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

\+ **W.P.(C) 6640/2015**

EI DUPONT INDIA PVT. LTD. AND ANR. ..... Petitioners

Through Mr Pramod Kr Rai, Mr Deepak Anand, Ms Hemlata Rawat, Advocates.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through Mr Anil Soni, CGSC with Mr Abhinav Tyagi, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 14.01.2019

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

> "a. Issue a Writ of Mandamus, or a Writ in the nature of mandamus, or any other appropriate Writ, Order or direction, as consequential relief directing the Respondents to comply with this Hon'ble High Court Order within a period of one month to refund the monetary equivalent of Scrip along with interest for the benefit of a vested right of the Petitioner for unduly long period of 5 years; and in the alternative;
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> i. At least refund of the actual custom duties paid by the Petitioner for the capital goods imported for providing services along with interest.
>
> ii. Issuance of SFIS scrip for tine residual claim

established by this Hon'ble High Court after deduction of the aforesaid refund, in a form and manner and with a longer validity date fully compatible with the contemporary policy and Customs notifications, so that the Petitioner is able to meaningfully utilize the scrip.

b. Issue a Writ of Prohibition, or a Writ in the nature of Prohibition, or any other appropriate Writ, Order or prohibition, prohibiting the Respondents by themselves, their servants and agents from withholding any benefits restored by this Hon'ble High Court vide Order dated 21st Jan 2015 under WP No. 1663/2012"

2. The petitioners were issued duty free licences on 05.02.2009 in terms of the Foreign Trade Policy 2004-2009 (FTP 04-09). The said scrips were issued pursuant in terms of the Served From India Scheme (SFIS) which entailed issue of such licences as an incentive to all service providers exporting services from India.

3. The aforementioned licences (SFIS licence numbers 0510235856 to 0510235865, dated 05.02.2009) were recalled by the respondents on the ground that petitioner no.1 was a subsidiary of a Foreign Entity, and according to the respondents, it was not eligible for benefits under the SFIS Scheme. Aggrieved by the same, the petitioners preferred a writ petition being W.P. (C) No. 1663/2012. The petition was heard along with two other petitions, and the same was allowed by a common judgment dated 27.01.2015 and the decision of the DGFT/PIC denying the benefit of the SFIS as well as separate communications sent to the petitioners withdrawing/recalling the said benefits (i.e. Duty Credit Scrips), were set aside. Whereas, the petitioners had claimed benefits under the FTP 04-09, the petitioners in other petitions, which were disposed of by the aforesaid

common order, claimed benefits under the Foreign Trade Policy 2009-2014 (FTP 09-14). There was a material difference between the language of the provisions relating to the SFIS under FTP 04-09 and FTP 09-14. Whereas the SFIS under the FTP 04-09 was applicable to "*all service providers*", the benefits of the SFIS scheme under FTP 09-14 were available only to "*Indian Service Providers*". Thus, the principal controversy involved in those petitions was whether the subsidiaries of foreign entities could be considered as *Indian Service Providers*. This Court had noted that there was no dispute with regard to the applicability of the SFIS scheme under FTP 04-09 in so far as the petitioners herein are concerned.

4. The relevant extract of the said decision (W.P.(C) 7011/2012 captioned ***Yum Restaurants Pvt. Ltd. and Anr v. Union of India & Ors. and other connected matters, decided on 27.01.2015)*** in this regard is set out below:-

> "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."

5. Insofar as the applicability of FTP 09-14 to Indian Subsidiaries of Foreign Entities is concerned, this Court did not accept the contention of the respondents that such companies were excluded from the benefit of the SFIS Scheme under FTP 09-14. Notwithstanding, the decision of this Court, the respondents did not provide the benefit of the SFIS to the petitioners.

6. The Bombay High Court in ***Shree Naman Hotels Pvt. Ltd. v. The Union of India*** : ***2015 (326) E.L.T. 513 (Bom.)*** has taken a different view with regard to the applicability of the SFIS under the FTP 09-14. This Court is informed that the said issue is now pending before the Supreme Court in view of the divergence of the opinion between this Court and the Bombay High Court. However, there was no divergence of opinion with regard to the applicability of the FTP 04-09. This was expressly noted by the Bombay High Court in its decision in ***Naman Hotel Limited*** (*supra*) in the following words :-

> "…..However, this is a 2009-14 Foreign Trade policy. The questions raised and answered are arising in the backdrop of the interpretation thereof placed in the year 2011 with which there is no agreement between two High Courts. What the Petitioner apprehends that recoveries would be effected for the past several years from 2005-06 by forfeiting prior

> incentives. If anything is recoverable in relation to prior policies and earlier to 2009-14 FTP that is surely something which cannot be taken away by making a adjudication order in 2015. We would therefore, hold that it will not be permissible for the authorities adjudicating the claims or issues arising therefrom to recover from the Petitioner in Writ Petition No.1755 of 2014 and all petitioners the 33.14.1516.15.1735.15.doc SFIS benefits granted till 2007-08. They are clearly falling within earlier policy framework and to that extent all petitions succeed. They accordingly succeed."

7. Notice of the present petition was issued on 14.07.2015, and despite several opportunities, the respondents did not file any counter affidavit. Finally, their right to do so was closed by an order dated 19.02.2018.

8. Mr Soni, who appears for the respondents, has also not advanced any contention to dispute that petitioners' claim for the relief as sought by it in this petition. He, however, states that an appeal against the common order passed in W.P.(C) 7011/2012 captioned ***Yum Restaurants Pvt. Ltd. and Anr v. Union of India & Ors. and other connected matters, decided on 27.01.2015*** is pending before the Division Bench of this Court. However, he does not controvert the submission that the subject matter of the appeal, essentially, relates to the provisions of the SFIS Scheme under FTP 09-14 (and not FTP 04-09).

9. In view of the above, there can be no dispute that the petitioners are entitled to the benefits as were granted to the petitioners in terms of the SFIS scrips issued to the petitioners on 05.02.2009 (SFIS Licence No.0501235856 to 0510235865). It is stated that the petitioners have thereafter imported certain capital goods by payment of duty and the petitioners pray that

directions be issued for refund of the duty already paid. However, this Court does not consider it apposite to grant this relief. It would be apposite for DGFT to now reissue transferable duty free scrips of a value equivalent to those that were recalled. It is directed that such licences be issued on the strength of this order within a period of four weeks from today. The said licences would be valid for a period of twelve months, as this Court is informed that the scrips withdrawn by the DGFT were also valid for a period of twelve months.

10. The petition is allowed in the aforesaid terms.

11. Order *dasti*.

VIBHU BAKHRU, J

JANUARY 14, 2019
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