

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

Date of Reserved: 18.03.2021

Date of Decision: 27.04.2021

+ **W.P.(C) 13249/2019 & CM APPL. 53883/2019**

ERICSSON INDIA GLOBAL SERVICES PVT LTD

..... Petitioner

Through: Mr.Tarun Gulati, Sr. Adv. with
Mr.Kishore Kunal, Mr.Parth &
Mr.Manish Rastogi, Advs.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Ms.Shiva Lakshmi, CGSC.

(12) **W.P.(C) 10146/2020 & CM APPL. 32318/2020**

(13) **W.P.(C) 1633/2020 & CM APPL. 5740/2020**

**HUAWEI TELECOMMUNICATIONS (INDIA) COMPANY
PVT LTD**

..... Petitioner

Through: Mr.Tarun Gulati, Sr. Adv. with
Mr.Kamal Sawhney, Mr.Sparsh
Bhargava & Mr.Ankit
Sachdeva, Advs.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Ms.Shiva Lakshmi, CGSC.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. All the above three petitions raise similar grievances and are therefore, adjudicated by way of a common judgment. For sake of convenience, the facts have been taken from WP (C) 13249 of 2019.

2. The said petition has been filed by the petitioner challenging the instructions dated 22.05.2019, addressed by the respondent no. 4 to

the respondent no. 3, advising that all services, whether Engineering Services (Network Engineering Services, Management and Operation of Network Services (Managed Services) in Telecom Sector or Management Consulting Services) in Telecom Sector, are ineligible for the benefit under the Service Exports from India Scheme (hereinafter referred to as 'SEIS') announced by the Foreign Trade Policy 2015-20. The petition further impugns the order(s) dated 11.06.2019 and 03.06.2019, whereby the respondent no. 3 has rejected the claim of the petitioner(s) for benefit under the SEIS for the financial years 2015-16, 2016-17 and 2017-18, respectively.

3. To appreciate the dispute between the parties, few facts need to be highlighted.

3.1 The respondent no. 1, in exercise of its powers under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the 'Act'), notified the Foreign Trade Policy, 2015-20 (hereinafter referred to as the 'FTP').

3.2 Chapter 3 of the FTP details the "Exports from India Schemes".

3.3 Paragraph 3.01 of the FTP states that there shall be following two schemes for exports of Merchandise and Services respectively:

- (a) Merchandise Exports from India Scheme (MEIS);
- (b) Service Exports from India Scheme (SEIS)

3.4 The present set of petitions relate to claim of the petitioners under SEIS.

3.5 The petitioner raised the claim for issuance of Duty Credit Scrips under SEIS claiming that it is providing Engineering Services under Central Product Classification (CPC) Code 8672 and Management Consulting Services under CPC Code 865, as mentioned in Appendix-3D of the FTP.

3.6 By way of the impugned instructions dated 22.05.2019, addressed by the respondent no. 4 to the respondent no. 3, respondent no. 4 opined/instructed that all services, whether Engineering Services (Network Engineering Services, Management and Operation of Network Services (Managed Services) in Telecom Sector or Management Consulting Services) in Telecom Sector, are ineligible for SEIS.

3.7 Following the above instructions, the claims of the petitioner for benefit of SEIS were rejected by the impugned Orders dated 03.06.2019 and 11.06.2019.

4. The learned senior counsel for the petitioner(s) submits that the Impugned Instructions dated 22.05.2019 are contrary to the FTP inasmuch as they seek to create an additional category of ineligible services for availing the benefit of SEIS. He submits that the phrase “Service Providers in Telecom Sector” relates to the service providers who are in the telecom sector and not those who provide services to the telecom sector. In this regard, he has drawn the attention of this

Court to the Handbook of Procedures (Volume I) for the period 27.08.2009 to 31.03.2014, which, in paragraph 3.6.1, had declared the service providers in telecom sector mentioned at S.No.2(C) of Appendix-10 thereto as ineligible for availing benefit under the “Served From India Scheme” (SFIS), which was the then prevailing scheme equivalent to present SEIS. He submits that S.No.2(C) of the Appendix-10 lists out the services in the telecom sector such as, voice telephone services, packet-switched data transmission services, telex services, etc. He submits that these are telecom services by themselves and therefore, it is only these telecom services that would be excluded and become ineligible from availing the benefit under the then SFIS and now the SEIS Scheme. He submits that there is no reason for interpreting the exclusion in the FTP 2015-20 in any other manner as, if that were the intention, the respondent no. 1 would have clearly spelt out the same in the FTP.

5. The learned senior counsel for the petitioner(s) further submits that in fact, the Impugned Instructions have been issued by the respondent no. 2. He submits that the same has also been admitted in paragraph 30 of the counter affidavit filed on behalf of the respondents. He submits that under the Act, respondent no. 2 has no power to modify the FTP; respondent no. 2 is empowered only to advise the Central Government in the formulation of the FTP and is responsible for carrying out that Policy. The power of modification of the Policy rests only with the respondent no. 1. He submits that by way of the Impugned Instructions, the respondent no. 2 has modified

the FTP by creating a new class of ineligible services. He submits that the respondent no. 2 cannot, by way of circulars/instructions, add new conditions or read down the benefit granted under the FTP. In support of his submissions, he places reliance on *Atul Commodities Pvt. Ltd. & Ors. v. Commissioner of Customs, Cochin*, (2009) 5 SCC 46; *M/s Deepak Enterprises v. Union of India & Ors.*, 2018 SCC OnLine Del 6724; *Yum Restaurants (I) Pvt. Ltd. v. Union of India*, 2015 SCC OnLine Del 14548; *Atlantic Shipping Private Limited v. Union of India & Ors.*, (Judgment dated 09.03.2021, of the Bombay High Court in WP(C) No. 1827 of 2019); *Union of India v. Inter Continental*, 2008 SCC OnLine SC 22; *Tata Teleservices Ltd. v. Commissioner of Customs*, (2006) 1 SCC 746; and *M/s Bright Engineering Works v. Union of India*, 2017 SCC OnLine Del 10471.

6. He further submits that the respondent no. 3, by basing its decision only on the Impugned Instructions dated 22.05.2019, has abdicated its powers to adjudicate on the claim of the petitioner. He submits that the adjudication being quasi-judicial in nature, cannot be influenced by any instructions or circulars issued by even a superior authority. He places reliance on the decisions in *M/s. Samsung India Electronics Pvt. Ltd. v. State of Telangana & Ors.*, (Order dated 02.12.2014 passed in WP(C) No. 34755 of 2014 by the High Court of Judicature at Hyderabad); *Faridabad Iron & Steel Traders Association v. Union of India*, 2003 SCC OnLine Del 1300; *Union of India v. Faridabad Iron & Steel Traders Association*, 2005 (181) E.L.T. A68 (SC); *Bullion and Jewellers Association v. Union of*

India, 2016 SCC OnLine Del 2437 and *Commissioner v. Cox & Kings India Ltd.*, 2015 (39) S.T.R. J308 SC.

7. The learned senior counsel for the petitioner(s) further submits that the Impugned Order(s) are also in violation of the Principles of Natural Justice having been passed by the respondent nos. 2 and/or 4 without granting an opportunity of hearing to the petitioner. The hearing, if at all, was granted by the respondent no. 3, who has merely acted on the dictate of the respondent nos. 2 and 4. He submits that where an order is passed by an authority different from the one which has granted a hearing, it would be in violation of the Principles of Natural Justice. In this regard, he places reliance on *Gullapalli Nageswara Rao & Ors. v. APSRTC & Anr.*, AIR 1959 SC 308 and *Automotive Tyre Manufacturers Association v. Designated Authority & Ors.*, (2011) 2 SCC 258.

8. The learned senior counsel for the petitioner submits that even if this Court was to hold that there was an ambiguity in the FTP, the same has to be interpreted liberally and in favour of the petitioner. In this regard, he places reliance on the decisions in *Metagraphs Pvt. Ltd. v. Collector of Central Excise, Bombay*, (1997) 1 SCC 262; Order dated 04.08.2009 of this Court in Crl. App. No. 806 of 2007-*M.I. Enterprises (I) Pvt. Ltd. v. Director of Enforcement,; Development Commissioner, MEPZ, SEZ & HEOU, Chennai v. Hospira Health Care India (P). Ltd.*, 2017 (356) ELT 167 (Mad.); and *JSW Steel Ltd. v. Union of India*, 2016 SCC OnLine Bom 54.

9. To counter the objection of the learned counsel for the respondent that the petitioner has already availed of its remedy of Appeal under Section 15 of the Act and has even a remedy under Section 16 of the Act in form of a Review before the Central Government, the learned senior counsel for the petitioner(s) submits that as the Impugned Order(s) have been passed on the basis of the Impugned Instructions dated 22.05.2019, the remedy of the petitioner would be to challenge the said instructions in form of a Writ Petition before this Court. He further submits that a decision having already been taken by the respondent no. 2 in form of the instructions dated 22.05.2019, the remedy under Section 15 of the Act would be a mere formality. As far as the remedy under Section 16 of the Act is concerned, he submits that the petitioner cannot be denied the remedy of original unbiased adjudication under law, by relegating him to only the remedy of Review under Section 16 of the Act. He submits that the denial of such remedy would itself be a violation of the statutory right created in favour of the petitioner. In this regard, he places reliance on the judgments in *M/s. Filterco & Anr. v. CST, Madhya Pradesh & Anr.*, (1986) 2 SCC 103; *Vistar Construction (P) Ltd. v. Union of India*, 2013 SCC OnLine Del 308; *Dravya Finance Pvt. Ltd. & Anr. v. Life Insurance Corporation of India, Mumbai & Anr.*, 2010 SCC OnLine Bom 740; 2010 (4) Mah LJ 419; *Faridabad Iron & Steel Traders Association v. Union of India*, (supra); *Union of India v. Faridabad Iron & Steel Traders Association*, (supra); *Bullion and Jewellers Association v. Union of India*, (supra) and *Atlantic Shipping Private Limited* (supra).

10. The learned senior counsel for the petitioner(s) submits that in any case, the appeals were filed only by the petitioner in WP(C) 13249 of 2019 and not in the other two petitions, that is, WP(C) 10146 of 2020 and WP(C) 1633 of 2020. He submits that these appeals were filed when the petitioner was not in possession of the Impugned Instructions dated 22.05.2019. He submits that the instructions were made available to the petitioner pursuant to the personal hearing in the appeal on 17.09.2019. He further submits that in any case, the Impugned Instructions can be challenged only in form of a Writ Petition before this Court.

11. On merit of the claim of the petitioner, the learned senior counsel for the petitioner submits that the petitioner is providing Engineering Services under CPC Code 8672 and Management Consulting Services under CPC Code 865 Appendix-3D. He submits that the scope of CPC Code 8672, which was a Provisional CPC, is now explained in the final CPC Code 83325. In the final CPC version 2.1, a Code 83325 has been added which pertains to “Engineering Services for Telecommunication and Broadcasting Projects” and explains the same. He submits that this itself shows that the Engineering Services are distinct from Telecommunication Services and are therefore, eligible for the benefit under the FTP even though they are provided to Telecom Service Providers.

12. He further submits that for all purposes, including Service Tax, etc., the services provided by the petitioner are being considered as Engineering Services and Management Consultancy Services.

13. On the other hand, the learned counsel for the respondents raised a preliminary objection on the maintainability of the present petition, by contending that the petitioner has an alternate efficacious remedy in form of an Appeal under Section 15 of the Act and of a Review under Section 16 of the Act. She submits that the petitioner has in fact, availed of its remedy under Section 15 of the Act by filing appeals against the orders of the respondent no. 3 impugned in the present petition. The said appeals are still pending adjudication.

14. On merit, she submits that the representation of the petitioner regarding the nature of services provided by it was duly scrutinised by the competent authority and it was found that the same would not fall within the scope of CPC Code 8672 and/or 865. She submits that the services claimed to be provided by the petitioner would in fact, fall within the scope of CPC Code 752 and 754, that is, telecommunication services and telecommunication related services, respectively. She further submits that the nature of services being rendered by the petitioner, having been scrutinised by the expert body, this Court should not interfere with the same.

15. She submits that the reliance of the petitioner on the final CPC version 2.1 is ill-founded inasmuch as the FTP refers only to the provisional CPC and therefore, no benefit can flow to the petitioner by the CPC version 2.1.

16. The learned counsel for the respondents further submits that the Impugned Communication/Instructions dated 22.05.2019 by the respondent no. 4 are merely clarificatory in nature and not a

modification of the FTP, as the FTP is otherwise clear that such services are ineligible for availing of benefits under the SEIS. She submits that the term ‘Service Providers in Telecom Sector’ is very clear in itself and would encompass all service providers in the Telecom Sector, including the petitioners herein.

17. I have considered the submissions made by the learned counsels for the parties.

18. At the outset, it would be apposite to consider the provisions of the Foreign Trade (Development and Regulation) Act, 1992. Section 5 of the Act empowers the Central Government to formulate and announce the Foreign Trade Policy by notifying the same in the Official Gazette. It reads as under:

*“5. **Foreign Trade Policy.**—The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy:*

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.”

19. Section 6 of the Act provides for appointment of the Director General of Foreign Trade (DGFT), whose function is to advise the Central Government in the formulation of the Foreign Trade Policy and who is made responsible for carrying out that Policy.

20. Sub-Section (3) of Section 6 of the Act provides for the delegation of powers by the Central Government to the DGFT, however, such delegation cannot be made with respect to *inter alia* power under Section 5 of the Act, that is to formulate or amend the Foreign Trade Policy.

21. In ***Atul Commodities Pvt. Ltd.*** (supra), the Supreme Court has held that the power to amend the Foreign Trade Policy is exclusively vested in the Central Government, whereas the power to clarify the Foreign Trade Policy is vested in the DGFT. It is therefore, not upon the DGFT to amend the Foreign Trade Policy by way of an instruction/circular.

22. In ***Deepak Enterprises*** (supra), this Court held that where the Foreign Trade Policy is unambiguous, the question of DGFT issuing any clarification in that regard does not arise. It was held that any circular/public notice issued by DGFT, which is inconsistent with the Foreign Trade Policy, would be liable to be set aside.

23. In ***Yum Restaurants (I) Pvt. Ltd.*** (supra), this Court reiterated that it is not upon the DGFT to introduce new conditions and criteria under the guise of interpreting the Policy, as that would amount to amending the provisions of the Foreign Trade Policy. Reference in this regard is made also to the judgment of this Court in ***Bright Engineering Works*** (supra).

24. With the above background, let us consider the FTP 2015-20, upon which the claim of the petitioner(s) is based.

25. Chapter 3 of the FTP 2015-20 provides for “Exports From India Schemes”. Paragraph 3.00 provides the objective of the Scheme as under:

“3.00 Objective

The objective of schemes under this chapter is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved and to provide exporters a level playing field.”

26. Paragraph 3.01 of the FTP states that there shall be two schemes for exports, which are-

- i) Merchandise Exports from India Scheme (MEIS);
- ii) Service Exports from India Scheme (SEIS).

27. The claim of the petitioner is under the SEIS.

28. Paragraph 3.02 of the FTP states that Duty Credit Scrips shall be granted as rewards under the MEIS and SEIS.

29. Paragraph 3.07 of the FTP gives the objective of SEIS, in the following words:

“3.07 Objective

Objective of Service Exports from India Scheme (SEIS) is to encourage export of notified Services from India.”

30. Paragraphs 3.08 and 3.09 stipulate the eligible and ineligible categories of Services under the SEIS. The same, insofar as are relevant to the present petitions, are reproduced hereinbelow:

“3.08 Eligibility

- (a) *Service Providers of notified services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. Only Services rendered in the manner as per Para 9.51(i) and Para 9.51(ii) of this policy shall be eligible. The notified services and rates of rewards are listed in Appendix 3D.*

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3.09 Ineligible categories under SEIS

- (1) *Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible.*
- (2) *Following shall not be taken into account for calculation of entitlement under the scheme*

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(i) Service providers in Telecom Sector.”

31. Paragraph 3.10 of the FTP states that under SEIS, the Service Providers of eligible services shall be entitled to Duty Credit Scrip at notified rates, as given in Appendix 3D, on net foreign exchange earned.

32. Chapter 9 of the FTP defines the terms used in the Policy. Paragraph(s) 9.50 and 9.51 give the definition of “Services” and “Service Provider”, respectively, and are reproduced hereinbelow:

“9.50

“Services” include all tradable services covered under General Agreement on Trade in Services (GATS) and earning free foreign exchange.”

9.51

“Service Provider” means a person providing:

(i) Supply of a ‘service’ from India to any other country; (Mode 1-Cross border trade)

(ii) Supply of a ‘service’ from India to service consumer(s) of any other country in India; (Mode 2-Consumption abroad)

(iii) Supply of a ‘service’ from India through commercial presence in any other country. (Mode 3-Commercial Presence)

(iv) Supply of a ‘service’ from India through the presence of natural persons in any other country. (Mode 4- Presence of natural persons.)”

33. Appendix-3D lists out the ‘notified services’ and the rates of rewards. The same gives reference to the Central Product Classification (CPC) Code as a reckoner.

34. A reading of the above provisions would show that the Service Providers (as defined in Paragraph 9.51 of the FTP) providing Services as notified in Appendix-3D are entitled to SEIS benefit in

form of Duty Drawback Scrips on foreign exchange remittance other than those provided in Paragraph 3.09 of the FTP.

35. As noted hereinabove, the petitioner in WP(C) 13429 of 2019 claims to be providing Notified Services as enumerated in S. No. 1(A)(e) having CPC Code 8672, being Engineering Services, and S. No. 1(D)(c) having CPC Code 865, being Management Consulting Service. On the other hand, the learned counsel for the respondents has submitted that the services rendered by the petitioner would fall under the CPC Code 752 and sub-Code 7522 and/or CPC Code 754, which are not part of Appendix-3D and, therefore, are not eligible services for the grant of benefit of SEIS.

36. However, the question of the exact nature of services provided by the petitioner and under which of the above Code(s) they would fall, need not detain me, as the Impugned Instructions dated 22.05.2019 state that any service, whether Engineering Services or Management Consulting Services, in Telecom Sector are ineligible for SEIS benefit. The impugned Instruction reads as under:

“2. The application has been examined in the Directorate. The RA may kindly note that M/s Ericsson India Global Services Limited is providing services in Telecom Sector and Telecom sector is ineligible under SEIS. Therefore, all services, whether Engineering services (network engineering services, Management and Operation of Network services (managed services) in Telecom Sector or Management Consulting services) in Telecom Sector, are ineligible for SEIS.”

37. A reading of the above would show that the respondents, having arrived at a conclusion that the services, whether the Engineering Services or Management Consulting Services, in Telecom Sector are ineligible for SEIS, have not considered the issue as to whether the services rendered by the petitioner(s) are indeed Engineering Services under the CPC Code 8672 and/or Management Consulting Services under the CPC Code 865, as claimed by the petitioner, or under the CPC Code 752 and/or 754, as now contended by the learned counsel for the respondents. The Impugned decision is based on the understanding of the respondents that any service provided in the Telecom Sector would be ineligible for SEIS in view of Paragraph 3.09(2)(i) of the FTP.

38. As the Impugned Order has not reflected on the services of the petitioner(s) *vis-à-vis* their claim of such services falling within the CPC Codes 8672 and 865, the respondents cannot be allowed to agitate the same before this Court. As held in ***Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.***, 1978 (1) SCC 405, when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. This Court, therefore, refrains itself from considering as to whether the services claimed to be rendered by the petitioners fall within CPC Codes 8672 and 865, or CPC Codes 752 and 754. This Court confines itself to the question whether all services

rendered in Telecom Sector are ineligible, as is the case of the respondents in the Impugned Instructions dated 22.05.2019.

39. The issue before this Court is the interpretation to be placed on Paragraph 3.09(2)(i) of the FTP in so far as it excludes “Service Providers in Telecom Sector” from the benefit of SEIS.

40. To appreciate the above issue, one may consider the historical evolution of SEIS vis-à-vis Service Providers in Telecom Sector.

41. Under FTP 2004-09, the similar Scheme of benefit for Service Exports was branded as “Served From India Scheme” (‘SFIS’). Paragraph 3.6.4.3 of the FTP 2004-09 stated that services and service providers listed in Paragraph 3.18.1 of the Handbook of Procedures, Volume 1 (hereinafter referred to as ‘HBPv1’) shall not be entitled to the Duty Credit Scrip under the Scheme. There was no exclusion of Service Providers in Telecom Sector in paragraph 3.18.1 of the HBPv1.

42. The DGFT thereafter, issued a Circular dated 01.01.2008, stating that foreign exchange earned by Telecom Service Providers for providing services that includes services not originating from India, such as global roaming charges, shall not be eligible for SFIS.

43. A Circular dated 15.07.2010, was thereafter, issued by the DGFT, which *inter alia* provided as under:

“1. xxxx

2. RAs shall review all the previously sanctioned Telecom Sector SFIS Cases (as

well as DFCE for Service Providers cases of EXIM Policy (RE2003)) as per this Policy Circular and the Minutes of the PIC meeting No. 04/AM11 held on 5.7.2010. It may also be noted that in the Telecom Sector, there are 3 types of services, namely ILDO, NLDO and AP (for mobile network). A telecom company /firm could either be AP or NLDO as well as an ILDO. Thus, each applicant shall be directed to clearly indicate whether he is an ILDO or NLDO or AP or a combination of these and segregate the FX earned for each type. Further, against each type, there could be subcategories as detailed in PIC minutes for meeting No. 04/AM11 held on 5.7.2010. Moreover, a telecom company / firm could also earn FX from Data Service or Maintenance Service etc. These are listed in the Minutes at Sr. No. 4(i) to 4(v) and each applicant should clearly indicate FX earned for each such subcategory.

3. RAs are required to take the following action in a time bound manner for SFIS Cases of Telecom Sector (including the DFCE for Service Providers cases of EXIM Policy (RE2003)) and cases relating to PC 6 dated 8.6.2005:

a. Re-open to review all the SFIS cases for re-computing the entitlement in each case in terms of the decision in the PIC meeting No. 04/AM11 held on 5.7.2010 and call information as required, within a time bound manner.

b. Recover or adjudicate (at appropriate level as per financial powers)

i) in case the review finds any excess grant of SFIS benefits; or

ii) in case the applicant is not providing the required information in a time bound manner.

c. Since the interpretation of the SFIS policy has taken place in PIC meeting recently held on 5.7.2010, no malafide can be ascribed to the applicants in cases where excess grant of SFIS benefit is established and duty credit amount, so granted in excess, be recovered without imposing any penal recovery of interest. This would uphold the principle of natural justice.

d. Report the progress to DGFT headquarters on a monthly basis, for each telecom sector applicant

The review exercise should be completed within 6 months from the date of this Policy Circular.”

44. The said Circular was challenged before the High Court of Bombay in ***Vodafone Essar Ltd. v. Union of India***, 2011 (270) E.L.T. 492 (Bom.), wherein the Court held that the Circular, insofar as it directs the implementation of the decision taken in the meeting of Policy Interpretation Committee dated 05.07.2010, is *ultra vires* the Foreign Trade Policy for the years 2004-09. Paragraph 3 of the Circular, as regards the implementation of the decision at S.No. 1, 2A and 2B of the PIC meeting on 05.07.2010, was also quashed and set aside. In reaching the above conclusion, the High Court of Bombay explained the kind of scenarios where the earning in foreign exchange by the Indian service provider shall fall within the claim of SFIS benefit, as under:

“15. In order to appreciate the nature of the controversy, it would be necessary to spell out the link through which the call between a

caller or receiver in India is established with the receiver or caller as the case may be overseas. The call between a person who makes a call and the person who receives the call from an overseas destination is facilitated by four entities; (i) the Indian Access Provider (IAP), (ii) the Indian International Long Distance Operator (IILDO); (iii) the Foreign International Long Distance Operator (FILDO) and (iv) the Foreign Access Provider (FAP). A person who makes a call from an overseas destination, would place that call through a Foreign Access Provider. The call would be routed through the Foreign International Long Distance Operator (FILDO) and in turn, through the Indian International Long Distance Operator (IILDO) and the Indian Access Provider (IAP) before it is received by the Indian subscriber. The IILDO receives the payment in foreign exchange from the FILDO in respect of which a claim is made for the grant of SFIS benefits. Similarly, in the second situation, where a foreign subscriber is using a roaming facility in India and has placed an outgoing call to an overseas destination, the Indian Access Provider (IAP) would receive payment in foreign exchange from the Foreign Access Provider (FAP). In the third situation, where a foreign subscriber who is on a roaming facility in India receives an incoming call from an overseas destination, the IILDO would receive a payment in foreign exchange from the FILDO. The earning in foreign exchange by the Indian service providers forms the basis of the claim for SFIS benefits.”

45. The High Court thereafter considered and rejected the submission of the Government that the benefit must be confined to net amount of foreign exchange earned. In this regard, the High Court observed as under:

“22.....The concept of net foreign exchange earned was present to the mind of the Union Government when it formulated the policy since it had adopted that concept in other parts of the policy. Not having adopted that concept in formulating eligibility and entitlement under the SFIS, it would not be possible to restrict the benefits of SFIS with reference to the concept of net foreign exchange earning. Any action to that effect would not amount to an interpretation of the policy, but would involve a modification, amendment or change of policy.

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27.....The submission of the learned ASG is that the principle of netting off must be applied because the benefits under the SFIS must be confined to the net foreign exchange that is earned by the country. The difficulty in accepting the submission of the learned ASG is that this would amount to a substantial modification and amendment to the policy. The document must be interpreted as it stands. The policy document has defined both the eligibility and the entitlement with reference to foreign exchange earned. The foreign exchange earned cannot be defined as the remittance of foreign exchange less an outflow. Where the policy intended that the concept of the net foreign exchange should be applied it has stipulated so expressly. In the absence thereof, it was wholly impermissible for the DGFT, by means of a policy circular, to direct the implementation of what constitutes clearly an amendment of the policy.”

46. Though the factual dispute involved in the above case is not present in the present petitions, the above have been quoted only to highlight that the Service Providers in Telecom Sector were

considered as one providing telecom services, like the Indian Access Providers (IAP), Indian International Long Distance Operator (IILDO), etc. The judgment further highlighted that the DGFT, in form of a clarification/instructions, could not modify or amend the Foreign Trade Policy and any such attempt is liable to be quashed as being *ultra vires*.

47. Then came FTP 2009-14, Paragraph 3.12.3 whereof provided that Services and Service Providers as mentioned in paragraph 3.6.1 of HBPv1 shall not be entitled for benefits under the SFIS scheme. Paragraph 3.6.1(g) excluded Service Providers in Telecom Sector (S.No.2(C) of Appendix-10) from the benefit of the scheme and read as under:

3.6.1 “Ineligible Remittances and Services for SFIS scheme

Foreign exchange remittances other than those that are earned for rendering of services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans, etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible. For calculation of entitlement, following shall not be taken into account.

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(g) Service Providers in Telecom Sector (Sr. No. 2C of Appendix 10);”

48. S. No. 2(C) of Appendix-10 read as under:

“2. Communication Services

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C. Telecommunication services

- a. Voice telephone services
- b. Packet-switched data transmission services
- c. Circuit-switched data transmission services
- d. Telex services
- e. Telegraph services
- f. Facsimile services
- g. Private leased circuit services
- h. Electronic mail
- i. Voice mail
- j. On-line information and data base retrieval
- k. Electronic data interchange (EDI)
- l. Enhanced/value-added facsimile services including store and forward, store and retrieve
- m. Code and protocol conversion
- n. On-line information and/or data processing (including transaction processing)
- o. Others”

49. From a reading of the above, it is apparent that “Service Providers in Telecom Sector” meant and included only the Telecom Service Providers of services mentioned therein. The ambit and scope of such exclusion was not of Service Providers who render services to such Telecom Service Providers.

50. Though, a similar list is not appended to FTP or HB Pv1, there is no reason for a different interpretation to be placed to FTP 2015-20. Clearly, what was made ineligible for availing benefit of SEIS in terms of paragraph 3.09(2)(i) are the Telecom Service Providers and

not the Service Providers who provide services to such Telecom Sector.

51. In my opinion, the Foreign Trade Policy is clear and unambiguous inasmuch as it excludes the Telecom Service Providers from the benefit of the SEIS and not the Service Providers who provide services to such Telecom Service Providers. As noted hereinabove, the ambit of the term was clearly spelled out in S.No. 2(C) of Appendix-10 to HBPv1 to FTP 2009-14. No different intention regarding the same is discernible from the FTP 2015-20.

52. In this regard, one may also take note of the provisions of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the “TRAI Act”). Section 2(j) of the TRAI Act defines the term “Service Provider” as under:

“(j) Service Provider” means the Government as a service provider and includes a licensee.

53. Section 2(e) of the TRAI Act defines the term “licensee” as under:

“(e) “Licensee” means any person licensed under sub-section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;

54. The term “Telecommunication Service” is defined under Section 2(k) of the TRAI Act and is reproduced hereinbelow:

“(k) ‘Telecommunication Service’ means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services.”

55. A reading of the above provisions would clearly show that the ‘Service Provider’ is one who in terms of a license granted under Section 4 of the Indian Telegraph Act, 1885 provides Telecommunication Services as defined under Section 2(k) of the TRAI Act. I see no reasons to interpret ‘Service Providers in Telecom Sector’ in the FTP differently.

56. In ***Board of Trustees of the Port of Bombay and Others vs. Sriyanesh Knitters***, (1999) 7 SCC 359, the Supreme Court held that where a statute is silent on a point then it is permissible to look at other laws. It observed as under:

“11. The MPT Act is not, in our opinion, an exhaustive and comprehensive code and the said Act has to be read together with other Acts wherever the MPT Act is silent in respect of any matter. The MPT Act itself refers to other enactments which would clearly indicate that the MPT Act is not a complete code in itself which ousts the applicability of other Acts. The preamble of the Act does not show that it is a codifying Act so as to exclude the applicability of other laws of the land. Even if it is a codifying Act unless a contrary intention appears it is presumed not to be intended to

change the law. (See Bennion's Statutory Interpretation, 2nd Edn., p. 444.) Furthermore where codifying statute is silent on a point then it is permissible to look at other laws. In this connection it will be useful to refer to the following observation of the House of Lords in Pioneer Aggregates (UK) Ltd. v. Secy. of State for the Environment [(1984) 2 All ER 358, 363 (HL)] (All ER at p. 363):

“Planning law, though a comprehensive code imposed in the public interest, is, of course, based on land law. Where the code is silent or ambiguous, resort to the principles of private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.”

12. *In J.K. Steel Ltd. v. Union of India [AIR 1970 SC 1173 : (1969) 2 SCR 481] it was held that cognate and pari materia legislation should be read together as forming one system and as interpreting and enforcing each other. In Vidyacharan Shukla v. Khubchand Baghel [AIR 1964 SC 1099 : (1964) 6 SCR 129] it was held that the Code of Civil Procedure has to be read along with the Limitation Act. In State of Madras v. A. Vaidyanatha Iyer [AIR 1958 SC 61 : 1958 SCR 580, 590] SCR at p. 590 it was held that*

the Prevention of Corruption Act should be read along with the Evidence Act. In Mannan Lal v. Chhotaka Bibi [(1970) 1 SCC 769 : (1971) 1 SCR 253] it was held that the Code of Civil Procedure has to be read along with the Court Fees Act. In Vasudev Ramchandra Shelat v. Pranal Jayanand Thakkar [(1974) 2 SCC 323 : (1975) 1 SCR 534] this Court observed that the Companies Act should be read along with the Transfer of Property Act.”

57. In view of the above, it must be held that exclusion of ‘Service Providers in Telecom Sector’ from benefit of SEIS is of a service provider providing telecom services. The Impugned Instructions dated 22.05.2019, therefore, sought to impose fresh restrictions on the eligibility of the service providers entitled to the benefit under SEIS, which amounted to amendment in the policy, and is therefore, *ultra vires* the Foreign Trade Policy.

58. In **JSW Steel Ltd.** (supra), the High Court of Bombay has held that in interpreting a beneficial piece of legislation or a policy, the Court will not read into the policy anything not already there. The High Court of Madras in **Hospira Health Care India (P) Ltd.** (supra), has held that Foreign Trade Policy being an economic legislation, which seeks to, *inter alia*, promote exports by giving various incentives to the exporters, should, in case of any ambiguity, be construed liberally in favour of the exporter.

59. Though I find that there is no ambiguity in the FTP on the scope of exclusion from SEIS benefit as provided in Paragraph 3.09(2)(i) thereof, even if one is to hold otherwise, the above principles would

apply and the interpretation sought to be placed by the respondent on the said provision cannot be sustained.

60. The Impugned Letters dated 11.06.2019 and 03.06.2019, formally rejecting the claim of the petitioner, have been passed based solely on the Impugned Instruction(s) dated 22.05.2019. They are quoted herein below:

Letter dated 11.06.2019

“Your application is deficient due to following reasons:

As per DGFT(HQ) instructions, you are providing services in Telecom Sector and telecom sector is ineligible under SEIS. Therefore all services whether engineering services (network engineering services, management and operation of network services (managed services) in Telecom Sector or Management Consulting services in Telecom Sector are ineligible for SEIS. So your case is rejected.

You are requested to remove above deficiencies within a period of 30 days from the date of issue of this letter, otherwise your case will be treated as closed.

Letter dated 03.06.2019

Your Application is deficient due to following reasons:

1. As per DGFT (HQ) instructions, you are providing services in Telecom Sector and telecom sector is ineligible under SEIS. Therefore all services whether engineering services (network engineering services, management and operation of network services (managed services in Telecom Sector

or Management Consulting services in Telecom Sector are ineligible for SEIS. So your case is rejected.

You are requested to remove above deficiencies within a period of 30 days from the date of issue of this letter, otherwise your case will be treated as closed.

Letter dated 03.06.2019

Your Application is deficient due to following reasons:

1. As per DGFT (HQ) instructions, you are providing services in Telecom Sector and telecom sector is ineligible under SEIS. Therefore all services whether engineering services (network engineering services, management and operation of network services (managed services) in Telecom Sector or Management Consulting services in Telecom Sector are ineligible for SEIS. So your case is rejected.

You are requested to remove above deficiencies within a period of 30 days from the date of issue of this letter, otherwise your case will be treated as closed.

61. The impugned orders/communications dated 11.06.2019 and 03.06.2019 therefore, suffer from the same vice as the Instructions/Circular dated 22.05.2019 and are equally liable to be set aside by this Court.

62. On the question of maintainability of the writ petition on account of availability of an alternate remedy to the petitioner, as noted hereinabove, the Impugned Letters have been premised on the Communication/Instructions of the DGFT dated 22.05.2019. They are,

in fact, communication of the instructions issued by the DGFT rather than an order passed by the Adjudicating Authority.

63. In *M/s Filterco* (supra), the Supreme Court observed that where the order is passed by a superior officer, the remedy of appeal would be a mere exercise in futility and that the High Court should have invoked its jurisdiction under Article 226 of the Constitution of India. It was held as under:

“11. We are of opinion that the High Court should have examined the merits of the case instead of dismissing the Writ Petition in limine in the manner it has done. The order passed by the Commissioner of Sales Tax was clearly binding on the assessing authority under Section 42-B(2) and although technically it would have been open to the appellants to urge their contentions before the appellate authority namely, the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer namely, the Commissioner, has already passed a well considered order in the exercise of his statutory jurisdiction under sub-section (1) of Section 42-B of the Act holding that 21 varieties of the compressed woollen felt manufactured by the appellants are not eligible for exemption under Entry 6 of Schedule I of the Act. Further Section 38(3) of the Act requires that a substantial portion of the tax has to be deposited before an appeal or revision can be filed. In such circumstances we consider that the High Court ought to have considered and pronounced upon the merits of the contentions raised by the parties and the summary dismissal of the Writ Petition was not justified. In such a situation, although we would have, ordinarily, set aside the judgment of the High Court and remitted the case to that Court for fresh disposal, we consider that in

the present case it would be in the interests of both sides to have the matter finally decided by this Court at the present stage itself especially since we have had the benefit of elaborate and learned arguments addressed by the counsel appearing on both sides.”

64. A Division Bench of this Court in **Vistar Construction (P) Ltd.** (supra) has held that where the Instructions/order are contrary to law, they are liable to be set aside and availability of alternate remedy would not bar the exercise of jurisdiction under Article 226 of the Constitution of India as otherwise such instructions/orders shall remain binding on the authorities under the Act and any appeal would be decided based thereon. It held as under:

“11. It is obvious that the said instruction being contrary to the law as declared by the Supreme Court can have no existence in the eye of the law. As a result we declare the instruction dated 28-4-2008 to be invalid. Consequently, the show cause notices and all the demands raised against the petitioner which are impugned in these writ petitions are also invalid.

12. The learned counsel for the respondent had argued that the petitioner has an alternative remedy by way of appearing in the adjudicatory process as also by way of an appeal as provided under the statute. However, we do not agree with this proposition inasmuch as the basis of the show cause notice as well as the adjudication order is the instruction dated 28-4-2008. Unless and until that instruction is set aside the statutory authorities would continue to apply that instruction and the petitioner would have no remedy before the said authorities. Since the instruction dated 28-4-2008 has been held by

us to be invalid, the show cause notice pertaining to the subject matter indicated by us as also the adjudication order would also have to go and it is for this reason that we have entertained these writ petitions and allowed the same.

13. The decision relied upon the learned counsel for the respondent in the case of Union of India and Anr. Vs. Vicco Laboratories : (2007) 13 SCC 270 is not applicable in the facts and circumstances of the present case inasmuch as the very basis of the show cause notices in the present case is the instruction dated 28-4-2008 which is contrary to the law declared by the Supreme Court.”

65. The above judgment was followed by another Division Bench of this Court in ***Bullion and Jewellers Association*** (supra), rejecting similar objection in the following words:

“59. In view of the above conclusions and, in particular, since the SCN has been issued on the basis of an invalid circular, relegating the petitioners to the alternative remedy of statutory adjudication and consequent appeal would be a pointless exercise. The decisions in Filterco v. CST (supra), TVL Pizzeria Fast Foods Pvt. Ltd. v. CCT Ezhilagam (supra) and Vistar Construction Pvt. Ltd. v. Union of India (supra) support the case of the Petitioners in this regard.”

66. Following the above, it is held that in the facts of the case, where the impugned Instructions/Circular dated 22.05.2019 has been issued under the instructions of the DGFT itself, the remedy of appeal under Section 15 of the Act would clearly be otiose and redundant. As far as the remedy under Section 16 of the Act is concerned, once it is

held that the Impugned Orders have been passed on basis of Instructions which are otherwise ultra vires the Act, the petitioner cannot be denied the benefit of an original adjudication on merits and the decision on an appeal under Section 15 of the Act in accordance with law, and be relegated only to a remedy of review.

67. In view of the above, the Impugned Instructions and Order(s) are set aside. The respondents are directed to consider the claims of the petitioner(s) under the SEIS afresh and in accordance with FTP 2015-20.

68. As there has already been a delay in consideration of the claim of the petitioner(s), the respondents are directed to pass a reasoned order thereon, upon giving an opportunity of hearing to the petitioner(s), within a period of eight weeks from the communication of the order of this Court.

69. The petitions are allowed in the above terms and directions. There shall be no order as to costs.

NAVIN CHAWLA, J

APRIL 27, 2021/rv/ns/G/P