief:

> *"7...*
>
> *(A) Your Lordships may be pleased to issue a writ of certiorari, or a writ in the nature of certiorari or any other appropriate, writ order or direction quashing order of reassessment of bills of entry No.5407944 and 5407946 'Annexure B (Colly);*
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> *(B) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondent No.3, his servants and agents to return/refund the differential amount of duty paid by the petitioner company being Rs.72,15,893/- regarding bill of entry No.5407944 and Rs.72,15,611/- regarding bill of entry No.5407946;*

(C) Your Lordships may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction quashing order in appeal No.KDL-CUSTM-0000-APP-07 to 071-18-19 dated 21.1.2019 (Annexure-A);

(D) Pending hearing and final disposal of this petition, Your Lordships may be pleased to direct the respondent No.3, his servants and agents to return/refund the differential amount of duty paid by the petitioner company being Rs.1,44,31,505/- regarding bill of entry No.5407944 and Rs.1,44,31,505/- regarding bill of entry No.5407946 on such terms and conditions as this Hon'ble Court thinks fit;

(E) an ex parte ad interim relief in terms of para 7 (D) may kindly be granted;

(F) any other further relief as may be deemed fit in the facts and circumstances of the case may also be granted."

3. Brief facts leading to the present petition are as follow:

3.1 The petitioner company is engaged in the manufacture of different types of edible oils, acid oil, soya gum, deo distillate, etc. The petitioner imports

edible oils on the regular basis, it is registered under the Customs Act, 1962 ('the Act' hereinafter) and holds Registration Number 0899000363.

3.2 Aggrieved by the order in original passed by the respondent No.2, the petitioner has challenged the reassessment of bills of entry No.5407944, 5407946 and 5404574. According to the petitioner, it is a non-speaking and unreasoned order coupled with the fact that it is contrary to the provisions of Section 17 (5) of the Act. There are series of decisions which favour the assessee - petitioner and the same shall have to be an express order.

3.3 It is the say of the petitioner that following the requirement of fulfilling the

fundamental rights to put a defence against the claim of the customs department, the respondent No.2 in an appeal No.KDL-CUSTM-000-APP-053 TO 054-18-19 dated 28.11.2018 remanded the matter to the adjudicating authority for examination of various details and then to pass a speaking order following the principles of natural justice. The delay is of 39 days in filing the appeal and as the appellate authority is not empowered to condone the delay, present petition has been preferred by the petitioner.

3.4 In case of ***PANOLI INTERMEDIATE (INDIA) PRIVATE LIMITED VS. UNION OF INDIA,*** reported in ***2015(326) ELT 532*** while interpreting *pari materia* provision under

Central Excise Act, 1944, the Court has held that in exceptional cases where gross injustice is satisfactorily demonstrated, under Article 226 of the Constitution of India, the Court can exercise the power of the writ of certiorari.

3.5 It is specifically the case of the petitioner that adjudication by the authority of the bill of entry is in violation of the principles of natural justice and in contravention of provision of Section 17(5) of the Act. The delay is unintentional, it had continued to correspond with the customs department and therefore, it has not slept over its right and hence, this petition.

4. Affidavit-in-reply has been filed by

the respondent Nos.2 and 3 questioning the very maintainability of the petition. In absence of any breach of fundamental or legal right of the petitioner, it is urged to dismiss this petition *in limine.*

4.1 It is further contended that the constitutional validity of Section 25(4) of the Act as amended by the Finance Act, 2016 is challenged on the ground of the same being discriminatory, arbitrary, illegal and violative of Article 14 of the Constitution of India. According to the respondents, a bare perusal of Section 25(4) of the Act required that both the conditions are required to be satisfied for the enforcement of the Notification. The Central Government issues a Notification for publication in Official Gazette with

further stipulation that such gazette Notification shall be offered on the date of its issuance by the Directorate of Publicity and Public Relations of the Board, New Delhi. The Notification is issued under Section 25(1) of the Act as it is necessary in public interest. Section 25(4) of the Act draws its power and is subject to Section 25(1) of the Act provides for grant of exemption from duty, it is for the Central Government to decide in public interest to exempt generally either absolutely or subject to such conditions as may be specified in the Notification, the goods of any specified description from the whole or any part of duty of customs leviable thereon.

4.3 According to the respondents, mere reading of Section 25(1) of the Act makes it clear that the Notification needs to be published in Official Gazette and unless otherwise provided, every Notification issued under Section 25(1) of the Act shall come into force from the date of its issuance by the Central Government for publication in the Official Gazette. It is invariably urged that for a Notification to be effective, it is the date of the Notification issued for publication Official Gazette which is relevant. Section 25(4) of the Act provides every Notification issued under sub-section (1) or sub-section (2A) of the Act shall come into force unless otherwise provided on the date of its issue by the Central Government

for publication in the Official Gazette.

4.4 The determination of the time, according to the respondents, would be by a combined reading of Section 5(3) and 3(13) of the General Clauses Act along with the stipulations laid down in Section 25(4) of the Act. It has also taken the ground for challenging the statute (i) of lack of legislative competence and (ii) violation of any of the fundamental rights guaranteed in Part III of the Constitution of India or any other constitutional provision. There is no third ground.

4.5 Legislative competence of Union of India for enacting any taxing statute is not to be doubted in view of Articles 246 and 248 of the Constitution of India read

with Schedule VII List I, Entry No.97. It is,therefore, urged to dismiss the petition.

5. Affidavit-in-rejoinder is filed by the petitioner where all contentions have been denied. It is urged that the constitutional validity of Section 25(4) of the Act is not challenged in the present petition and the averments are completely misconceived. The assertion is that the Notification No.29/2018-CUS dated 01.03.2018 came into effect was on 01.03.2018. However, it has been digitally signed on 06.03.2018 and therefore, it cannot be said to have come into effect prior to the said date. The Gazette Notification of Government of India are being published only in soft copy by

Office Memorandum No.O-17022/1/2015-PSP-I dated 30.09.2015. Section 8 of the Information Technology Act, 2000 ('the IT Act' hereianfter) provides thus:

> ***SECTION 8:*** *"Publication of rule, regulation, etc., in Electronic Gazette. "Where any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic gazette:*
>
> *Provided that where any rule, regulation, order, by-law, notification or any other matter is published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form."*

6. It is further contended that the Government has implemented the step of not taking out the hard copy of any Gazette and instead to circulate only the soft copy,

the soft copy will be validated only if it is signed by the concerned authority. The digitally signed Notification is dated 06.03.2018 for having been signed by the authority on the said date and the Notification come into force on 06.03.2018. The e-publishing of the Gazette Notification has been initiated in consonance with Section 8 of the IT Act, the newly amended Section 25(4) of the Act shall be read accordingly.

6.1 It is further contended that the respondent has not disputed that no speaking order was passed by the proper officer under Section 17(5) of the Act and hence, there is a clear breach of principles of natural justice as mandated by the Act. The Assessing Officer was duty

bound not only to follow the principles of natural justice, but to act in fairness while passing the order which ought to be a reasoned order.

7. The brief facts of Special Civil Application No.8058 of 2019 with the chronology of events would be briefly touched upon at this stage.

7.1 The petitioner is engaged in manufacture of different types of edible oils, acid oil, soya gum, deo distillate, etc. It has challenged order in appeal dated 21.01.2019.

7.2 On 27.02.2018 the vessel arrived with palm edible oil at Mundra anchorage. On 28.02.2018 the Vessel MT CHEMROAD SIRUS

VO2 has berthed and entry was granted at 15:10 hours. On 01.03.2018 the petitioner filed bill of entry No.5404574 with regard to the said goods which were assessed to 40% in term of serial No.65 of the Notification No.50/2017-CUS dated 30.06.2017 as amended by Notification No.87/2017 dated 17.11.2017. The duty was paid at 17.07 hours by a challan No.2021741695.

7.3 On 06.03.2018 Notification No.29 of 2018-CUS dated 01.03.2018 enhancing the rate of duty from 40% to 54% was digitally signed. On 07.03.2018 bill of entry No.5404574 was unilaterally reassessed to a higher rate of duty at 54% under Section 17(4) of the Act and the petitioner paid

enhanced rate of duty of Rs.1,37,46,173/- under protest vide its letter dated 06.03.2018.

7.4 The petitioner also addressed a letter to the custom department for deciding its protest and for passing of speaking orders on 21.05.2018. Since order passed was not a speaking one, on 19.06.2018, the petitioner challenged the reassessment of the bill of entry before Commissioner of Appeal. On 21.01.2019, Commissioner of Appeal passed the order in appeal without going into the merit on the ground that he did not have power to condone the delay caused in filing the appeal under Section 128 of the Act as the same was filed after 90 days from the date of communication of

order.

8. We have heard extensively the learned advocates on both the sides, who have extensively argued and relied on the following decisions in support of their respective submissions:

(i) Union of India and others vs. Ganesh Das Bhojraj, reported in (2000) 9 SCC 461

(ii) Union of India and others vs. G.S.Chatha Rice Mills and another, reported in (2021) 2 SCC 209

(iii) Ruchi Soya Industries Ltd. vs. Union of India, reported in 2021 (375) E.L.T. 497 (Guj.)

(iv) Union of India vs. G.S.Chatha Rice Mills, reported in 2020 (374) E.L.T. 289 (S.C.)

8.1 The only issue which this Court is

required to consider is as to whether the Notification No.29/2018-CUS dated 01.03.2018 will be effective from 01.03.2018 or 06.03.2018 on the day on which it has been digitally signed.

9. What is effective date of Notification is a question no longer *res integra.* The Apex Court in case of ***UNION OF INDIA VS. G.S.CHATHA RICE MILLS,*** reported in ***2020(374) E.L.T. 289 (SC)*** was to decide whether Notification No.5 of 2019-CUS dated 16.02.2019, which was uploaded on e-Gazette on 16.02.2019 at 20:46:58 hours are to be made applicable to the bills of entry presented for home consumption before such Notification was uploaded. The Apex Court held in categorical terms that the revised

rate of duty apply to bills of entry presented subsequent to uploading of Notification in e-Gazette form.

9.1 The Apex Court in case of ***G.S.CHATHA RICE MILLS (supra)*** has held thus:

> *"51. Section 8 of the Information Technology Act, 2000 creates a legal basis for the publication of laws through e gazettes. It reads as follows:*
>
> *"Section 8. Publication of rule, regulation, etc., in Electronic Gazette. - Where any law provides that any rule, regulation, order, byelaw, notification or any other matter shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette:*
>
> *Provided that where any rule, regulation, order, by-law, notification or any other matter is published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form."*
>
> *52. On 30 September, 2015, the Ministry of Urban Development issued an Office Memorandum No. 0*

17022/1/2015-PSP-1 which discontinued the practice of physical printing and replaced it with the electronic gazette. The notification, in relevant part, reads as follows:

> *"In compliance with the provisions of Section 8 of the Information Technology Act, 2000, it has been decided in consultation with Department of Legal Affairs to switch over to exclusive e-publishing of the Government of India Gazette Notification on its official website with effect from 1-10-2015 and to do away with the physical printing of Gazette Notification. The date of publishing shall be the date of e-publication on official website by way of electronic gazette in respect of Gazette notification." (emphasis supplied)*

53. Thus far, this Court has not had to confront the question as to whether the shift from the analog to the digital for Gazette notifications has any bearing for ascertaining when they come into force. The judgments which dealt with the starting point for the enforceability of notifications were all concerned with circumstances in which such publication took place in the physical gazette. We are now required to determine if the shift to electronic gazettes has brought about a change in this position.

54. The High Courts have begun offering guidance on this score. The Delhi High Court in M.D. Overseas Industries v. Union of India [W.P. (C) 7838/2017 decided on 15 October,

2019 (Delhi High Court)] [2020 (371) E.L.T. 319 (Del.)], dealt with a situation where the Director General of Foreign Trade issued two notifications dated 25 August, 2017 restricting the importation of gold, including gold coins. Gold coins could no longer be imported freely and had to be imported in accordance with a public notice issued in that behalf. The petitioners urged that the restrictive regime created by these notifications was inapplicable to them because the notifications, they contended, came into force only on 28 August, 2017, when they were published in the official gazette. The gold coins imported by the petitioners, however, were dispatched on 25 August, 2017. Since the notifications came into force three days later, they contended that these were inapplicable to them. The notifications were electronically notified in the gazette.

55. The High Court upheld the Petitioner's view that the notifications were inapplicable to the petitioners after considering Section 8 of the Information Technology Act, 2000 along with the Office Memorandum dated 30-9-2015. It held:

> *"32. The endorsement on the electronic copy of the Gazette, whereby the impugned Notification Nos. 24 and 25, dated 25th August, 2017, were notified, seen in juxtaposition with Section 8 of the IT Act, and of the OM dated 30th September, 2015 supra, of the Ministry of Urban Development, makes it clear that the impugned*

Notification Nos. 24 and 25, dated 25th August, 2017 were, in fact, electronically published in the Official Gazette only at or after 10:47 p.m. on 28th August, 2017.

33. It has been conclusively held, by the Supreme Court, in a catena of decisions Including Harta v. State of Rajasthan [1952 (1) SCR 1101, BK Srinivasan v. State of Kamataka (AIR 1987 SC 10591 and U.O.I v. Param Industries [(2016) 16 SCC 692 that, notifications would come into force on their publication in the Official Gazette, i.e. in the present case, with effect from the date and time when they wore electronically printed in the Gazette, which was at or after 10:47 p.m. on 28th August, 2017." (emphasis supplied)

56. Thus, the High Court regarded the time of publication as the relevant marker for determining the enforceability of the notifications. The issue of determining the starting point for the enforceability of a notification in the electronic gazette was considered by the Andhra Pradesh High Court in Ruchi Soya Industries vs. Union of India. (W.P.No.4533 and 4534 of 2019 decided on 28 September, 2019 (Andhra Pradesh High Court). The petitioner entered into a contract with its foreign suplier on 18 January, 2008 for the import of

9,500 Metric Tons of crude oil. The first consignment of 4000 metric tons was shipped by the supplier on 6 February, 2018 from Dubai. The petitioner filed two bills of entry for 2000 metric tons of crude oil on 1 March, 2018. They were assessed that day and levied with 30% customs duty and 10% social welfare surcharge. On the same date, a notification raised the basic customs duty from 30 to 44%. The petitioner filed four bills of entry for the remaining 2000 tons on 2 March, 2018 and argued that the revised rate was not applicable to it because the notification was published in the electronic gazette only on 6 March, 2018. The High Court agreed with the petitioner and held that the revised notification would come into force only after it was digitally signed by the competent official and uploaded and published in the official gazette. The relevant excerpts from page 41 of the High Court's judgment is quoted below:

> *"... The notification was Published electronically on 06.03.2018. In view of the decision taken by the Government of India in terms of Section 8 of the Information Technology Act, to avoid physical printing of Gazettee notification to publish the same exclusively by electronic mode, so as to attribute knowledge to the public at large. The notification was signed by Rakesh Sukul on 06.03.2018 at 19:15:13 + 05:30. When notification needs to be*

signed digitally and only when the notification was uploaded and published in the Official Gazette, the same is made available for public."

57. The Madras High Court dealt with a similar situation in Ruchi Soya Industries v. Union of India [W.P. No. 21207 of 2018, decided on 14 July, 2020 (Madras High Court)] and held that the decision of the A.P. High Court noted above was applicable to the case before it. As a result, it allowed the writ petition on the same terms and directed the Respondent to refund the enhanced duty collected from the petitioner, along with IGST.

58. With the change in the manner of publishing gazette notifications from analog to digital, the precise time when the gazette is published in the electronic mode assumes significance. Notification No.5/2019, which is akin to the exercise of delegated legislative power, under the emergency power to notify and revise tariff duty under Section 8A of the Customs Tariff Act, 1975, cannot operate retrospectively, unless authorized by statute. In the era of the electronic publication of gazette notifications and electronic filing of bills of entry, the revised rate of import duty under the Notification No.5/2019 applies to bills of entry presented for home

consumption after the notification was uploaded in the e-Gazette at 20:46:58 hours on 16 February, 2019.

59. The impugned High Court judgement has relied on the decision of the Karnataka High Court in Param Industries Ltd. v. Union of India (2002 (150) E.L.T. 3 (Kar.)], which was confirmed by the decision of this Court in Union of India v. Param Industries Limited [(2016) 16 SCC 692 2015 (321) E.L.T. 192 (S.C.) = 2017 (51) S.T.R. 233 (S.C.)] ["Param Industries] In that case, the respondents were in the business of importing and exporting edible oil. The respondents imported RBD Palmolein which was cleared after payment of import duty of 85 per cent of its value. The import duty was paid pursuant to a notification which was in existence as on that date. A major quantity of the goods had been removed from the warehouse after the payment of duty. The importer was, however, informed that by a notification dated 3 August, 2001 (incidentally this was also the date the bill of entry was filed and goods were cleared) the tariff value had been raised to USD 372 per metric tonne and that the importer was liable to pay the difference in the tariff which was paid on the basis of the earlier notification. The respondent contested the demand on the ground that the notification raising the import duty had not come into effect on 3 August, 2001.

The Division Bench of the High Court held that the notification was not published on 3 August, 2001 and must have been Gazetted only after the following weekend namely on 6 August, 2001 or thereafter; the Gazette issued containing notification was offered for sale only starting from 6 August, 2001; and that the mere publication of the notification on the website and the issuance of a letter to the Assistant Controller, Government of India (Press) was not sufficient for the notification to be operational and enforceable on 3 August, 2001. This Court in appeal observed that according to the High Court two conditions were mandatory for the notification to be brought into force :

(i) Due publication in the official Gazette; and

(ii) Offering the notification for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi.

This Court noted that, in their case, the second condition was not satisfied as the notification was offered for sale only on 6 August, 2001 as it was published in the late evening hours of 3 August, 2001 and the next two days were holidays.

60. The decision of this Court in Param Industries was on the interpretation of Section 14(2) of the Customs Act. However, prima facie, this decision appears to be contrary to the principles previously elucidated by this Court in the context of the Customs Act. In a two judge Bench decision of this Court in Pankaj Jain Agencies v. Union of India, [(1994) 5 SCC 198 1994 (72) E.L.T. 805 (S.C.)) ["Pankaj Jain'] the Court considered the determination of the date when a notification dealing with an exemption would come into force. The mode of publication for such notifications is prescribed separately under Section 25 of the Customs Act. The Court held:

> *"17. In the present case indisputably the mode of publication prescribed by Section 25(1) was complied with. The notification was published in the Official Gazette on the 13-2- 1986. As to the effect of the publication in the Official Gazette, this Court held [Srinivasan case [(1987) 1 SCC 658, 672: AIR 1987 SC 1059, 1067] AIR at p. 1067: SCC pp. 672-73, para 15]*
>
> *"Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of*

publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognized official channel, namely, the Official Gazette or some other reasonable mode of publication."

18. We, therefore, see no substance in the contention that notwithstanding the publication in the Official Gazette there was yet a failure to make the law known and that, therefore, the notification did not acquire the elements of operativeness and enforceability."

(emphasis supplied)

The principles recognized in Pankaj Jain were re-iterated and affirmed by a three judge Bench of this Court in Union of India v. Ganesh Das Bhojraj [(2000) 9 SCC 461 = 2000 (116) E.L.T. 431 (S.C.).] which dealt with the enforceability of a notification under Section 25, prior to its Amendment by Act 21 of 1998 which inserted Section 25(4) and the requirement of 'offering for sale'. The Court separately noted that the newly introduced requirement of 'offering of sale' had prospective application. However, in the factual scenario concerning a notification governed by the pre-amended act, it upheld the principle that any additional requirement of publication can only be introduced by statute and the

Court is bound by the applicable statutory scheme for determining enforceability. It noted:

> *"11. In our view, as noted above, in Pankaj Jain Agencies case [(1994) 5 SCC 198] the Court directly dealt with a similar contention and after relying upon the decision in the case of Mayer Hans George (AIR 1965 SC 722: (1965) 1 Cri LJ 641 (1965) 1 SCR 123] rejected the same. That decision is followed in I.T.C. Ltd. [(1996) 5 SCC 538] and other matters. Hence, it is difficult to agree that the decision in Pankaj Jain Agencies case [(1994) 5 SCC 198] was not helpful in deciding the question dealt with by the Court. Section 25 of the Customs Act empowers the Central Government to exempt either absolutely or subject to such conditions, from the whole or any part of the duty of customs leviable thereon by a notification in the Official Gazette. The said notification can be modified or cancelled. The method and mode provided for grant of exemption or withdrawal of exemption is issuance of notification in the Official Gazette. For bringing the notification into operation, the only requirement of the section is its publication in the Official Gazette and no further publication is contemplated. Additional requirement is that under Section 159 such notification is required to be laid before each House of conte Parliament for a period of thirty days as prescribed therein. Hence, in our view*

Mayer Hans George [AIR 1965 SC 722: (1965) 1 Cri LJ 641: (1965) 1 SCR 123] which is followed in Pankaj Jain Agencies case ((1994) 5 SCC 198] represents the correct exposition of law and the notification under Section 25 of the Customs Act would come into operation as soon as it is published in the Gazette of India i.e. the date of publication of the Gazette. Apart from the prescribed requirement under Section 25, the usual mode of bringing into operation such notification followed since years in this country is its publication in the Official Gazette and there is no reason to depart from the same by laying down additional requirement."

(emphasis supplied)

61. Param Industries, in as much as it imposed an additional requirement of 'offering for sale', outside of the prescribed statutory scheme under S.14(2) of the Customs Act, 1962, appears to be contrary to pre-existing principles. Having said this, we do not wish to rule on the validity of Param Industries or its consequent impact on decisions that have relied on it. In the present judgment it is not necessary to take recourse to the line of reasoning in Param Industries. The situation at hand, operates on a landscape which is significantly altered by the regulatory regime in the electronic age where, both - uploading of notifications in the e-gazette and filing of

bills of entry- are in the electronic form. As we have previously noted, Notification No. 5/2019 was uploaded in the e-gazette at a specific time and date and cannot apply to bills of entry which were presented on the customs automated EDI system prior to it, attracting the legal fiction set out in Regulation 4(2) of the 2018 Regulations. Therefore, Param Industries does not have any bearing on the case at hand.

M. Retrospectivity

62. Section 8A of the Customs Tariff Act confers an emergency power upon the Central Government to increase import duties "in respect of any article included in the first schedule". By the notification dated 16 February, 2019, the Union Ministry of Finance in the Department of Revenue introduced a distinct tariff item- 9806 00 00 encompassing "all goods originating in or exported from the Islamic Republic of Pakistan" for which a rate of duty of 200 per cent has been prescribed. The exercise of the power under Section 8A is contingent on the satisfaction of the Central Government that (i) the duty on any article in the first schedule should be increased; and (ii) that circumstances exist which render it necessary to take immediate action. The Central Government in the exercise of this power may by a notification in the official gazette

direct an amendment of the schedule to be made "so as to provide for an increase in the import duty leviable on such article to such extent as it thinks necessary". Section 8A does not contain language indicative of a legislative intent to authorize the Central Government to relate back the exercise of the power to a period prior to its exercise. The exercise of the power under Section 8A(2) is governed by the prescriptions contained in sub-sections (3) and (4) of Section 7. The conferment of the power has not been made retrospective either expressly or by necessary implication.

63. Section 8A enables the Central Government to increase the rate of duty on an article in the first schedule in emergent situations. The notification dated 16 February, 2019 adds a new entry altogether. Such an exercise may well be as relatable to the provisions of Section 11A, Section 11A confers a power on the Central Government to amend the First schedule in public interest. Section 8A on the other hand contemplates an increase in duty on an article contained in the First Schedule. Notification No. 5/2019 introduces a new tariff entry to provide for a duty of 200% on all articles originating in or exported from Pakistan. However, this aspect of the matter need not be explored further for the reason that neither before the High Court, nor before this Court, was the challenge to the vires of the notification pressed during the course of the

submissions. The legal position which needs emphasis is that the entrustment of the power to issue a notification enhancing the rate of duty under Section 8A is not accompanied by a statutory entrustment of authority to the Central Government to exercise it with retrospective effect. An enhancement of the rate of duty pursuant to the exercise of power under Section 8A can only be prospective.

64. Parliament and the state legislatures are entrusted with the power to enact legislation under Articles 245 and 246 of the Constitution. Parliament and the state legislatures possess the plenary power to enact legislation, with prospective and retrospective effect, subject to due observance of constitutional requirements. A notification issued by the government pursuant to the conferment of statutory power is distinct from an act of the legislature. Administrative notifications, even when they are issued in pursuance of an enabling statutory framework, are subject to the statute. Delegated legislation does not lose its character even when it has the same force and effect as if it is contained in the statute. This is a settled position of law. In a decision which was rendered in 1961 by a Constitution Bench of this Court in Chief Inspector of Mines v. Lala Karam Chand Thapar [AIR 1961 SC 838], the principle of law was formulated in the following terms:

"20. The true position appears to be that the rules and regulations do not lose their character as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and though for certain purposes, including the purpose of construction, they are to be treated as if contained in the Act, their true nature as subordinate rule is not lost...."

In K.I. Shepard v. Union of India [(1987) 4 SCC 431), a two judge Bench of this Court held that the power to frame a scheme under Section 45 of the Banking Regulation Act, 1949 was not legislative in character but an administrative function. This Court observed :

"9...But is the scheme-making process legislative? Power has been conferred on the RBI in certain stations to take steps for applying the Central Government for an order of moratorium and during period of moratorium to propose either reconstruction or amalgamation of the banking company. A scheme for the purposes contemplated has to be framed by RBI and placed before the Central Government for sanction. Power has been

vested in the Central Government in terms of what is ordinarily known as a Henry VIII clause for making orders for removal of difficulties. Section 45(11) requires that copies of the schemes as also such orders made by the Central Government are to be placed before both Houses of Parliament. We do not think this requirement makes the exercise in regard to schemes a legislative process."

The above decision was distinguished in New Bank of India Employees' Union v. Union of India [(1996) 8 SCC 407] ['New Bank of India] where the court held that a scheme framed under Section 9 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 stands on a distinct footing of being a legislative and not an administrative function. The court held that the question was not of much relevance in view of its conclusions on the main issues presented for decision. Yet, it considered the question and laid emphasis on the authority entrusted to Parliament to consider, within 30 days, to agree/modify/arrive at any decision with regards to the scheme, only thereafter was the scheme was to have effect. These requirements, qualitatively distinguished from a requirement of mere 'laying' under Section 45 of the Banking Regulation Act, 1949, were pivotal in the court's view that a scheme under the 1980

Act has a legislative character. Mr. Natraj sought to emphasize a similar argument, by placing reliance on the provisions of sub-sections (3) and (4) of Section 7 which are made applicable by reason of sub-section (2) of section 8A. However, in the absence of a sine qua non for parliamentary sanction before the notification is enforceable, the decision of New Bank of India provides little anchor. For the purpose of the present decision the point which needs emphasis is that in empowering the Central Government to exercise power under Section 8A of the Customs Tariff Act, Parliament has not either expressly or by necessary implication indicated that a notification once issued will have force and effect anterior in time. The provisions of sub-sections (3) and (4) of Section 7 of the Customs Tariff Act bring to bear legislative oversight and supervision over the power which is entrusted to the Central Government under Section 8A. That however does not lead to the inference that a notification under Section 8A has retrospective effect. Plainly, a notification enhancing the rate of duty under Section 8A has prospective effect.

A rule framed by the delegate of the legislature does not have retrospective effect unless the statutory provision under which it is framed allows retrospectivity either by the use of specific words to that effect or by necessary implication. In Hukum Chand v. Union of India

[(1972) 2 SCC 601], a three judge Bench of this Court held that:

> *"8... The extent and amplitude of the rule-making power would depend upon and be governed by the language of the section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event would have no power to make that rule. Likewise, if there was nothing in the language of Section 40 to empower the Central Government either expressly or by necessary implication, to make a rule retroactively, the Central Government would be acting in excess of its power if it gave retrospective effect to any rule. The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority and that Court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled."*
>
> *(emphasis supplied)*

65. The distinction between the plenary power which is entrusted to Parliament and the state legislatures to enact legislation with both prospective and retrospective effect, and the power entrusted to a delegate of the legislature to frame subordinate legislation has been maintained in a consistent line of precedent of this Court. In Regional Transport Officer, Chittoor v. Associated Transport Madras (P) [(1980) 4 SCC 597], Justice V.R. Krishna lyer speaking for a two judge Bench of this Court with his characteristic eloquence observed:

> *"4. The legislature has no doubt a plenary power in the matter of enactment of statutes and can itself make retrospective laws subject, of course, to the constitutional limitations. But it is trite law that a delegate cannot exercise the same power unless there is special conferment thereof to be spelled out from the express words of the delegation or by compelling implication. In the present case the power under Section 4(1) does not indicate either alternative....."*

The Court held that the fact that the rules had been framed in pursuance of a resolution passed by the legislature or that they have to be placed on the table of the legislative body would not lead to an inference that

the legislature had authorized the framing of subordinate legislation with retrospective effect:

> *"4...The mere fact that the rules framed had to be placed on the table of the legislature was not enough, in the absence of a wider power in the section, to enable the State Government to make retrospective rules. The whole purpose of laying on the table of the legislature the rules framed by the State Government is different and the effect of any one of the three alternative modes of so placing the rules has been explained by this Court in Hukam Chand v. Union of India ((1972) 2 SCC 601, 606: (1973) 1 SCR 896, 902]."*

This precisely is the principle which applies in construing whether the power which is conferred by Section 8A of the Customs Tariff Act is retrospective. The provisions of sub-sections (3) and (4) of Section 7, which are made applicable by sub-section (2) of Section 8A, are to ensure Parliamentary oversight. But that does not enable the Central Government to exercise the power under section 8A with retrospective effect.

In Federation of Indian Minerals Industries v. Union of India [(2017) 16 SCC 186], a three judge Bench of this Court formulated the principles on the subject. Justice Madan B. Lokur observed that the power to frame subordinate legislation is not retrospective unless it is authorized expressly or by necessary implication by the parent statute. The Court observed:

"26...The relevant principles are:

(i) The Central Government or the State Government (or any other authority) cannot make a subordinate legislation The Central Government or the State Government (or any other authority) cannot make a subordinate legislation having retrospective effect unless the parent statute, expressly or by necessary implication, authorises it to do so. [Hukam Chand v. Union of India [Hukam Chand v. Union of India, (1972) 2 SCC 601] and Mahabir Vegetable Oils (P) Ltd. v. State of Haryana [Mahabir Vegetable Oils (P) Ltd. v. State of Haryana, (2006) 3 SCC 620]].

(ii) Delegated legislation is ordinarily prospective in nature and a right or a liability created for the first time cannot be given retrospective effect. (Panchi Devi

v. State of Rajasthan [Panchi Devi v. State of Rajasthan, (2009) 2 SCC 589: (2009) 1 SCC (L&S) 408])

(iii) As regards a subordinate legislation concerning a fiscal statute, it would not be proper to hold that in the absence of an express provision a delegated authority can impose a tax or a fee. There is no scope or any room for intendment in respect of a compulsory exaction from a citizen. [Ahmedabad Urban Dev. Authority v. Sharadkumar Jayantikumar Pasawalla [Ahmedabad Urban Dev. Authority v. Sharadkumar Jayantikumar Pasawalla, (1992) 3 SCC 285] and State of Rajasthan v. Basant Agrotech (India) Ltd. [State of Rajasthan v. Basant Agrotech (India) Ltd., (2013) 15 SCC 1."

The judgment of Justice Dipak Misra (as he then was) speaking for a two judge Bench decision in State of Rajasthan v. Basant Agrotech (India) Ltd [(2013) 15 SCC 1=2014 (302) E.L.T. 3 (S.C.)] adopts the same position.

66. The imposition of a tax encompasses three stages. The locus classicus on the subject is embodied in the dictum of Lord Dunedin in Whitney v. Commissioners of Inland Revenue [(1926) AC 37 at 52.] which has been consistently applied in the decisions of this court. There is, first, the declaration of liability which determines

"what persons in respect of what property are liable. The second is the stage of assessment. Liability, it is well settled, does not depend on assessment since ex-hypothesi, that has already been fixed. Assessment particularizes the exact sum which a person is liable to pay. Third (and the last) are the methods of recovery if a person who is taxed does not voluntarily pay. (See in this context the decisions of the Federal Court in Chatturam v. CIT, Bihar [(1947) FCR 116 at 126] and of this Court in A.V. Fernandez v. State of Kerala [1957 SCR 837 at para 39] and Deputy CTO v. Sha Sukraj Peerajee ((1967) 3 SCR 661 at para 5].

67. In the present case the twin conditions of Section 15 stood determined prior to the issuance of Notification No. 5/2019 on 16 February, 2019 at 20:46:58 hours. The rate of duty was determined by the presentation of the bills of entry for home consumption in the electronic form under Section 46. Self-assessment was on the basis of rate of duty which was in force on the date and at the time of presentation of the bills of entry for home consumption. This could not have been altered in the purported exercise of the power of re-assessment under Section 17 or at the time of the clearance of the goods for home consumption under Section 47. The rate of duty which was applicable was crystallized at the time and on the date of the presentation of the bills of entry

in terms of the provisions of Section 15 read with Regulation 4(2) of the Regulations of 2018. The power of re-assessment under Section 17(4) could not have been exercised since this is not a case where there was an incorrect self-assessment of duty. The duty was correctly assessed at the time of self assessment in terms of the duty which was in force on that date and at the time. The subsequent publication of the notification bearing No. 5/2019 did .not furnish a valid basis for re-assessment."

Concurring this view, the very aspect is dealt with in the specific summation by one of the Honourable Judges of the Bench this wise:

"147. In the context of the Customs Act, and having regard to the Scheme, which, in the case of import duty. consists of filing of Bill of Entry for home consumption, self-assessment and payment of duty on the basis of the same and the rate being clearly fixed with reference to the particular point of time when the Bill of Entry is presented and there is a deemed presentation and even a deemed assessment, which is otherwise in order, and bearing in mind the principle

> *that Section 8A does not provide power for increase of rate of duty with retrospective effect, the Notification must be treated as having coming into force not before its publication which is at 20:46:58 hrs. on 16-2-2019. This would necessarily mean that the Notification cannot be used to alter the rate of duty on the basis of which, in fact, there was presentation of Bill of Entry several hours ago, the self-assessment was done and what is more, the self-assessment was completed under Regulation 4(2) of the 2018 Regulations. There cannot be re-assessment. The interpretation based on time of publication is in harmony with a view that accords respect for vested rights."*

It is thus quite clear that when Section 25 of the Act empowers the Central Government to exempt either totally or subject to certain conditions from the whole or any part of the customs duty leviable thereon by a Notification in the Official Gazette, it has also the powers to modify and cancel.

10. It is also necessary to refer to the decision of ***RUCHI SOYA INDUSTRIES LTD. VS. UNION OF INDIA,*** reported in ***2021(375) E.L.T. 497 (Guj.)*** where the bills of entry dated 01.03.2018 and 02.03.2018 were filed under the exemption Notification No.50 of 2017-CUS on the ground that though the principal Notification No.50 of 2017 was amended by Notification No.29 of 2018-CUS dated 01.03.2018 but came to be published electronically on 06.03.2018. The customs department enhanced the custom duty and directed the petitioner to pay the differential duty amount.

10.1 Similar questions arose for consideration before the High Court of Andhra Pradesh in the case of ***M/s. Ruchi***

Soya Industries Ltd.(supra) and the Court after considering at length all provisions held that the Notification was not signed by the competent authority on the date of presentation of ex-bond bill of entry before the competent authority for release of imported goods for human consumption and therefore, the collection of enhance customs duty on the imported goods belonging to the petitioners prior to the publication of Notification in electronic mode, is an illegality. The petitioners were thus, held entitled to claim refund of the amount paid in excess of 30% of the original rate of customs duty as on the date of presentation of ex bond bills of entry for clearance of import goods of human consumption.

10.2 This Court in case of ***Ruchi Soya Industries Ltd (supra)*** had questioned as to whether the Notification No.29 of 2018 dated 01.03.2018 would be effective from the date of issue or from the date of publication in e-Gazette, where the Court held that the Notification is deemed to have come into force on the date of signing of the Notification by the competent authority as otherwise there is no Notification in the eyes of law. Notification cannot be said to have come into force on the date of its issue for publication in the Gazette, but, it shall be deemed to have come into force on the date when it is published. Madras High Court also has followed the aforesaid decision of Andhra Pradesh High Court in

the case of ***Ruchi Soya Industries Ltd (supra), 2021 (375) E.L.T. 40 (Mad.)*** where again it is held that effective date of amendment Notification will be the date of publication of the Notification.

11. This Court is of the view that mere pendency of the Special Leave Petition (Civil) Diary No.26479 of 2020 will not be a reason for this Court to not hold otherwise than what has been held in case of ***Ruchi Soya Industries Ltd (supra)*** by the Coordinate Bench of this Court following the decision of the Andhra Pradesh High Court, which also has been followed by the Madras High Court. This Court further finds that while issuing the notice, the Apex Court has chosen not to stay the operation of the order. Moreover, the decision of

G.S.Chatha Rice Mills (supra) squarely covers the issue.

12. The Apex Court, in case of ***UNION OF INDIA VS. GANESH DAS BHOJRAJ,*** reported in ***(2000) 9 SCC 461,*** also lays down the method and mode provided for grant of exemption or withdrawal of exemption by issuance of Notification in the Official Gazette. The requirement of the section is its publication in the Official Gazette and no further publication is contemplated. Additional requirement is to place such Notification under Section 159 of the Act before each House of Parliament for a period of thirty days as prescribed therein. Hence, this Notification under Section 25 of the Act would come into operation as soon as it is published in the

Gazette of India on the date of publication of the Gazette. Apart from prescribed requirement under Section 25, usual mode of bringing into operation such Notification was the publication in the Official Gazette. The individual service of a general Notification on every member of the public, according to this decision, is not required and the Court held that the interested persons can acquaint themselves with the contents of Notification published in the Gazette. Sections 35 and 38 of the Act read with Section 81 of the Evidence Act also provide for presumption of its contents being genuine once the Gazette is admissible being the official record evidencing public affairs.

13. This Court needs to remind itself of the extensive way of consideration of the issue of Notification in e-Gazette with the advent of IT Act and particularly, Section 8 of the IT Act. The Ministry of Urban Development discontinued the practice of physical printing and replaced it with electronic Gazette on 30.09.2015 in compliance with the provision of Section 8 of the IT Act. Thus, it switched over to exclusive e-publishing of the Government of India Gazette Notification on its official website with effect from 01.10.2015 and has done away with the physical printing of Gazette Notification. The date of publishing shall be the date of e-publication on official website by way of electronic Gazette in respect of Gazette

Notification. Thus the Apex Court has already dealt with the issue *"as to whether the shift from the analog to the digital for Gazette notifications has any bearing for ascertaining as to when the same has come into force and whether this switching over to the digital manner of publication has brought about a change in this position has resulted into the Court concluding that the time of publication in digital mode would be the date and time on which it would come into effect."*

14. So far as the present bills of entry are concerned, under Section 46 of the Act, the rate of duty enforced on the date and the time when the bills of entry presented for home consumption was 40%, the same had been already paid by the petitioner. This

by no means could be altered by any power of re-assessment under Section 17 of the Act or at the time of clearance of the goods for home consumption under Section 47 of the Act. The rate of duty as held by the Apex Court in case of ***G.S.Chatha Rice Mills (supra)*** shall have to be what was crystallized at the time and on the date of the presentation of the bills of entry in terms of the provisions of Section 15 of the Act. The power of re-assessment under Section 17(4) of the Act could not have been exercised as it was not a case of incorrect self assessment of duty. The duty was correctly assessed at the time of self-assessment in terms of the duty which was in force on that date and at the time. The subsequent publication of the Notification

bearing (29/2018-Cus, dated 01.03.2018 amending entry no. 65 of table notification no. 50/2017 dated 30.06.2017) would not have any sustained basis for re-assessment.

15. The Notification could not be said to have been published without declaration form or digital signature certificate. Only after the declaration form and documents are signed digitally that they can be uploaded for e-publishing which has been done on 06.03.2018 at 19:15 hours. Therefore, the effective date of Notification in terms of Section 25(4) of the Act is the date of its publication in Official Gazette in e-mode on 06.03.2018 and the Notification, therefore, cannot be said to have come into force on 01.03.2018 and enhanced rate of duty by way of

Notification No.29/2018-CUS dated 01.03.2018 surely would not be, therefore, applicable. The petitioner would be entitled to pay only 40% of the duty which was applicable at the time of presenting the bills of entry for home consumption and not 54% under Section 17(4) of the Act.

16. Resultantly, these petitions are allowed quashing and setting aside the orders of re-assessment of the bills of entry No.5407944, 5407946 and 5404574. The respondents are also directed to refund the differential amount of Rs.1,44,31,505/- being the duty paid by petitioner vide bill of entries No.5407944, 5407946 and Rs.1,37,46,173/- being the duty paid vide bill of entry No.5404574, within a period of eight weeks from the date of receipt of

a copy of this order, with interest at the rate of 6% p.a. from the date of deposit till the date of payment. The order of appeal dated 21.01.2019 is also quashed and set aside, and appeal stands disposed in aforesaid terms.

17. Over and above the regular mode of service, direct service is permitted through speed post as well as e-mode.

(SONIA GOKANI, J)

(NISHA M. THAKORE,J)

M.M.MIRZA