

(2015) 01 DEL CK 0008

In the Delhi High Court

Case No : Writ Petition (C) 7011/2012 and CM 10056/2013, W.P. (C) 1663/2012 and W.P. (C) 6800/2013

Yum Restaurants (I) Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-01-2015

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 15, 16, 19, 3, 5

Citation : (2015) 148 DRJ 471 : (2015) 320 ELT 781

Hon'ble Judges : Vibhu Bakhru, J.

Bench : Single Bench

Advocate : S. Ganesh, Senior Advocate, Sonu Bhatnagar and Udit Jain, for the Appellant; Jasmeet Singh, CGSC, Advocates for the Respondent

Final Decision : Allowed

Judgement

Vibhu Bakhru, J.—The petitioners are companies incorporated under the Companies Act, 1956 and have their registered office situated in India. The petitioners, inter alia, challenge the decision of the Director General of Foreign Trade (hereafter "DGFT") denying the benefits of the "Served from India Scheme" (hereafter "SFIS"), as framed under the foreign trade policy, to the petitioners.

2. The Policy Interpretation Committee (hereafter "PIC") and DGFT have held that the SFIS is not applicable to the petitioners as they are subsidiaries of foreign companies. According to PIC/DGFT, the SFIS is not applicable to subsidiaries of foreign companies as granting benefits available under the SFIS does not further the objective of the SFIS, which is to create a powerful and a unique "served from India" brand. The petitioners dispute this. According to them, the SFIS is applicable to all "Indian Service Providers" who fulfill the specified criteria; no distinction can be drawn on the basis of nationality of their constituent shareholders.

3. The main controversy to be addressed is whether the petitioners could be denied the benefit of the SFIS only on the ground that they were subsidiaries of foreign companies. And, whether it was open for DGFT to interpret the foreign trade policy to exclude the petitioners from the benefit of the SFIS.

4. Briefly stated the relevant facts necessary to consider the controversy are as under:-

4.1 M/s. Yum Restaurants (India) Pvt. Ltd. (the petitioner in W.P.(C) 7011/2012 - hereafter referred to as "Yum") is, inter alia, engaged in providing wide range of management services to Yum! Asia Franchise Pte. Ltd., Singapore in respect of franchisees located in Nepal, Bangladesh, Sri Lanka, Mauritius etc. Yum applied for license (Duty Credit Scrips) in terms of the SFIS under the applicable foreign trade policies for the financial years 2004-05 to 2010-11. Yum's applications were accepted and it was provided the Duty Credit Scrips in terms of the SFIS. Subsequently, Yum also applied for benefits under the SFIS, for the financial year 2011-12 under the Foreign Trade Policy, 2009-14 (hereafter "FTP 2009-14"). In response, the respondents called upon Yum to furnish details of its share holding. By a letter dated 11.07.2012, Yum was informed that its application was rejected for the following reasons:-

"YUM BRAND IS NOT A ESSENTIALLY INDIAN BRANDS.

THE NAME OF COMPANY REPRESENTS BRAND NOT ESSENTIALLY IDENTIFIED AS INDIAN BRAND THEREFORE. YOU CLAIM REJECTED IN TERMS OF PARA 3.12.2 OF FTP -2009-2014."

4.2 Thereafter, Yum was issued communications dated 30.05.2013 and 17.06.2013, inter alia, stating that the Duty Credit Scrips (License) granted to Yum were in contradiction of the objective of the SFIS; Yum was called upon to refund the amount of the Duty Credit Scrips granted earlier and settle the issue. Yum has also impugned the said communications dated 30.05.2013 and 17.06.2013.

4.3 E.I. DuPont India Pvt. Ltd. (the petitioner in W.P.(C) 1663/2012 - hereafter "DuPont") is engaged in providing wide range of services in varied market segments including agriculture, food and nutrition, healthcare, home and construction, electronics etc. DuPont applied for license (Duty Credit Scrips) for the financial year 2003-04 to 2008-09 in terms of the SFIS as envisaged under the Foreign Trade Policy 2004-09 (hereafter "FTP 2004-09"). DuPont's applications were accepted and it was granted the Duty Credit Scrips in terms of the SFIS. Subsequently, by letter dated 22.04.2009, DuPont was informed that its claim for SFIS benefits was rejected for the following reasons:-

"In this case it seems your firm is not an Indian brand or company and does not contribute in creation a powerful and unique served from India brand. Hence the objective of SFIS Scheme to accelerate growth in export of Services from India which creates a powerful and unique served from India brand is not achieved.

Hence your case is not covered under any category of para 9.53 of FTP and also does not meet the basic objective for grant of SFIS benefit." 4.4 M/s. Nokia Solutions and Networks India Pvt. Ltd. (the petitioner in W.P.(C) 6800/2013 - hereafter referred to as "Nokia") is, inter alia, engaged in manufacture and distribution of telecom infrastructure equipment and provision of wide range of services in telecommunications sector. Nokia applied for licenses (Duty Credit Scrips) in terms of the SFIS under the applicable foreign trade policies (FTP 2004-09 and FTP 2009-14) for the financial years 2009-10. Nokia's applications were accepted and it was provided the Duty Credit Scrips in terms of the SFIS. These were sought to be withdrawn by a letter dated 07.12.2010; Nokia was informed that the Duty Credit Scrips were "issued inadvertently without approval of competent authority" and was directed to "submit the original licenses within a period of 10 days."

4.5 Nokia also impugns the minutes of PIC meeting No. 10/AM12 held on 27.12.2011, wherein it was noted that Nokia and other companies named in the agenda, "represent brands not identified as Indian Brands" and accordingly the grant of SFIS benefits "would not be harmonious with the intent behind the Scheme".

5. Before proceeding to address the controversy, it would be essential to refer to the applicable legal and policy framework relevant for foreign trade. The Foreign Trade (Development and Regulation) Act, 1992 (hereafter the "Act") has been enacted for development and regulation of foreign trade. Section 5 of the Act provides that "the Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy."

6. In exercise of powers under Section 5 of the Act, the Central Government had framed and notified FTP 2004-09. Subsequently, the Central Government declared FTP 2009-14, which came into force on 27.08.2009. In terms of paragraph 1.2 of FTP 2009-14, all exports and imports up to 26.08.2009 would be governed by FTP 2004-09. Both FTP 2004-09 and FTP 2009-14 provide for an incentive scheme captioned as "Served from India Scheme" (i.e. SFIS), which entails providing duty credit scrips - as an incentive - to eligible service providers earning free foreign exchange. The relevant provisions of the SFIS under FTP 2004-09 and FTP 2009-14 are quoted below:-

Clause 3.12.2 of FTP 2009-14 as initially framed used the expression "All Indian Service Providers". This was subsequently amended by deleting the word "All" to read as above. Notably, PIC had deliberated on the SFIS as initially framed.

7. Section 6 of the Act provides for the appointment of DGFT and also indicates the functions to be performed by the DGFT. The said Section is quoted below:-

"6. Appointment of Director General and his functions.

(1) The Central Government may appoint any person to be the Director General

of Foreign Trade for the purposes of this Act.

(2) The Director General shall advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy.

(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order."

8. Paragraph 2.3 of the FTP 2004-09 as well as the paragraph 2.3 of the FTP 2009-14 contemplate that questions and/or doubts in respect of the interpretation of any provision of the Foreign Trade Policy would be referred to DGFT whose decision would be final and binding, in respect of such questions. Paragraph 2.3 of FTP 2004-09 is quoted below:-

9. Paragraph 2.3 of FTP 2009-14 was amended with effect from April 2010 to provide for constitution of a PIC to aid and advice the DGFT. Paragraph 2.3 as amended and effective from April 2010 reads as under:-

10. The minutes of the meetings of the PIC held on 29.04.2011 and 27.12.2011 embody the decision on the basis of which the petitioners have been denied the benefits of the SFIS. The cases of Nokia and DuPont were considered by the PIC in its meeting held on 29.04.2011; the relevant extract of the said minutes reads as under:-

"The PIC considered the case as per Agenda, the issue involved interpretation of the term "All Indian Service Providers" as per Para 3.12.2 of the FTP 2009-14 and for grant of duty Credit Scrip under the Served From India Scheme.

After the detailed discussions on this issue, the committee felt that mere registration with the RoC does not give them the status of an Indian company for SFIS benefit. The Committee felt that the firm's need to prove how they are Indian companies by way of their share holding pattern which would enable the committee to determine whether they are truly Indian company or not. It was decided that details from RoC need to be collected as regard to share holding/ ownership status of all these companies before a view can be taken by the PIC."

11. Subsequently, the question regarding entitlement of Indian subsidiaries of foreign companies including Nokia and DuPont was considered by the PIC at a meeting held on 27.12.2011 where it was decided that SFIS's benefits could not be granted to the said companies. The relevant extract of the minutes of the said meeting are as under:-

"PIC considered the issue pertaining to request for grant of SFIS by the above companies. PIC also referred its earlier decision of 27.1.2009 in the case of M/s. Federal Express Corporation and M/s. UPS Jet Air Express Pvt. Ltd.

2. Para 3.12.1 of the Foreign Trade Policy states the objective of SFIS Scheme as

"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." Therefore, the objective of the scheme inter alia 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 wide.

3. The Committee noted that the objective of the Foreign Trade Policy is to encourage essentially Indian brands. The Foreign Trade Policy did not intend to incentivise any brand which is created outside India. Such Indian brand should be so unique as to be easily recognizable and create a distinct identity for itself both domestically and internationally. Essentially such a brand should enhance the Indian image and hence the Foreign Trade Policy uses the phrase "Served from India" brand.

4. The Committee, therefore, noted that the names of companies mentioned in the agenda represent brands not identified as Indian Brands. They may be known in the global market. Accordingly, the Committee decided that grant of SFIS benefits to the above companies would not be harmonious with the intent behind the Scheme."

12. It is relevant to note that the above-referred meetings of PIC were held under the Chairmanship of DGFT and, thus, the decisions taken at the said meetings are, in effect, the decisions of the DGFT. The petitioners impugn the minutes of the said meetings (hereafter the "impugned minutes") as being contrary to the FTP 2004-09/FTP 2009-14 and without jurisdiction.

13. The challenge laid by the petitioners to the impugned minutes must be considered in the backdrop of the legal and policy framework as indicated herein before. It is clear from the scheme of the Act and foreign trade policies framed under the Act that whereas Central Government is empowered to frame and/or to amend the foreign trade policy, the role of DGFT is predominantly to assist in implementation of the said policy and to specify the import/export procedure to be followed. DGFT is also empowered to decide any question as to interpretation of any provision of the policy. But, the DGFT is neither entrusted nor empowered to amend or alter the foreign trade policy in any manner. Although certain powers exercisable by the Central Government can be delegated to DGFT, the same does not include the power under Section 5 of the Act. Thus, DGFT would have no power to either amend or alter any provision of the FTP. The question, whether the DGFT has the power to add to or amend the policy, has been considered by courts in a number of decisions and it is now well established that the DGFT must act strictly within the four corners of the foreign trade policy. The Supreme Court in *Atul Commodities Pvt. Ltd. and Others Vs. Commissioner of Customs, Cochin-9*, also held that DGFT would have no power to amend the foreign trade policy. This Court had also expressed a similar view in *BRG Iron and Steel Co. Pvt. Ltd. Vs. Union of India*, . The decision of the DGFT as noted

in the impugned minutes must be considered in the above perspective.

14. Concededly, there was no ambiguity in the language of the provisions of paragraph 3.6.4.2 of FTP 2004-09. "All Service Providers" complying with the specific eligibility criteria were entitled to the benefits under the SFIS as framed under FTP 2004-09. The expression "All service providers" cannot be interpreted to exclude service providers, which are subsidiaries of foreign entities. The impugned minutes also, clearly, indicate that the provisions of the SFIS under FTP 2004-09 were not considered or discussed. Thus, insofar as DuPont is concerned, its claim - which was only under FTP 2004-09 - was rejected without even considering the relevant policy. There was no possible occasion for the DGFT to interpret the words "All Service Providers" in a manner so as to exclude DuPont or any other Indian company claiming benefits of the SFIS under FTP 2004-09. Thus, the decision of the DGFT to read paragraph 3.6.4.2 of FTP 2004-09 to mean that Indian subsidiaries of foreign companies were ineligible for benefits under the SFIS, is bereft of any reason and without application of mind. The said decision is, therefore, unsustainable. Insofar as exports made by the petitioners prior to 26.08.2009 are concerned, the same would be governed by FTP 2004-09. And, indisputably, the petitioners would be eligible for the SFIS in respect of services exported prior to 26.08.2009.

15. Paragraph 3.12.2 of FTP 2009-14 contains the provisions with regard to eligibility for claiming benefits under the SFIS for services exported after 26.08.2009. A plain reading of the said provision indicates that "Indian Service Providers" providing services as listed in the Appendix 41 of the Handbook of Procedures, Volume I and who have earned free foreign exchange of Rs. 10 lacs and more in the current financial year would be entitled duty credit scrips equivalent to 10% of the free foreign exchange earned during the current financial year. The eligibility condition of earning Rs. 10 lacs or more is relaxed to Rs. 5 lacs in case of Individual service providers.

16. Plainly, the expression "Indian Service Providers" would include all Indian entities including individual nationals. The decision of the DGFT/PIC to exclude Indian subsidiaries of foreign companies, from the scope of "Indian service providers", is based on their interpretation of the stated objective of SFIS, which 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". The DGFT has mis-interpreted the expression "Served from India brand" to be brands of Indian companies, which are recognized as Indian. This, in my view, is wholly unsustainable; "Served from India brand" used in the context of accelerating growth of services does not refer or allude to any trade name or trade mark of any individual service provider. The DGFT/PIC has introduced a completely new concept in the eligibility criteria as specified under the FTP 2009-14, that is, to limit the incentives only to companies with trade names, which reflect their association with India. The expression "Served from India brand" must be read in the context of the object to accelerate growth in export

of services from India. The purpose of granting incentive to Indian Service Providers is to incentivize export from India in order to strengthen such exports and to ensure that larger quantum of services are outsourced or procured from India. Clearly, the objective is to establish "India" as a brand; a recognized destination for outsourcing of services. The objective as specified under paragraph 3.12.1 of FTP 2009-14 contains no reference to trade names of Indian companies.

17. The incentive provided under the SFIS is also available to individuals providing the specified services and fulfilling the criteria of earning free foreign exchange of Rs. 5 lacs or more. It is not necessary that such services be provided under any brand or that the name of the individual service provider be recognized as an Indian name. This becomes apparent when one examines the eligible services listed in Appendix 41 of the Handbook of Procedures, Volume I (Appendix 10 for Export of Services done prior to 01.01.2011).

18. The respondents have contended that in terms of paragraph 2.3 of the FTP 2009-14, the decision of DGFT with regard to interpretation of the said policy would be binding. It is urged that DGFT has interpreted the object of the SFIS and based on such interpretation has proceeded to interpret the expression "Indian Service Providers". It is argued that as the issue relates to interpretation of FTP 2009-14, the same would be within the jurisdiction of DGFT and the impugned minutes do not warrant any interference in these proceedings.

19. I find it difficult to accept this contention as the meaning sought to be attributed to paragraph 3.12.2 of the FTP 2009-14 is not sustainable by the plain language of that provision. Whilst, it cannot be disputed that DGFT is empowered to interpret the foreign trade policy, such powers can be exercised only when the plain language of the policy presents an ambiguity. It would not be open for DGFT to introduce new conditions and criteria under the guise of interpreting the policy as that would, clearly, amount to amending the provision of the foreign trade policy. The words used in paragraph 3.12.2 of FTP 2009-14 are "Indian Service Providers". There is no scope to read into these words the condition that for service providers to be Indian, its shareholders must also be Indian. This, clearly, would amount to introducing an additional eligibility condition which is extraneous to the eligibility criteria as spelt out in paragraph 3.12.2 of the FTP 2009-14. Introduction of such condition would, in effect, amount to amending the FTP 2009-14. The conclusion of DGFT that Indian companies having foreign equity cannot be considered as Indian, militates against well established canons of company law.

20. It is trite law that a company is a juristic entity and the identity of the company is different from its shareholders. The petitioners are companies incorporated under the Companies Act, 1956 and are governed by the provisions of the statute (currently Companies Act, 2013). Insofar as the domicile of the petitioners is concerned, no distinction can be drawn between the petitioners and other companies incorporated under the said Act. It is also well established that

the situs of shares is located in the country in which the register upon which they are registered is kept. (See: *Re Clarke, McKechnie v. Clarke*: (1904) 1 Ch 294, *Brassard v. Smith*: (1925) AC 371, *R. Viswanathan Vs. Rukn-UI-Mulk Syed Abdul Wajid*, , *Vodafone International Holdings B.V. Vs. Union of India (UOI) and Another*, . Companies incorporated under the laws of India and having their registered offices in India would undeniably be Indian companies.

21. In view of the aforesaid, the petitions are allowed; the decisions of DGFT/PIC, denying the benefit of the SFIS to the petitioners reflected in the impugned minutes, as well as separate communications sent to the petitioners withdrawing/recalling the said benefits (i.e. Duty Credit Scrips), are set aside.