

(2022) 12 DEL CK 0017

In the Delhi High Court

Case No : Civil Writ Petition No. 10384 Of 2018, 9084 Of 2020, 1120 Of 2021, 6166, 7144 Of 2022, Civil Miscellaneous Application No. 40487 Of 2018, ?29315 Of 2020, 18573 Of 2022

Hyatt India Consultancy Pvt Ltd

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

Date of Decision : 05-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 300A

Foreign Trade (Development & Regulation) Act, 1992 — Section 3, 5, 7, 15

Citation : (2022) 12 DEL CK 0017

Hon'ble Judges : Satish Chandra Sharma, CJ;Subramonium Prasad, J

Bench : Division Bench

Advocate : Kishore Kunal, Parth, Kanak Grover, Kamal Sawhney, Anishka Gupta, Krishna Rao, Deepak Thakur, Aakansha Wadhvani, Ajay Dipaul, Kamal Digpaul, Swati Kwatra, Balbir Singh, Ravi Prakash, Varun Agarwal, Farman Ali, Monica Benjamin, Prasenjeet Mohapatra, Rajesh Gogna

Final Decision : Disposed Of

Judgement

1. Since common questions of law are involved in the instant Writ Petitions, with the consent of the parties, the same are being disposed of by a Common Order. The facts of W.P.(C) 9084/2020 are being narrated for the sake of brevity, to understand the gamut of the questions that arise for consideration. However, before delving into the facts based on which the instant question of law has arisen, this Court would deem it fit to give an outline of the provisions of the relevant statute and policy made under it, the vires of which is under challenge.

2. The Foreign Trade (Development & Regulation) Act, 1992 ("FTDR Act") was enacted with the aim and objective of providing a framework for development and regulation of foreign trade by facilitating imports into, and augmenting exports from India. Section 3 of the FTDR Act gives power to the Central Government to make provisions by publication in the official gazette to implement the aforesaid objectives of the Act. Further, Section 5 of the FTDR Act

empowers the Centre to formulate the export and import policy of the Country. Keeping the power envisaged under Section 5 of the FTDR Act, the Centre has launched policies concerning the import-export of the country from time to time.

3. Under Section 7 of the Act, it has been elucidated that –

“No person shall make any import or export except under an Importer-exporter Code Number granted by the Director General or the officer authorised by the Director General in this behalf, in accordance with the procedure specified in this behalf by the Director General.”

4. On 19.08.2010, the Foreign Trade (Development and Regulation) Amendment Act, 2010 came into effect, thereby amending the aforesaid Section 7 of the Act and inserting a proviso to it which reads as under –

“Provided that in case of export or import of services or technology, the Importer-exporter Code Number shall be necessary only when the service or technology provider is availing benefit under the foreign trade policy or is dealing with specified services or specified technology”

5. On 31.03.2015, the Respondent No. 1 in exercise of powers conferred under Section 5 of the FTDR Act, announced the Foreign Trade Policy for the year 2015-2020 (“FTP 2015-20”). This replaced the earlier ‘Serve from India Scheme’ under the prior Foreign Trade Policy with a ‘Service Exports from India Scheme’ (“SEIS”) policy under the FTP 2015-20.

6. In the SEIS, under the FTP 2015-20, service providers of notified services are incentivized in the form of Duty Credit Scrips at a certain percentage of their Net Foreign Exchange (“NFE”) earnings. A service provider of such notified services located in India shall be eligible to avail the benefit of these Scrips if it garners a minimum NFE of USD 15000 \$ in a particular financial year while rendering services.

7. Under paragraph 3.08 which gives the specifications for eligibility of afore stated benefits, clause (f) states that in order for one to claim reward under the scheme, the service provider shall have to have an active IEC at the time of rendering such services, for which rewards are claimed. The same is reproduced as under –

“(f) In order to claim reward under the scheme, Service provider shall have to have an active IEC at the time of rendering such services for which rewards are claimed.”

8. It is the afore stated provisions of Clause 3.08 (f) of the FTP 2015-20, the vires of which in relation to the Parent Act, i.e., the FTDR Act, is under challenge on the ground that it is repugnant to the Parent Act.

9. Coming to the facts of this case, W.P.(C) 9084/2020 has been filed under Article 226 of the Constitution of India for issuance of appropriate writ, order or direction to quash and set aside the impugned para 3.08(f) of FTP 2015-20 along

with impugned deficiency memos dated 03.06.2020 and 21.07.2020 issued by Respondent No.3. Further, the Petitioner has prayed for this Court to direct processing of the SEIS application dated 22.03.2020 filed by the Petitioner.

10. The Petitioner herein is a company incorporated under the provisions of the Companies Act, 1956 engaged, inter alia, in exports related 'Accountancy and Book-Keeping Services' to various customers outside India. In the financial year 2017-18, the Petitioner exported services and earned an NFE of USD 2,957,322.83 \$ thereby, according to the Petitioner, entitling it to benefit of Duty Credit Scrips to the tune of Rs.71,58,109.21 under the SEIS Scheme. Since the Petitioner intended to take benefit under the SEIS scheme under FTP 2015-20, it applied for Importer Exporter Code (IEC) as required under the relevant statutory provisions, on 06.02.2022, in prescribed Form ANF-3B. The Petitioner was subsequently granted IEC bearing No.AABCH9297E vide certificate dated 18.02.2020.

11. On 22.03.2020, the Petitioner filed an online application in Form ANF-3B along with relevant supporting documents for claiming benefit under the SEIS scheme. Subsequent to this, the Petitioner received a deficiency memo from Respondent No.3 wherein multiple reasons were provided for rejecting the application for benefit of Duty Credit Scrips. Several documents were requested from the Petitioner which according to the Respondents had not been provided in support of Petitioner's application. A reply to the same was sent by the Petitioner on 29.04.2020 attaching the documents requested by the Respondents.

12. Thereafter, impugned deficiency memo dated 03.06.2020 was received from Respondent No.3 wherein it was categorically stated that for the financial year 01.04.2017 - 31.03.2018, the Petitioner would not be entitled to be benefitted under the SEIS scheme as IEC has only been obtained by it on 06.02.2020. The Petitioner submitted a response on 01.07.2020 to this stating that obtaining IEC is only a procedural requirement and against the same, a substantive benefit cannot be denied. Once the Petitioner had obtained the requisite NFE then the benefit under the FTP 2015-20 cannot be denied to it. Pertinently, it was stated that as envisaged in Paragraph 2.05 (I)(a) of the FTP 2015-20 duly amended vide notification No. 24/ 2015-20 dated 08.08.2018, a service exporter is required to have an IEC only if it intends to take benefit under the SEIS.

13. On 21.07.2020, another deficiency memo was issued which is also impugned herein. By way of the same, the Petitioner was again informed that it is not entitled to the claim for SEIS for the financial year 01.04.2017 - 31.03.2018 as the IEC has only been obtained by it on 06.02.2020 in terms of Para 3.08 (f) of FTP 2015-20. Aggrieved by these events, the Petitioner has approached this Court under its extraordinary Civil Writ Jurisdiction.

14. The Petitioner has submitted that it has acted in compliance with all the substantive provisions under SEIS scheme and the Respondents have taken a hyper technical view. Further, that the actions of the Respondents are arbitrary

and capricious. By denial of the benefit under SEIS scheme merely on account of not having Importer Exporter Code (IEC) violates the Petitioner's right under Articles 14, 19(1)(g) and 300A of the Constitution of India.

15. The Petitioner submitted that the Respondents have failed to appreciate that the impugned rejection is contrary to the purpose of SEIS. It is submitted that the SIES was introduced under FTP 2015-20 with the objective of encouraging export of services notified vide Public Notice No.3/2015-20 dated 01.04.2015 and to provide benefit to such service exporters who are generating revenue in foreign currency by exporting notified services.

16. The Petitioner further submitted that the FTDR Act requires a service provider to obtain IEC only when service provider is taking benefit under the FTP. In this regard, impugned para 3.08(f) of the FTP 2015-20 and impugned deficiency memos are beyond the mandate of Section 7 of the FTDR Act, and therefore, the same are liable to be quashed. Further, that the Respondents grossly erred in imposing conditions of having IEC at the time of rendering service and that the said demand travels way beyond the scope of Section 7 of FTDR Act. It was submitted that the legislature within its wisdom has made a clear demarcation between goods and services and has accordingly worded Section 7 to be mandatory at the time of exports in cases of goods, whereas only at the time of claiming benefit under the FTP 2015-20 in cases of services. The stand taken by the Respondents travels beyond Section 7 of the FTDR Act in exercise of their executive powers and the same is contrary to the settled principles of law. Reliance has been placed by the Petitioner upon cases of *Babaji Kondaji Garad v. Nasik Merchants Coop. Bank Ltd.*, (1984) 2 SCC 50 and *Union of India v. Intercontinental Consultants & Technocrats (P) Ltd.*, (2018) 4 SCC 669.

17. It is further submitted by the Petitioner that the provisions of para 3.08(f) ought to be interpreted and applied in a manner consistent with the scheme of Section 7 of the FTDR Act. Para 3.08(f) cannot travel beyond the scope of the said provision. The Respondents have not appreciated that benefits under the SEIS scheme can be realized by an exporter only at the end of relevant year as the scheme requires an exporting service provider to have garnered a minimum NFE of USD 15,000 \$to claim benefit under the SEIS. It was submitted that to gauge what the revenue of an exporting service provider would be at the starting of a financial year is difficult and only after upon conclusion of a financial year, would the service provider would be able to quantify its NFE. That putting a burden on an entity to gauge the amount of NFE in the beginning of a financial year would be unreasonable, arbitrary and onerous on the said exporter.

18. It was further submitted that the Respondents ought to have considered that mere delay in allotment of IEC cannot render the Petitioner disentitled for claiming benefit under the FTP. Even in cases relating to import and export of goods where as per the mandate of Section 7 of the FTDR Act, it is compulsory for the importer to have an IEC for such imports or exports, the Hon'ble Tribunals and Authorities under the Customs Act, 1962 have taken a view that the absence

of IEC is only a tactical approach which can be condoned. Even where it is compulsory as per the Section 7 of the FTDR Act, in the present case, the substantive benefit ought not to have been denied, especially, when there was only delay in obtaining the said IEC. To substantiate this contention, the Petitioner has placed reliance upon cases in CC & CE vs. Port ware International, 2012 (284) ELT 50, CC & CE vs. Vignette Software India, 2012 (280) ELT 151, Laser Sight (India) Pvt Ltd. vs. CCE, 1999 (110) ELT 935 and CC vs. Shipping & Trading Associates, 2001 (128) ELT 250.

19. Pertinently, the Petitioner has submitted that the issue involved in these instant proceedings were also raised before the High Court of Judicature at Bombay in the case of Smarte Solutions Pvt. Ltd. v. Union of India & Ors., Writ Petition (Civil) No. 503/ 2021. The Division Bench of the Bombay High Court vide Judgment dated 27.07.2022 has held as under:

"14. Undoubtedly, in terms of eligibility Clause 3.08(f) of the FTP, the condition is of having an active IEC number at the time of rendering services for claiming reward. It is to be examined whether the said condition is inconsistent or casts an additional obligation on the exporter which was not intended or led under the principal statute. The learned counsel for the petitioner would submit that the FTP has been framed in pursuance of powers delegated under Section 5 of the FTDR Act. It is the prime submission that FTP being delegated legislation, it should be in conformity with the principal statute. In other words, by way of delegated legislation, additional rights or obligations cannot be imposed. In this regard, reliance is placed on the decision of the Supreme Court in case of Kunj Behair Lal Butail and others Vs. State of H. P. and others, AIR 2000 SC 1069, wherein it is ruled that delegated power to legislate by making rules is for carrying out the purposes of the Act is a general delegation without laying down any guidelines. It cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

15. In reported case of Supreme Court Employees Welfare Association Vs. Union of India AIR 1990 SC 334, the Supreme Court ruled that a delegated legislation or a subordinate legislation must confirm exactly to the power granted. Meaning thereby, the rules must be consistent with the parent law under which power has been derived. In another decision of the Supreme Court in case of General Officer Commanding-in-Chief Vs. Dr. Subhash Chandra Yadav, AIR 1988 SC 876, it has been ruled that, before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule.

16. In the light of said legal position, we have examined the eligibility Clause 3.08(f) of the FTP requiring IEC number at the time of rendering services. We have particularly examined whether said condition is consistent with the statute or it has exceeded the Authority under which delegation was made. Reverting to

the Section 7 of the FTDR Act, it pertains to the mandatory requirement of IEC number for making import or export of general goods. However, exception has been carved out by the proviso particularly in cases of import or export of services or technology. In the said eventuality, IEC number shall be necessary only when the service provider is taking the benefits under the FTP. The proviso does not lay down that the IEC number is essential at the time of rendering services of said specified kind. The requirement of IEC number is only for taking benefits under the scheme. Therefore, it is abundantly clear that the eligibility criteria of Clause 3.08(f) of the FTP has imposed additional restriction of having IEC number at the time of rendering services which was not intent or purport of the statute. Therefore, we are of the considered view that the said condition is against the principal legislation and therefore, it cannot be termed as of mandatory nature for availing benefits under the scheme.

17. In that view of the matter, we hereby allow the petition and direct the respondents to consider the petitioner's application without insisting for an active IEC number at the time of rendering services. The respondents shall take appropriate decision within three months from the date of receipt of this order and shall communicate its decision to the petitioner.

18. Writ petition stands disposed of in above terms."

(emphasis supplied)

20. In sum and substance, the submission of the Petitioners is that they cannot be denied the substantive benefit for a mere procedural lapse and that the actions of the Respondents has violated their fundamental rights under Articles 14, 19(1)(g) as well as rights under Article 300A of the Constitution. Further, that paragraph 3.08(f) of the FTP 2015-20 is ultra vires its Parent Act i.e., the FTDR Act so far as it directs the export service provider to have an IEC at the time of making export of its service.

21. A Counter affidavit has been filed during the course of these proceedings. The submissions necessary for the disposal of this instant case are those put forward by Ld. ASG, Mr. Balbir Singh. It has been stated by him on behalf of the Respondents, that the controversy in the present case does not subsist any longer as the Centre has taken into account the grievances raised by the exporters. The Government had decided to inter alia amend para 2.05 of the FTP 2015-20. He has placed on record a Notification bearing No.24/2015-2020 dated 08.08.2018. The said Notification reads as under:

"MINISTRY OF COMMERCE AND INDUSTRY

(Department of Commerce)

(DIRECTORATE GENERAL OF FOREIGN TRADE)

NOTIFICATION

New Delhi, the 8th August, 2018

No.24/2015-2020

Subject: Amendment in Para 2.05 of Foreign Trade Policy 2015-2020

S.O. 3941(E).- In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends and revises the provision in Para 2.05 of the Foreign Trade policy (2015-20) on Importer-Exporter Code (IC) as under:

2.05 Importer Exporter Code (IEC)

Existing Para

Revised Para

(I)

(a) Application for obtaining IC may be filed online in ANF 2A with applicable fees and submitted with digital signature.

(b) When an e-IEC is approved by the competent authority, applicant is informed through e-mail that a computer generated e-IEC is available on the DGFT website. By clicking on "Application Status" after having filled and submitted the requisite details in "Online IC Application" webpage, applicant can view and print his e-IEC.

(c) The applicant may submit online application with the following details / documents (scanned copies to be submitted/ uploaded) along with the IEC application:

(i) Digital photograph of the signatory applicant;

(ii) Copy of the PAN card of the business entity in whose name Import/Export would be done (Applicant individual in case of Proprietorship firms);

(iii) Cancelled cheque bearing entity's pre-printed name or Bank certificate in prescribed format ANF-2A(1)

(d) For modification in IC, applicants may submit online application through digital signature (Class-II or Class-III), by paying applicable fees and uploading requisite documents, corresponding to the changes sought.

(e) Detailed guidelines for applying for e-IEC is available at http://dgft.gov.in/exim/2000/iec_anf/iecanf.htm.

(II) No Export/Import without IC:

(i) No export or import shall be made by any person without obtaining an TEC number unless specifically exempted.

(ii) Exempt categories and corresponding permanent IEC numbers are given in Para 2.07 of Handbook of Procedures.

(a) No export or import shall be made by any person without obtaining an IC number unless specifically exempted. For services exports, IC shall be necessary as per the provisions in Chapter 3 only when the service provider is taking benefits under the Foreign Trade Policy.

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(b) Exempt categories and corresponding permanent IC numbers are given in Para 2.07 of Handbook of Procedures.

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(c) Application process for IC is completely online and IC can be generated by the applicant as per the procedure detailed in the Handbook of Procedure.

Effect of the Notification: Para 2.05 on IEC is revised and details on the procedure is shifted to para 2.08 of Handbook of Procedures.

F. No.01/93/180/20/AM-13/PC-2(B)/e-5200

ALOK VARDHAN CHATURVEDI, Director General of Foreign Trade”

22. A perusal of the above Notification shows that para 2.05 of the FTP 2015-20 regarding IEC has been amended and the Government has taken a decision that for services exports, the Importer Exported Code shall be necessary as per the provisions in Chapter 3 only when the service provider is taking benefits under the FTP.

23. It is the case of the Respondents that they have not violated any of the fundamental rights of the Petitioner and any other rights under Article 14, 19(1) (g) and 300A of the Constitution of India, and that para 3.08(f) is a reasonable provision.

24. The Respondents submitted that the Petitioner has also not exhausted its remedies available under Section 15 of the FTDR Act and para 2.59 of Handbook Provisions which provides for “Appeals” and “Personal Hearing by DGFT for Grievance Redressal” respectively.

25. Heard learned Counsels appearing for the Parties and perused the material on record.

26. As rightly pointed out by Ld. ASG Mr. Balbir Singh, the principal grievance of the exporters that the Government cannot insist upon IEC at the time of export stands satisfied in light of the above stated amendment.

27. This Court is also in agreement with the decision of the Bombay High Court in *Smarte Solutions* (supra). However, it was brought to the notice of this Court during these proceedings, the said amendment pointed out by Ld. ASG was not brought to light before the Bombay High Court.

28. In view of the amendment made in the FTP 2015-20, this Court does not

deem it fit to venture further on individual facts of the present case.

29. It is now open to the Petitioners to raise their grievances before the authorities regarding other reliefs as prayed for in the instant Writ Petitions and the authorities are directed to consider the grievances of the Petitioners, if any, and adjudicate upon them afresh, in accordance with law.

30. With these observations the petitions are disposed of, along with pending application(s), if any.