(2011) 07 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition No. 932 of 2011

Tata Communications Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 113 SCL 387 : (2012) 25 STR 131

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Janak Dwarkadas, Rohan Shah and Nitya Bagaria, instructed by Madhur R. Baya, for the Appellant; R.V. Desai, Senior Advocate and M.S. Bhardwaj, for the Respondent

Judgement

D.Y. Chandrachud, J.—Rule, by consent, returnable forthwith. With the consent of the Counsel and at their request, the Petition is taken up for hearing and final disposal.

2. This Petition has been listed for hearing and final disposal with a companion Petition (Vodafone Essar Ltd. v. Union of India and Ors.) Writ Petition No. 2357/2010 which was decided on 17 June 2011. The challenge in those proceedings before the Court was to a Circular dated 15 July 2010 issued by the Directorate General of Foreign Trade and to several notices issued by the Zonal Joint Director and by the Joint Director General, purporting to revoking the benefit granted under the Served From India Scheme (SFIS). The scheme was formulated under the Foreign Trade Policy for 200409. The circular under challenge was in turn based on the minutes of a meeting of the Policy Interpretation Committee (PIC) dated 5 July 2010. Counsel for the Petitioners has confined the challenge in these proceedings to the decisions taken at serial Nos. 1, 2(b), 4(ii) and 4(iii) by the PIC which were directed to be implemented by the Circular dated 5 July 2010.

3. In the companion Petition, by a judgment delivered by this Court on 17 June

2011, the Circular has been quashed and set aside in respect of the directions contained therein to implement the decision of the PIC at Serial Nos. 1, 2(a) and 2(b). Counsel appearing on behalf of the Petitioners and counsel appearing on behalf of the Respondents state before the Court that the challenge in these proceedings to the minutes of the PIC meeting contained at serial Nos. 1 and 2(b) will be governed by the earlier judgment of this Court. Consequently, for the reasons which have been already indicated by this Court while allowing Writ Petition No. 2357/2010, the impugned Circular dated 15 July 2010 in so far as it directs the implementation of the decision taken at Sr. Nos. 1 and 2(b) in the meeting of the PIC dated 15 July 2010 is held to be ultra-vires the Foreign Trade Policy for 200-409.

4. The surviving challenge which now has to be considered by the Court in these proceedings is to the decision taken by the PIC as contained at serial Nos. 4(ii) and 4(iii). Before considering the challenge, it will be necessary to advert to the basis on which these proceedings have been moved under Article 226 of the Constitution. The Petitioners have averred that they are providers inter alia of dedicated bandwidth services. These services are provided inter alia to foreign telecommunication carriers through a continuous optic fibre cable network owned by the Petitioners. The cables are laid under sea. The Petitioners have been granted a regulatory licence which permits them to provide point to point dedicated bandwidth which can be used by the customer for the carriage of data/ voice/video to and from India. The service in question is provided to foreign carriers. The Petitioners have stated that they do not offer any service in relation to the carriage of data between any two locations outside India; for example, from Dubai to Europe. The services are provided by the Petitioners on a point to point basis using the dedicated bandwidth for the carriage of data/voice/video, as the case may be to and from India. Hence, according to the Petitioners, the transaction relevant to this part of the Petition under Article 226 involves international telecommunication services which are provided to foreign telecommunication carriers through the use of the Petitioners'' optic fibre cables which run from India to other countries. The Petitioners have explained in the Petition that the optic fibre cable which runs from the territory of India is continuous and hence there is a continual connectivity with India in the provision of dedicated bandwidth services. In respect of those services, the Petitioners contract with foreign Telecommunication carriers for the provision of dedicated bandwidth between two points one of which is located in India. Payment is received for the services provided in foreign exchange. The services are provided by the Petitioners under a cohesive service contract whereby data can be transmitted between two points one of which is located in India and the other abroad. The Petitioners have stated before the Court that they do not charge separately for capacity usage in respect of the portion of the cable located in India and the portion of the cable located outside India. The Petitioners claim SFIS benefits in respect of foreign exchange that they have earned and received from foreign telecommunication carriers for eligible services covered by

Appendix10 to the Handbook of Procedures of the Foreign Trade Policy for 2004-09.

5. The objective of the SFIS is prescribed in paragraph 3.6.4.1 of the Foreign Trade Policy as follows:

3.6.4.1 Objective

Objective is to accelerate growth in export of services so as to create a powerful and unique ''Served From India'' brand, instantly recognized and respected world over.

Paragraph 3.6.4.2 defines "eligibility" thus:

All Service Providers, of services listed in Appendix-10 of HBP v1, who have a total free foreign exchange earning of at least Rs. 10 lakhs in preceding financial year shall qualify for Duty Credit scrip. For Individual Service Providers, minimum would be Rs. 5 lakhs.

Paragraph 3.6.4.3 defines the entitlement of an eligible service provider and is to the following effect:

All Service Providers (except Hotels, Restaurants and other Service Providers in Tourism Sector) shall be entitled Duty Credit scrip equivalent to 10% of free foreign exchange earned during preceding financial year. However services and service providers as listed in Paragraph 3.18.1 of HBP V1 shall not be entitled.

6. The expression "Service Provider" is defined in Para 9.53 of the FTP as follows:

9.53 "Service Provider" means a person providing

(i) Supply of a ''service'' from India to any other country;

(ii) Supply of a ''service'' from India to service consumer of any other country in India; and

(iii) Supply of a ''service'' from India through commercial or physical presence in territory of any other country

(iv) Supply of a ''service'' in India relating to exports paid in free foreign exchange or in Indian Rupees which are otherwise considered as having being paid for in free foreign exchange by RBI.

7. Appendix-10 to the Handbook of Procedures provide a list of services in respect of which the SFIS benefit was available. Amongst them, at serial No. 2C is Telecommunications services. Under the head of Telecommunications services, item "c" refers to "Circuit-switched data transmission services" while item "g" refers to "private leased circuit services". The scheme is no longer available to the Telecommunications sector in respect of foreign exchange earned with effect from 27 August 2009. The dispute in the present case relates to the period prior to the discontinuation of the scheme in relation to the Telecommunications sector.

8. On 6 October 2004, 8 June 2005 and 1 January 2008 several policy circulars were issued by the Director General of Foreign Trade interpreting the provisions of the Scheme. In a Petition filed to challenge the last of the aforesaid circulars to the extent that it impacted upon the Telecommunications service providers, a statement was made before the Delhi High Court that the grievance of the Petitioners there would be met if the Policy Interpretation Committee (PIC) of the DGFT would consider the Petitioners'' representation and clarify the position.

9. Pursuant to the orders of the Delhi High Court, the Policy Interpretation Committee held a meeting on 5 July 2010 for dealing with a case involving a Telecommunications service provider. The minutes of the meeting sought to clarify the entitlement to SFIS benefits to Telecommunications providers in several situations. Following this, the DGFT issued a policy circular on 15 July 2010 which mandated that all Regional Authorities would review previously sanctioned cases and that the entitlement in each case would be recomputed in terms of the decision taken. The Regional Authorities were directed to initiate recoveries in the event that benefits in excess of what was permissible were provided.

10. The challenge in these proceedings by the Petitioners is to the decision contained at points 2(b), 4(ii) and 4(iii) of the minutes of the PIC. The first part of the challenge, as noted earlier, is covered by the judgment delivered by this Court on 17 June 2011 in the case of Vodafone Essar Ltd. In serial No. 4 of the minutes, the PIC has dealt with other services provided by Telecom service providers. Clause 4(ii) deals with rentals from optic fibre cables in India, while 4(iii) deals with rentals from optic fibre cables overseas. The PIC has opined that these services do not fall within the purview of paragraph 9.53 of the Foreign Trade Policy. According to the PIC, foreign exchange earnings earned from optic fibre cables can be categorised as rentals from international private leased circuits. According to the Committee, these would not be entitled to SFIS benefits.

11. The narrow issue which falls for determination in these proceedings is whether the Petitioners fall within the purview of the expression "service provider" in Paragraph 9.53 of the Foreign Trade Policy. Clause (i) of Para 9.53 brings within the purview of that expression, the supply of a service from India to any other country. Clause (iii) comprehends the supply of a service from India through commercial or physical presence in the territory of any other country. The Handbook of Procedures provides in Appendix10 a list of eligible services. Telecommunications services were a subcategory of Communication services (item 2C). Among the subcategories of Telecommunications services were circuit switched data transmission services and private leased circuit services. The minutes of the PIC meeting dated 5 July 2010 accept the position that the foreign exchange earnings of the Petitioners could be categorised as rentals from private leased circuits. The nature of the service provided is hence an eligible service.

12. The Petitioners have moved the Court on a specified factual basis which is that: (i) The Petitioners provide dedicated bandwidth services through the use of an optic fibre cable network owned by them; (ii) The optic fibre cable which runs from the territory of India to overseas destinations is continuous; (iii) The Petitioners contract with foreign Telecommunications carriers for the provision of a dedicated bandwidth which can be used by the customer for the carriage of data/voice/video to and from India; (iv) The bandwidth is utilised between a location within India to an overseas destination and the Petitioners do not offer any service for the carriage of data between two locations outside India. On these facts, which have not been disputed at the hearing, the Petitioners would fall within the definition of the expression "service provider" in Paragraph 9.53 of the Scheme. Transmission of data, voice or video utilising the facility of an optic fibre cable laid by the Petitioners undersea from a point within India to an overseas destination in one continuous and scamless transaction would constitute a supply of a service from India to any other country within the meaning of Clause (i) or the supply of a service from India through commercial or physical presence in the territory of any other country within the meaning of Clause (iii).

13. Counsel appearing on behalf of the Respondents submitted that the PIC, in the course of its decision rendered on 5 July 2010, proceeded on the basis that the rentals from optic fibre cables in India could be dealt with as a separate category from rentals from optic fibre cables overseas. Counsel submitted that the situation which the Petitioners have postulated before the Court namely of a transmission of data/voice/video on a continuous fibre optic cable from a point in India to an overseas destination was not before and was not hence considered by the PIC. The grievance of the Petitioners is that the PIC minutes purport to artificially split the transaction in which a dedicated bandwidth is provided between a place located in India and a place outside India into two separate transactions relating to the portion of the optic fibre cables physically located in India and the portion located overseas. According to the Petitioners, they provide a dedicated bandwidth as a part of a cohesive service involving the use of the cable located in India and overseas and the entire transaction falls within Clause (i) of Para 9.53. Alternatively, it has been urged by the Petitioners that the service would clearly fall within clause (iii) and on a purported interpretation of SFIS, the element of service through the use of the fibre optic cable which is located on high seas (and therefore technically not present in the territory of any country) cannot be denied an SFIS entitlement. The conditions of eligibility for availing of the benefits of SFIS entitlements are prescribed in clause 3.6.4.2. The eligibility is defined with reference to service providers who have a total free foreign exchange earning of at least the stipulated amount in the preceding financial year. Who is a service provider is elucidated in Para 9.53. Evidently, on the facts which have been stated before the Court, the Petitioners provide services of the nature described in Appendix-10 and as noted earlier, this has been accepted by the PIC. The transmission of data, voice or video through an

optic fibre cable laid undersea from a point within India to an overseas destination constitutes a supply of service from India to any other country within the meaning of Clause (i) of Para 9.53. The task of the PIC was to interpret Foreign Trade Policy. In the process of construing the policy, it would not be open to the Committee or, for that matter, to any administrative authority to modify the policy or amend the policy. The reasons which weighed with the PIC in holding that the Petitioners do not fall within the description of a service provider in Paragraph 9.53 are fallacious. Hence, the interference of this Court in the exercise of writ jurisdiction under Article 226 would be warranted.

14. For these reasons, the Circular dated 15 July 2010 in so far as it directs the implementation of the decisions taken at serial Nos. 1, 2(b), 4(ii) and 4(iii) of the meeting of the PIC dated 5 July 2010 is ultravires the Foreign Trade Policy for 2004-09 in its application to Petitioners. Consequently, the directions contained in paragraph 3 of the Circular to reopen the SFIS cases and to make recoveries in accordance with the decisions taken at the PIC meeting of 5 July 2010 is quashed and set aside as regards the implementation of the decision at serial Nos. 1, 2(b), 4(ii) and 4(iii). All consequential actions shall follow in accordance with the directions contained hereinabove. However, we clarify that it would be open to the Authorities to verify that the factual basis of the claim on which SFIS benefits have been sought by the Petitioners is in the same terms as stated before this Court and recorded in the earlier part of this judgment. Since the Petitioners have claimed their entitlement on a particular factual basis which has been adverted to in this judgment, it would be open to the Authorities to verify that claim to SFIS benefits has been made on the same factual basis as stated before the Court.

15. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.