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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 195/2018

BLUE COAST HOTELS LTD. ..... Petitioner

Through: Mr Akhil Sibal, Sr. Advocate with Ms Meghna Mishra, Mr Sameer Jain, Mr Naman Joshi, Ms Riya Singh and Ms Jayashree Parihar, Advocates.

versus

DIRECTOR GENERAL OF FOREIGN TRADE AND ORS. ..... Respondents

Through: Mr Ripu Daman Bhardwaj with Mr T. P. Singh, Advocates for R-1 to R-3.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **10.01.2018**

CM No.792/2018

1. Allowed, subject to all just exceptions.

W.P.(C) 195/2018 & CM No.793/2018

2. The petitioner has filed the present petition, *inter alia,* praying as under:-

> "a. Set aside and declare that Impugned Letters dated 27.12.2017, 29.12.2017 and 01.01.2018 issued by Respondent Nos. 2 and 3 are in violation of the provisions of the FTP 2009-14 provisions of the Section 5 of the FTDR Act and/or Article 14 and Article 19(l)(g) of the Constitution of India;
>
> b. Set aside and declare that the Impugned PIC Minutes, dated 27.12.2011 are in violation of the provisions of the FTP 2009-14, the provisions of Section 5 of the FTDR

Act and/or Article 14 and Article 19(l)(g) of the Constitution of India;

c. For costs of the Petition and orders thereon."

3. The petitioner is aggrieved by the demand raised by the office of Director General of Foreign Trade (hereafter 'DGFT') - by way of the three letters impugned in this petition - for refund of duty credit claimed by and disbursed to the petitioner by issuance of Duty Credit Scrips under the Served from India Scheme (SFIS).

4. The principal question involved in the present case relates to the interpretation of the "Served From India Scheme" (SFIS) forming a part of the Foreign Trade Policy (FTP) 2009-14. The relevant provisions of the FTP 2009-14 are set out below:-

	"3.12	**SERVED FROM INDIA SCHEME (SFIS)**
Objective	3.12.1	Objective of SFIS 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.
Eligibility	3.12.2	<u>Indian Service Providers</u>, of services listed in Appendix 41 of HBP v1, who have free foreign exchange earning of at least Rs. 10 Lakhs in current financial year will be eligible for Duty Credit scrip. For Individual Indian Service Providers, minimum free foreign exchange earnings would be Rs.5 Lakhs.
Ineligible	3.12.3	Services and Service Providers as

Services and Service Providers		listed in Para 3.6.1 of HBPv1 shall be entitled for benefits under the SFIS scheme
Entitlement	3.12.4	Service Providers of services listed in Appendix 41 of HBPv1 would alone be eligible. Such eligible service providers will be entitled to Duty Credit Scrip equivalent to 10% of free foreign exchange earned during current financial year (w.e.f. 1.1.2011). For services rendered prior to 1.1.2011, Appendix 10 of HBPv1 would be applicable.”

5. As is apparent form the above, the objective of the SFIS was to create a powerful and unique “Served From India Brand”. This has been construed by the DGFT/Policy Interpretation Committee (PIC) to mean as a scheme to encourage essentially “Indian Brands”. It is contended on behalf of the DGFT that only Indian entities providing eligible services under a trademark recognised as an Indian trademark are eligible for such benefits. According to the DGFT, Indian entities, which adopt and provide services under trademarks that are owned by companies registered in other countries, are to be excluded from the benefits of the said scheme. This Court is of the view that the aforesaid interpretation is unsustainable. On a plain reading of the SFIS, the expression “Served From India brand” as referred to in paragraph 3.12.1 of the FTP 2009-14, which sets out the objective of the said scheme, would mean services exported from India that strengthen the perception of India being a viable source for such services. The expression “Served From India Brand” cannot be misunderstood as trademark or brand established in

India. The brand referred to is “Served From India”. Plainly, this would simply mean services from India. The brand “Served From India” is used in the context of services just as the expression “Made in India” is understood in context of goods. In my view, the interpretation as to the objective of the Scheme as provided by the DGFT/PIC runs contrary to the plain language of the SFIS.

6. In terms of paragraph 3.12.2 of the FTP 2009-14 all “*Indian Service Providers*” that meet the eligibility criteria - namely (a) provide services listed in Appendix 41 of the hand Book of Procedures Volume 1 and (b) have foreign exchange earnings of at least Rs 10 lakhs (or five lakhs in case of individuals) - are entitled to Duty Credit Scrips as indicated in paragraph 3.12.4 of the FTP. The expression “Indian Service Providers” would include all Indian entities including Indian Companies.

7. The learned counsel for the petitioner submits that the issue involved in the present case are squarely covered by the decision of this Court in ***Yum Restaurant (I) Pvt. Ltd. v. Union of India: 2015 (158) DRJ 471.***

8. Mr Bhardwaj, learned counsel for the respondents also concurs with the above submission that the issues involved in the present case are squarely covered by the earlier decision of this Court in ***Yum Restaurant (I) Pvt. Ltd.*** *(supra)*. He further states that the said order is the subject matter of an appeal pending before the Division Bench of this Court, although, no stay order has been granted in that matter. He also referred to the decision of the Bombay High Court in ***Shree Naman Hotels Pvt. Ltd. and Ors. v. Union of India: 2015 (326) ELT 513 (Bom.)*** where the Hon'ble Bombay

High Court has taken a different view.

9. Mr Bhardwaj also states that noticing the conflict in the decisions of this Court and the Bombay High Court, the Hon'ble Supreme Court in ***Cummins Technologies India Pvt. Ltd. v. Union of India (SLP (C) No. 28830 of 2017)*** has issued notice in another matter and the same is pending consideration. However, the Supreme Court has not granted any interim order.

10. In view of the above, Mr Bhardwaj was called upon to take instructions whether the proceedings against the petitioner could be kept in abeyance awaiting the decision of the Supreme Court in ***Cummins Technologies India Pvt. Ltd.*** (*supra*). He states that he has instructions that the respondent are not willing to keep the proceedings in abeyance and *"will pursue recovery proceedings against firms associated with foreign brands that have claimed the SFIS benefit."*

11. In view of the above stand, this court does not consider it apposite to defer the hearing in this matter.

12. A perusal of the decision in ***Shree Naman Hotels Pvt. Ltd. and Ors. v. Union of India*** (*supra*) indicates that the Hon'ble Division Bench of the Bombay High Court was of the view that in ***Yum Restaurant (I) Pvt. Ltd.*** (*supra*), this Court had construed the policy narrowly as the objects and purpose of the Scheme were not placed before this Court. In view of the Bombay High Court, the objective as stated in paragraph 3.12.1 of FTP 2009-14 ought to be construed in a larger perspective. The Court concurred with the submissions made on behalf of the respondents that the purpose

was to give incentive to such companies to create an Indian Brand which is instantly recognised and respected world over and this would not be achieved by permitting those who are not creating a powerful and unique "Served From India' brand. Thus the entity using an established foreign brand of service would not qualify. It was contended of the DGFT that it was necessary to have Indian involvement in Indian Brands.

13. I, most respectfully, find myself unable to concur with the decision of the Bombay High Court. In my view, the FTP has no room to accommodate subjective opinion such as on Indian involvement in Indian brands. More importantly, the eligibility criteria as set out in paragraph 3.12.2 uses expression “Indian Service Providers” and as stated above, the same must necessarily include entities incorporated in India.

14. The Learned counsel for the petitioner points out that in the present case all shareholders of the petitioner are also Indian. The letters dated 27.12.2017, 29.12.2017 and 01.01.2018 (which are impugned in the present petition) indicate that the benefits of SFIS has been denied to the petitioner only on the ground that “grant of benefits to companies representing brands not identified as Indian Brands would not be harmonious with the intent of the SFIS Scheme” as decided by the PIC in the meeting held on 27.12.2011. In my view, the decision of the PIC dated 27.12.2011 is not sustainable.

15. In view of the above, the petition is allowed. The impugned communications dated 27.12.2017, 29.12.2017 and 01.01.2018 seeking recovery of the SFIS benefits provided to the petitioner are set aside. Insofar as the PIC Minutes dated 27.12.2011 are concerned, this Court had

set aside those minutes in ***Yum Restaurant (I) Pvt. Ltd.*** *(supra)*.

16. The petition is disposed of in the above terms.

VIBHU BAKHRU, J

JANUARY 10, 2018
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