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UPON hearing the counsel the Court made the following

O R D E R

Heard Mr. P.S. Patwalia, learned Additional Solicitor General along with Ms. Binu Tamta, learned counsel for the petitioner.
It is contended by Mr. Patwalia that the High Court has erroneously recorded its conclusions. He has drawn our attention to paragraphs 39, 39(1) and 39(2). In paragraph 39, the High Court has held that paragraph 2.3 of Foreign Trade Policy (F.T.P.) is not to be given the interpretation that has been placed by the respondent No.2, Directorate General

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of Foreign Trade (D.G.F.T.) and, in any case, it would not be binding on the constitutional courts, but only on the departmental authority in the absence of an interpretation given by the courts. Mr. Patwalia, learned Additional Solicitor General has submitted and we must say, with all fairness at his command, that the said conclusion arrived at by the High Court is absolutely defensible and does not warrant any interference.

In paragraph 39.1, the High Court has opined that paragraph 8.3.6 of Handbook of Procedure (H.O.P.) by which the Customs and Central Excise Draw Back Rules 1995 has been adopted, is ultra vires the provisions of the Foreign Trade (Development and Regulation) Act (for short, 'the FTDR Act'), for the Act has not conferred any power on D.G.F.T. to make rules. According to the High Court, it is the Central Government that can exercise the power under Section 19 of the FTDR Act by issuing appropriate notification in the Official Gazette, that too after complying with the requirement of Section 19 of the FTDR Act for carrying out the provisions of the Act and in the process, may make similar rules like the Customs and Central Excise Draw Back Rules but not any other authority. In essence, the conclusion of the High Court is that it is the Central Government which alone has the authority to make rules within the framework of the Act, but not the D.G.F.T. Mr. Patwalia, learned Additional Solicitor General would submit that the High Court has fallen into error by opining that it is the Central Government alone that can make the rules. According to him, D.G.F.T. can also issue directions under the FTDR Act. In paragraph 39.2, the High Court has ruled that the paragraph 7 of the declaration attached with ANF-8 form read with the provision of H.O.P. cannot lawfully confer any power

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upon the respondent No.2, that is, D.G.F.T. or its subordinates to recall any adjudication under the Act by taking aid of such declaration attached with ANF form. The said finding has been returned by the High Court on the bedrock that the exercise of review jurisdiction has to be specifically conferred under the Act and, therefore, the D.G.F.T. cannot exercise the power of review. It has referred to Section 16 of the FTDR Act. Mr. Patwalia criticizing the said conclusion, would contend that there was no adjudication, but Joint Director General of Foreign Trade computed the amount under the duty draw back to be paid to the respondents which could be redetermined in terms of clause (7) of the H.O.P. It is also submitted by him that the said order was assailed in appeal before the D.G.F.T., which concurred with the view expressed by the Joint Director General of Foreign Trade. The said order was assailed before the High Court which remitted the matter to the D.G.F.T. on the foundation that the principles of natural justice in entirety were not followed and liberty was granted to the assessee to raise all contentions before the said appellate authority. Mr. Patwalia is quite vehement that the assessee-respondents availed the said proceedings and also the present one. Mr. S. Ganesh, learned senior counsel appearing for the respondents, per contra, would contend that in the present case, a writ petition was filed challenging the constitutional validity of the relevant provisions of the Act and paragraph 7 of the Hand Book of Procedure, therefore, the lis is quite different. According to Mr. Ganesh, before the D.G.F.T., the only point that could have been canvassed was that the computation was wrong, but before the High Court in the writ petition the ground that was urged was that paragraph 7 did not confer any kind of review jurisdiction on

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the D.G.F.T. Be it noted, according to Mr. Ganesh, Joint Director General of Foreign Trade had initially made a computation and, thereafter, relying on paragraph 7, he recomputed which is not permissible and contrary to the statute. In essence, the submission of Mr. Ganesh is that

once there has been adjudication, it cannot be reviewed by relying on paragraph 7, for the review jurisdiction is quite different.

We will be failing in our duty if we do not take on record the submission in reply by Mr. Patwalia that the order passed by the Joint Director General of Foreign Trade at the first stage, does not amount to adjudication. Therefore, the second order does not amount to review. Additionally, it is submitted by him that this Court should interfere and set aside the order of the High Court as the respondents had not approached the writ court under Article 226 of the Constitution with clean hands.

We have recorded the contentions so that the learned counsel for the parties shall only address with regard to the said issues on the next date of hearing.

Let the matter be listed for further hearing on 8 th

February, 2017. As agreed to by the learned counsel for the parties, it shall be taken up at 2.00 p.m.

(Chetan Kumar)
Court Master (H.S. Parasher)
Court Master