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Prospective in Letter, Retrospective in Practice: The Enduring Battle Against Unlawful Amendments to Foreign Trade Policy Benefits

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1. Introduction

There is a peculiar kind of injustice that visits an exporter who has laboured to fulfil every condition of a government scheme, structured his trade transactions around it, and earned an entitlement under it only to be told, months or years later, that the government has amended the scheme away, and amended it **retrospectively**. The export is done. The obligation is discharged. The benefit, in law, has vested. And yet, by the stroke of an executive pen, it is taken away as though it never existed. This is not a hypothetical example but a recurring feature of India's foreign trade policy administration and it is one which courts have, over the past two decades, consistently and emphatically condemned.

The Foreign Trade Policy ('**FTP**') is the cornerstone instrument through which India regulates and incentivises its export-import trade. Administered under the Foreign Trade (Development and Regulation) Act, 1992 ('**FTDR Act**'), the FTP holds out a framework of benefits duty credit scrips, advance authorisations, export obligation schemes, status-holder entitlements, and a host of other incentives upon which exporters place enormous commercial reliance. The legal question that has repeatedly arisen, and which this article examines, is deceptively simple: can the Central Government or the Directorate General of Foreign Trade amend or withdraw these benefits with retrospective effect? The answer, settled by an unbroken line of judicial authority from the Hon'ble Supreme Court downwards, is an unambiguous **no** and yet the controversy refuses to die.

The most recent iteration of this controversy came recently before the Hon'ble Delhi High Court in *Chillies Exporters Association India* v. *Directorate General of Foreign Trade* [(2026) 43 Centax 441 (Del.)], where the Court was once again called upon to restate what it described as a principle that is *"no more res integra"* settled law and beyond debate. That such a restatement was necessary in 2026, a full decade after the Supreme Court's landmark ruling in *Director General of Foreign Trade & Anr.* v. *Kanak Exports & Anr* [2015 (326) E.L.T. 26 (S.C.)], speaks volumes about the persistence of the problem. This article traces the legal framework, the judicial evolution of the principle, and its practical implications for exporters and practitioners navigating FTP disputes.

2. The Provision and the Controversy

The power of the Central Government to formulate and regulate foreign trade policy is sourced principally from two provisions of the FTDR Act. *Section 3* confers upon the Central Government the power to make provisions for the development and regulation of foreign trade by way of orders, and *Section 5* empowers it to formulate and announce an export and import policy and to amend that policy from time to time. It is the word *"amend"* in Section 5 that has been the fulcrum of the controversy on most occasions.

The Revenue's position, advanced with remarkable persistence across decades of litigation, has been that the power to *amend* the FTP is wide enough to encompass an amendment with retrospective effect and that since the government retains the prerogative to grant or withdraw benefits as a matter of policy, it follows that it may do so even in respect of past periods. Reliance has been placed, in different iterations of this argument, upon Section 21 of the General Clauses Act, 1897, which provides that where a power to issue a notification or order is conferred, that power may be exercised from time to time; and upon the broad latitude that courts have traditionally extended to executive action in complex economic matters.

The exporters' position, which has found favour with every court that has examined the question, rests on a different and more fundamental proposition that the power to make *delegated or subordinate legislation* is, as a matter of settled constitutional law, inherently prospective in operation, unless the parent statute expressly vests the rule-making authority with the power to legislate retrospectively. Sections 3 and 5 of the FTDR Act contain no such express grant. Absent that grant, no amendment however compelling the policy justification can operate to take away a right that has already accrued to an exporter who has fulfilled the prescribed conditions. The doctrine of legitimate expectation, the principle of promissory estoppel against the State, and the constitutional guarantee under *Article 14* of the Constitution all converge to reinforce this position.

3. How Courts Have Interpreted the Power to Amend: The Judicial Evolution

(a) The Foundational Ruling: Kanak Exports (2016)

The authoritative statement of the law on this question is the decision of the Hon'ble Supreme Court in *Kanak Exports*. The case arose from challenges to several notifications under the EXIM Policies 2002-2007 and 2004-2009 which retrospectively removed items eligible for incentives or scaled down those incentives. The Court, in a comprehensive examination of the statutory scheme, laid down the legal position with unmistakable clarity in paragraph 113 of its judgment:

> "113. We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless the rule-making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, *Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective*. No doubt, this section confers powers upon the Central Government to "amend" the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospectively..."

The Court traced this principle to the earlier decisions wherein it had been held that unless a statute conferring the power to make rules provides for retrospective operation, rules made pursuant to that power can have prospective operation only. The Court also rejected the Revenue's reliance upon Section 21 of the General Clauses Act, holding that the said provision is a rule of construction whose application must be governed by the relevant provisions of the statute conferring the power, and that it cannot be pressed into service to confer a retrospective power that the parent statute itself does not grant.

(b) The Delhi High Court: Malik Tanning Industries v. Union of India

Prior to the Supreme Court's definitive ruling in *Kanak Exports*, the Delhi High Court had reached the same conclusion in *Malik Tanning Industries* v. *Union of India* [2015 (320) E.L.T. 508 (DEL.)]. In paragraph 23 of its judgment, the Court held with admirable clarity:

> "23. A bare reading of the provisions of Section 5 of the Act indicates that a policy cannot be made with retrospective effect. The expression 'formulate and announce' used in Section 5 clearly means that the power is to be exercised prospectively..."

The Court in *Malik Tanning* also extracted and applied the earlier Supreme Court ruling in *Union of India* v. *Asian Food Industries* [2006 (204) E.L.T. 8 (S.C.)] wherein the Court had held that prohibition promulgated by a statutory order under Section 5 read with Section 3(2) of the FTDR Act can only have prospective effect, and that a vested or accrued right cannot be taken away by a policy or by an amendment thereof.

(c) The Division Bench Affirmation: Indian Flexible Intermediate Bulk Container Assn. v. DGFT

The Division Bench of the Delhi High Court yet again in *Indian Flexible Intermediate Bulk Container Association* v. *Director General of Foreign Trade* [2024 (387) E.L.T. 12 (Del.) = (2023) 12 Centax 191 (Del.)] undertook a comprehensive survey of the entire line of authority and held that neither the Central Government nor the DGFT possesses the authority to modify the foreign trade policy or rescind any export benefit retrospectively. The Court distilled the jurisprudential position in paragraph 10 of its judgment:

> "The Supreme Court's verdict in the case of *Kanak Exports* emerges as a cornerstone when discussing the retrospective application of the impugned notification... it was unequivocally stated that section 5 of the FTDR Act, 1992, lacks any provision that permits the Central Government to promulgate rules with a retrospective effect. Consequently, the scope to "amend" any policy under section 5 does not imply a carte blanche authority to make retrospective changes. This judgment is not an isolated stand; it derives its strength from the foundational legal principle that secondary or delegated legislation, by default, is prospective. Retrospective application is an exception and can only be permitted if explicitly provided by the parent statute..."

(d) The Most Recent Restatement: Chillies Exporters Association India v. DGFT

The issue came full circle again before the Delhi High Court in *Chillies Exporters Association case*. The Court, acknowledging that the question was *"no more res integra"*, restated the settled position comprehensively in paragraphs 27 to 30 of its judgment. After extracting the relevant paragraphs from *Kanak Exports*, the Court concluded:

> "We, thus, conclude that *Central Government lacks any power or authority available to it under Section 3 and Section 5 of the FTDR Act to either make an order or notification having retrospective effect.*"

4. The Legal Framework Synthesised

Across these decisions, the courts have consistently applied and reinforced three distinct but mutually reinforcing propositions. First, delegated or subordinate legislation is inherently prospective in operation, retrospectivity is an exception that requires an express statutory grant, and none exists in Sections 3 or 5 of the FTDR Act. Second, the word *"amend"* in Section 5 carries no implication of retrospective power and it means the government may change the policy going forward, not that it may reach back in time to undo rights already earned. Third, and most practically significant, once an exporter fulfils the conditions prescribed under the FTP in force at the relevant time, a *vested right* arises and that right is immune from subsequent executive amendment, whether characterised as a withdrawal, a clarification, a modification, or a rescission. Lastly, Section 21 of the General Clauses Act offers no escape from this position. Its function is one of construction as it tells us that a power conferred may be exercised from time to time but it cannot enlarge the substantive scope of the power beyond what the parent statute permits.

5. Conclusion

The proposition that the Central Government lacks the power to amend or withdraw FTP benefits retrospectively is, by any measure, one of the most thoroughly settled questions in Indian foreign trade law. From *Asian Food Industries* in 2006, through *Malik Tanning Kanak Exports*, *Indian Flexible*, to *Chillies Exporters* in 2026, twenty years of consistent judicial pronouncements have built a fortress around the exporter's accrued right. And yet the government continues to issue amendments of questionable retrospective application, forcing exporters into courts that must, with some weariness, restate what they have already stated many times before.

It is hoped that the DGFT and the Ministry of Commerce will internalise what the courts have repeatedly told them that the power to amend the FTP is a power to shape the future of trade policy, not to revise the past. Every notification that purports to operate retrospectively, or that is worded ambiguously enough to invite such an interpretation, imposes a litigation burden on exporters who have done nothing wrong and a judicial burden on courts that have better things to do.

For the practitioner, the message is simpler still: where a client has fulfilled the prescribed conditions under the FTP in force at the relevant time, the right has vested. No amendment however worded, however justified in policy terms can take that away. The courts have said so, consistently and emphatically. It is a point worth making, and making again, for as long as the government continues to test it.

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