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

Date of decision: 6th December, 2019

+ LPA 770/2015

UNION OF INDIA & ORS

..... Appellants

Through: Mr. Arun Bhardwaj, CGSC with
Mr. Rakesh Mudgal and Mr. Ashish
Rai, Advs.

versus

E I DUPOINT INDIA & ANR

..... Respondents

Through: Mr. Pramod K. Rai, Mr. Deepak
Anand and Ms. Hemlata Rawat,
Advs.

AND

+ LPA 631/2019

UNION OF INDIA & ORS

..... Appellants

Through: Mr. Arun Bhardwaj, CGSC with
Mr. Rakesh Mudgal and Mr. Ashish
Rai, Advs.

versus

EI DUPONT INDIA PVT LTD & ANR

..... Respondents

Through: Mr. Pramod K. Rai,
Mr. Deepak Anand and
Ms. Hemlata Rawat, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

06.12.2019

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D.N. PATEL, CHIEF JUSTICE (ORAL)

CM APPL. Nos. 25323/2015(for condonation of delay of 94 days in filing) and 25324/2015 (for condonation of delay of 82 days in re-filing) in LPA No. 770/2015

CM APPL. Nos. 42999/2019 (for condonation of delay of 181 days in filing) and 43002/2019 (for condonation of delay of 15 days in re-filing) in LPA No. 631/2019

Having heard counsel for both the sides and looking to the reasons stated in these applications, there are reasonable reasons for condonation of delay. We, therefore, condone the delay in filing and re-filing of the Letters Patent Appeals. These applications are allowed and disposed of.

LPA Nos. 770/2015 and 631/2019

1. These Letters Patent Appeals have been preferred by the original respondents. **WP(C) No. 6640/2015** and **WP(C) No.1663/2012** were preferred by the respondents and the same were allowed by the learned Single Judge *vide* orders dated **14th January, 2019** and **27th January, 2015**.

2. The respondents, in these two appeals, are E.I.Dupoint India Private Limited, and its Manager-Indirect Tax, Mr. Vineet Bose, respectively.

3. Respondent No. 1, on **5th February, 2009**, was issued scrips/licenses, under the “**Served From India Scheme**” (hereinafter referred to as “**SFIS**”), which was one of the export promotion schemes, available under the Foreign Trade Policy, in terms whereof importers could, subject to fulfillment of the conditions stipulated, avail the benefit

of exemption, either in whole or in part, from the payment of Customs duty, on the goods imported by them.

4. The SFIS scrips, issued to Respondent No.1, were in terms of the SFIS as contained in the **2004-2009 Foreign Trade Policy** (hereinafter referred to as “**FTP 2004-2009**”).

5. At this juncture, certain relevant provisions, relating to the SFIS, as contained in the FTP 2004-2009, and in the FTP 2009-2014 (under which no benefits were sought by Respondent No. 1) merit reproduction, thus:

FTP 2004-09

“3.6.4 SERVED FROM INDIA SCHEME

Objective 3.6.4.1 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.

Eligibility 3.6.4.2 *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.*

Entitlement 3.6.4.3 *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.”

FTP 2009-14

“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 *Indian Service Providers, 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 listed in Para 3.6.1 of HB Pv1 shall not be entitled for benefits under the SFIS scheme.*

Entitlement 3.12.4 *Service Providers of services listed in Appendix 41 of HB Pv1 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 HB Pv1 would be applicable.”*

6. It is clear, at the first glance, that the conditions, fulfillment of which were mandatory for an importer to be entitled to the benefits of the SFIS, were that

(i) the importer was a service provider, providing service/services, listed in Appendix-10 of the Handbook of Procedures (HBP), and

(ii) the import had a total free foreign exchange earning of at least ₹ 10 Lakhs in preceding financial year.

It is important to note that **paras 3.6.4.2 and 3.6.4.3** of the **FTP 2004-2009**, extended the benefit of the SFIS to *all service providers*.

7. As against this, **para 3.12.2** of the **FTP 2009-2014** extended the benefit of the SFIS *only to Indian service providers*, the other eligibility conditions remaining the same.

8. On 22nd April, 2009, a communication was addressed, to Respondent No. 1, rejecting its claim, for grant of SFIS benefits, (despite the fact that the scrips already stood issued to it) 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 & 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.”

9. The above decision was, admittedly, taken pursuant to deliberations by the Policy Interpretation Committee (PIC), constituted to interpret the provisions of the FTP. One of the issues, on which PIC

deliberated, was whether Respondent No.1, being an Indian subsidiary of a foreign country, was entitled to the benefit of SFIS. The minutes of the meeting, which took place, on 27th December, 2011, read thus:

“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.”

(Emphasis supplied)

10. In these circumstances, Respondent No.1 moved this Court, by way of **WP (C) 1663/2012**, challenging the deliberations and decision taken by the PIC, in its afore-extracted minutes dated 27th December,

2011, as well as the communication dated 22nd April, 2009, whereby the claim, of Respondent No. 1, to the benefit of the SFIS, was rejected.

11. The said **WP (C) 1663/2012**, preferred by Respondent No.1, was tagged with two other writ petitions, namely, WP (C) 7011/2012 (*M/s Yum Restaurants (I) Pvt. Ltd v. U.O.I.*) and WP (C) 6800/2013 (*Nokia Solutions and Networks India Pvt. Ltd. v. U.O.I.*).

12. There was, however, one crucial distinguishing feature, in the case of Respondent No. 1, vis-à-vis, the cases of Yum Restaurants (I) Pvt. Ltd. and Nokia Solutions and Networks India Pvt. Ltd.

13. While *M/s Yum Restaurants (I) Pvt. Ltd. (supra)* and *Nokia Solutions and Networks India Pvt. Ltd. (supra)* dealt with entitlement to the benefits of SFIS, *under the FTP 2009-2014*, the case of Respondent No.1 *was with respect to the FTP 2004-2009*.

14. The learned Single Judge, vide judgment dated 27th January, 2015 (which forms subject matter of challenge in LPA 770/2015) allowed all the writ petitions, including WP (C) 1663/2012, holding that SFIS benefits were available to all the petitioners before him i.e. that the said benefits available under the FTP 2004-2009 as well as under the FTP 2009-2014.

15. We are not concerned, in these appeals, with the availability, or otherwise, of SFIS benefits under the FTP 2009-2014, as the case of Respondent No. 1 is limited to the FTP 2004-2009. In fact, the

entitlement of Yum Restaurants (I) Pvt. Ltd. to SFIS benefits, under the FTP 2009-2014, forms subject matter of a separate challenge, at the instance of the appellant, with which we need not engage ourselves.

16. Insofar as Respondent No. 1 is concerned, certain capital goods were imported by Respondent No. 1, claiming the benefits of SFIS, on which Customs duty, without availing the said SFIS benefit, was deposited by Respondent No. 1. Subsequently, in view of the judgment, dated 27th January, 2015 *supra*, of the learned Single Judge, in WP (C) 1663/2012, Respondent No.1 claimed refund of the duty, deposited by it, as the learned Single Judge had held Respondent No. 1 to be entitled to the benefits of the SFIS, under the FTP 2004-2009.

17. As the request of Respondent No. 1, for refund of the duty deposited by it, did not meet with any favourable response, Respondent No.1 moved this Court, by way of WP(C) 6440 /2015.

18. Vide judgment dated 14th January, 2019, the learned Single Judge has, following the earlier judgment dated 27th January, 2015, in WP(C) 1663/2012 *supra*, allowed WP(C) 6440/2015.

19. It is noted, in the said judgment, that the only ground, ventilated by the appellant, was that the judgment dated 27th January, 2015, *qua* M/s Yum Restaurants (I) Pvt. Ltd., was under challenge before a Division Bench of this Court. The learned Single Judge noted, correctly, however, that the said challenge pertained to the entitlement, to the benefits of

SFIS, under the FTP 2009-2014, and not under the FTP 2004-2009, with which Respondent No. 1 was concerned.

20. These two appeals, at the instance of the Union of India and the Director General, Foreign Trade, impugn the aforesaid judgments, dated 27th January, 2015 *supra* (insofar as it allowed WP (C) 1663/2012) as well as the judgment dated 14th January, 2019 passed in WP (C) 6640/2015.

21. Mr. Arun Bhardwaj, learned Central Government Standing Counsel for the appellants, laid repeated emphasis on the decisions of the PIC, taking in its meeting dated 27th December, 2011. He submitted that a conscious decision had been taken by the PIC – which was empowered to interpret the provisions of the FTP – that, in view of the avowed objectives of the SFIS, the benefit thereof could not be made available to Indian subsidiaries of foreign companies and to entities which did not create a powerful and unique “served from India” brand.

22. These being the two considerations on which Respondent No. 1 had been denied the benefits of the SFIS, Mr. Arun Bhardwaj would seek to contend that the learned Single Judge was in error in reversing the said decision.

23. Mr. Arun Bhardwaj also places reliance on para 2.3 of the FTP whereunder the interpretation, by the DGFT, of the provisions in the FTP, was final and binding.

24. We are unable to subscribe to the view canvassed by the appellant.

25. **Para 3.6.4.2** of the **FTP 2004-2009** is clear and unequivocal in its terms. All Service Providers, who provided service enlisted in Appendix 10 of the FTP, and who have a total free foreign exchange earning of at least ₹10 Lakhs in the preceding financial year, qualified for the benefits of the SFIS. Significantly, the clause talks that all such service providers, *shall* qualify for the benefits of the SFIS Scheme.

26. Etymologically, the expression “shall” denotes a mandate, and the Supreme Court has, in various decisions, held so.¹ Equally numerous, however, are decisions which hold that the expression “shall” is not, inevitably, to be regarded as mandatory, and the court is required to be guided by the real intention of the Legislature, as it appears by attending to the whole scope of the statute.² It is also well-settled that beneficial fiscal statute sought to be liberally construed, and provisions which confer tax benefits, conditional to obligations to be fulfilled by the beneficiary, should be so construed as to advance the benefit, rather than deny the same, subject, of course, to fulfilment of the requisite obligation. In *C. I. T. v. Straw Board Manufacturing Co.*³, it was held that a provision, granting concessions from payment of tax, for the purpose of encouraging an industrial activity, was required to be liberally construed. Specifically in the context of an exemption notification, issued with the object of encouraging exports by granting exemption from customs duty

¹ Khub Chand v. State of Rajasthan, AIR 1967 SCC 1074; Janki Sugar Mills v. Commissioner of Meerut Divn, (1979) 1 SCC 524; Divisional Level Committee v. Sahu Stone Crushing Industries, (1998) 8 SCC 435; Biswanath Poddar v. Archana Poddar, (2001) 8 SCC 187; Hemalata Gargya v. C.I.T., (2003) 9 SCC 510

² State of U.P. v. Babu Ram, AIR 1961 SCC 751

³ AIR 1989 SC 1490

on materials required for the manufacture of the resultant product – a situation which can easily be analogised to the case before us – the Supreme Court held that a liberal interpretation, so as to extend the benefit of exemption, was required to be adopted, and the words “material required to be imported for the purpose of manufacture of products” ought to be construed as including not only materials actually used in the manufacture of the resultant product, but also materials which, though they are not actually so used, are required in order to manufacture the resultant product.⁴ In *Hemraj Gordhandas v. H. H. Dave*⁵, a Constitution Bench of the Supreme Court held that, if a taxpayer fell within the plain terms of an exemption notification, the benefit of the notification could not be denied by calling, in aid, any supposed intention, and the language of the notification had to be given effect to.

27. Nearly a century ago, it was classically enunciated, thus, in *Cape Brandy Syndicate v. Inland Revenue Commissioners*⁶, thus:

“...in a taxing Act one has to look merely at what is clearly said. *There is no room for any intendment.* There is no equity about a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

(Emphasis supplied)

The above aphorism, as enunciated by Rowlatt, J., is generally regarded as *locus classicus*.

28. It cannot be forgotten that export promotions schemes are intended to benefit exporters, who, through the export, earn valuable foreign

⁴ *Oblum Electrical Industries Pvt Ltd v. Collector of Customs*, 1997 (94) ELT 449 (SC)

⁵ 1978 (2) ELT J 350 (SC); AIR 1970 SCC 755

⁶ (1921) 1 KB 64

exchange. It is precisely for this reason that, minimum free foreign exchange has been stipulated as one of the pre-conditions for being entitled to the benefits of SFIS. It would do complete disservice to the intent to clause 3.6.4.2 of the SFIS, therefore, to restrict the benefit thereof, to entities which fulfill the two conditions stipulated therein, viz. of providing of a service/services listed in Appendix-10 of the FTP and of earning free foreign exchange of at least ₹ 10 lakhs in the preceding financial year, to the benefits of the said Scheme.

29. The decision of the said PIC is, therefore, on the fact of it, unsustainable in law.

30. The PIC, no doubt, was entitled to interpret the policy. Under the guise of such interpretation, however, the PIC had no authority, however, to reword the policy, or import, into the policy, conditions and restrictions which were not to be found therein. What the PIC has effectively done is to dovetail para 3.6.4.1 of the FTP 2004-2009 into para 3.6.4.2 thereof. Such an exercise is totally untenable in law. If the framers of the FTP intended to subject the entitlement, or the eligibility, to benefits under the SFIS, by the objective thereof, the framers ought to have expressly done so. This, having not been done by the framers of the policy, cannot be done by its interpreter. The interpreter of the law cannot be wiser than the framer thereof.

31. A juxtaposed comparison of para 3.6.4.2 of the FTP 2004-2009, with para 3.12.2 of the FTP 2009-2014, underscores this legal position. The framers of the policy had, while framing the FTP 2009-2014,

consciously limited the benefits, to the SFIS, available thereunder, to Indian service providers. The respondent, very fairly, does not seek to avail the benefit of FTP 2009-2014.

32. The claim of the appellant, if accepted, would result to substituting para 3.6.4.2, in the FTP 2004-2009, with para 3.12.2 of the FTP 2009-2014. Needless to say, this can never be allowed.

33. We, therefore, find no infirmity with the judgment, dated 27th January, 2015 and judgment dated 14th January, 2019, of the learned Single Judge in WP(C) No.1663/2012 and WP(C) No. 6640/2015, respectively. Respondent No. 1, clearly, was entitled to the benefits of the SFIS, under the FTP 2004-2009.

34. The reliance, by the appellant, on the LPA, preferred against the judgment dated 27th January, 2015, insofar as it allowed WP (C) 7011/2012 filed by M/s *Yum Restaurants (I) Pvt. Ltd. (supra)*, is, obviously, totally misplaced, as the said LPA deals with the entitlement of the benefits of SFIS, under the FTP 2009-2014 and not under the FTP 2004-2009.

35. This being the sole ground on which Respondent No. 1 claimed for refund of duty, paid by it, was rejected, the rejection could not sustain. The learned Single Judge has, therefore, rightly allowed both the aforesaid writ petitions.

36. In view of the aforesaid facts, reasons and judicial pronouncements, there is no substance in these Letters Patent Appeals and hence, the same are dismissed.

CM Appl. No.25321/2015 (stay) in LPA 770/2015
CM Appl. No.42998/2019 (stay) in LPA 631/2019

In view of the orders passed in these Letters Patent Appeals, these applications stand disposed of.

CHIEF JUSTICE

C.HARI SHANKAR, J.

DECEMBER 06, 2019
r.bararia/dsn

