Ajay/Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO.1827 OF 2019

Atlantic Shipping Private Limited. .. Petitioner

Versus

Union of India & Ors. .. Respondents

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- Mr. Vikram Nankani, Senior Advocate a/w. Mr. Prithviraj Choudhari, Mr. Santosh Jadhav and Ms. Preeti Shah for Petitioner.
- Mr. Rajiv Chavan, Senior Advocate a/w. Ms. Priyanka Chavan for Respondent Nos.1(a), 1(c), 2, 3 and 4.
- Mr. Pradeep S. Jetly, Senior Advocate a/w. Mr. J. B. Mishra for Respondent Nos.1(b), 5 and 6.

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CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

RESERVED ON : FEBRUARY 23, 2021.
PRONOUNCED ON : MARCH 09 , 2021.

JUDGMENT : (PER : MILIND N. JADHAV, J.)

Heard Mr. Vikram Nankani, learned senior advocate for the petitioner; Mr. Rajiv Chavan, learned senior advocate for Respondent Nos.1(a), 1(c), 2, 3 and 4; and Mr. Pradeep S. Jetly, learned senior advocate for Respondent Nos.1(b), 5 and 6.

2. By this petition filed under Article 226 of the Constitution of India, petitioner has challenged the validity and legality of Policy Circulars No. 06/2018 dated 22.05.2018 and 08/2018 dated 21.06.2018 issued by respondent No.3 i.e. Joint Director General of Foreign Trade clarifying determination of eligibility of service providers

for Service Exports from India Scheme (for short "**SEIS**") to claim benefit to the extent of free foreign exchange earnings (or INR payments as allowed under the scheme) routed through them as receipt of service charges. Petitioner has also challenged refusal order dated 25.10.2018 and consequential show cause notice dated 10.05.2019 issued by respondent No.4 i.e. Zonal Additional Director General of Foreign Trade, Mumbai and show cause notice dated 30.05.2019 issued by respondent No.6 i.e. Additional Director General of Revenue Intelligence, Chennai Zonal Unit, Chennai.

3. Before we advert to the submissions made by learned counsel for the parties, it will be apposite to briefly refer to the relevant facts as pleaded:

3.1. Petitioner is a shipping agent providing port services, logistical services and other ancillary services to the oil / chemical tanker owners / foreign clients being one of the leading port agencies in India with strong fundamentals operating for the past 30 years. Petitioner is an ISO 9001:2008 certified port agency in India certified by Det Norske Veritas and accredited by the Dutch Accreditation Council - Raad voor Acreditatie (RvA). Petitioner is also member of Maritime Association of Nationwide Shipping Agencies of India (MANSA).

3.2. Petitioner as a Shipping Agent takes care of all regular and routine tasks of a shipping company, besides arranging / ensuring supply of port and ancillary services, services of essential supplies, crew transfers, customs documentation and waste declarations. The responsibilities / competencies as well as the remuneration of the petitioner are decided as per contracts with its

principals i.e. the ship / vessel owners / foreign clients.

3.3. Responsibilities of the petitioner as a Shipping Agent include :

(i) Contacting and co-ordinating with worldwide ship owners / charterers / principals and market maritime agency services which, in turn, facilitate more trade in India;

(ii) Vessel acceptance :- Providing vessel acceptance to the vessel owners / charterers / receivers on the basis of vessel dimensions and suitability of the port;

(iii) Providing and managing quick turnaround of the vessel which saves time and money of the vessel owners;

(iv) Transmitting prompt and correct information to vessel owners for fixing up of the vessel as well as during the entire stay of the vessel at Agent's port;

(v) Providing information to vessel owners / charterers / receivers / terminals with respect to ETA (Estimated Time of Arrival), ETB (Estimated Time of Berthing) and ETD (Estimate Time of Departure) of the vessels calling at respective ports;

(vi) Requesting port to allot berths, arrange pilotage and arrange tug for the vessel and paying for the same as obliged contractee;

(vii) Providing quotations regarding port costs and other expenses. They also make the following payments on behalf of the principal :-

(a) Indian Light House (ILH) dues to the customs;

(b) Port payments to the port; pilotage, tug charges etc.

(viii) Attending berthing meetings to declare vessels to the ports;

(ix) Arranging customs, immigration and PHO (Port Health Officer) clearance for the vessels;

(x) Arranging security and ISPS (International Ship and Port Facility Security Code) requirements;

(xi) Close co-ordination between various agencies / entities / receivers etc.;

(xii) Arranging sign on and sign off (crew / officers);

(xiii) Arranging cargo documentation :-

(a) Arranging to file cargo manifest;

(b) Arranging to obtain trading license on behalf of charterers in co-ordination with the Director General of Shipping;

(xiv) Assisting in MMD (Mercantile Marine Department) and PSC (Port State Control) inspections;

(xv) Arranging port clearance for the vessels;

(xvi) Arranging services for undertakings on board of the vessels as and when required;

(xvii) Arranging security guard clearance;

(xviii) Arranging vessel charter permission from the Director General of Shipping;

(xix) Arranging conversion / reversion of vessels;

(xx) Arranging importation of vessels;

(xxi) Arrangement of hotel / cars for signing on / off crew members and owner's representatives;

(xxii) Supplying stores / desk stores / provisions to the vessels;

(xxiii) Arranging technical support to the vessels as and when required;

(xxiv) Arranging bonded / ex-bonded bunker to the vessel as and

when required;

(xxv) Arranging fresh water, medical assistance to the vessels as and when required;

(xxvi) Organizing vessel stevedores as per requirement.

3.4. In the case of damage to cargo or the ship, petitioner also makes the necessary arrangements (at the request of the ship's master or owner) with the insurance company and for nautical inspections and the services of experts or surveyors.

3.5. Petitioner as 'shipping agent' enters into an overall Maritime Support Service Agreement with its principal i.e. foreign client to manage various operations at the ports in India, more particularly, with the Mumbai Port Trust and Nhava Sheva Port and in return for such overall management services receives entire consideration in convertible foreign exchange; petitioner sub-contracts the services to actual services providers such as the Port Trust, Stevedores and other port service providers for providing services in connection with port operations; service providers have no privity of contract with the principal / foreign client; service providers are paid directly by the petitioner in Indian Rupees.

3.6. Directorate General of Foreign Trade vide public notice No.03/2015-20 dated 01.04.2015 notified the list of eligible services, rates and conditions for rewards under SEIS vide Appendix 3D in terms of para 3.08(a) of the Foreign Trade Policy, 2015-2020 (for short "**FTP**") and vide public notice No.07/2015-2020 dated 04.05.2016 notified the list of services in Appendix 3E in which cases payment when received in Indian Rupees can be deemed as received in 'Foreign Exchange' as per the guidelines of the Reserve Bank of

India (reference para 3.08(c) of the FTP).

3.7. Petitioner claims SEIS benefits on the entire foreign exchange earnings received from its principal; such eligibility of the petitioner to claim benefit under SEIS emanates from its competitive and constant efforts of rendering and supplying notified services by arranging, negotiating and paying for such services with applicable service tax to maximise export of notified services to overseas clients.

3.8. Petitioner filed online application on 29.03.2016 with respondent No.1 for issuance of SEIS benefit (duty credit scrips) for F.Y.2015-16. Office of respondent No.1 raised deficiencies vide letters dated 03.08.2016 and 30.09.2016. Petitioner replied to the first deficiency letter vide its reply dated 17.08.2016. Thereafter office of respondent No.2 issued the duty free scrips on 03.10.2016 to the petitioner for the said period after considering all applicable aspects and eligibility as per its application and the enclosures thereto.

3.9. Petitioner filed application on 27.09.2017 for issuance of SEIS benefit on the same terms and conditions for F.Y.2016-17.

3.10. In the meanwhile, petitioner received email dated 03.11.2017 from Cochin Port Trust (CPT) wherein it was stated that Cochin Port Trust being the actual service provider of the services provided to foreign vessels during F.Y.2016-17 is entitled to the benefit i.e. duty credit scrips at the notified rates calling upon the petitioner not to avail benefit under SEIS and provide 'No Objection Certificate' to enable Cochin Port Trust to avail the said benefit. By detailed reply dated 01.03.2018 petitioner refused to accept the

contention of Cochin Port Trust and refused to provide 'No Objection Certificate'.

3.11. Petitioner vide letter dated 11.04.2018 sought release of SEIS benefit for F.Y. 2016-17 from the respondents. Petitioner was given a personal hearing on 08.05.2018.

3.12. Upon receiving representation from the Industry, respondent No.3 with the approval of respondent No.2 i.e. Director General of Foreign Trade issued policy circular No.06/2018 dated 22.05.2018, *inter alia*, stating that the actual service providers (and not ports) are eligible for SEIS benefit in respect of their shares of earnings made by performing the notified services under SEIS and ports cannot claim benefit of foreign exchange earnings simply routed through them as receipt of service charges with regard to services rendered by other actual service providers.

3.13. Subsequent to the issuance of the above circular, upon further representation received from the industry, regional authorities and shipping agents, respondent No.3 with the approval of respondent No.2 issued policy circular No.08/2018 dated 21.06.2018 clarifying the eligibility of Steamer Agents for receiving benefit under SEIS for the services exclusively rendered by them and for which foreign exchange earnings (or INR payments allowed under the scheme) are received and retained by them in their accounts. This circular clarified that the actual service provider i.e. whether it is the port trust or any other entity is required to get the certificate of receipt of payment from the entity which had received the foreign exchange earnings in their account in India.

3.14. In view of policy circular No.08/2018 dated 21.06.2018, respondent No.4 issued order dated 25.10.2018 for refusal and renewal of further licenses which was received by the petitioner on 30.10.2018, *inter alia*, stating that show cause notice dated 30.07.2018 was issued to the petitioner asking the petitioner to refund the amounts of Rs.22,10,00,000.00 and Rs.2,88,365.00 received by it as SEIS benefit against scrip Nos.0319087350 and 0319087351 dated 03.10.2016.

3.15. Petitioner filed appeal against the order of refusal dated 25.10.2018 before respondent No.2 i.e. Director General of Foreign Trade. Petitioner also filed Writ Petition No.1411 of 2019 to challenge the validity of the circulars and consequential actions taken by the respondents thereunder.

3.16. Respondent No.4 issued show cause notice dated 10.05.2019 seeking to impose penalty for alleged infractions on the part of the petitioner. Petitioner filed its reply dated 27.05.2019 with respondent No.3 and requested for the proceedings to be kept in abeyance until disposal of Writ Petition No.1411 of 2019.

3.17. Respondent No.6 i.e. Directorate of Revenue Intelligence, Chennai Zonal Unit, Chennai issued show cause notice dated 30.05.2019 to the petitioner demanding refund of Rs.21,04,02,303.00, being the SEIS benefit received by the petitioner.

3.18. Petitioner thereafter withdrew Writ Petition No.1411 of 2019 on 28.06.2019 with liberty to file fresh writ petition. Accordingly, petitioner filed the present petition on 04.07.2019 challenging the validity, propriety and legality of:

(i) Policy circulars No.06/2018 dated 22.05.2018 and No.08/2018 dated 21.06.2018;

(ii) Order of refusal dated 25.10.2018; and

(ii) Show cause notices dated 10.05.2019 and 30.05.2019.

4. Respondent Nos. 1(a), 1(c), 2, 3 and 4 have filed reply affidavit denying the claim of the petitioner and justifying the impugned action taken.

5. Mr. Nankani, learned senior counsel appearing on behalf of the petitioner at the outset submitted that without issuance of any demand cum show cause notice to the petitioner of any alleged violation or infraction the impugned order of refusal dated 25.10.2018 is issued; such an order is manifestly arbitrarily, illegal, unjust and in gross violation of the principles of natural justice as also contrary to the departmental guidelines issued vide F.No.18/24/HQ/99-2000/ECA II dated 31.12.2003; the order of refusal has been signed by the Foreign Trade Development Officer (FTDO) on behalf of respondent No.4 i.e. the Additional Director General of Foreign Trade and not signed by a proper authority without sanction and approval of the competent authority, thus acting in excess of jurisdiction.

5.1. He submitted that the contents of the impugned policy circulars No.06/2018 dated 22.05.2018 and No.08/2018 dated 21.06.2018 are contrary to the provisions of the FTP 2015-2020, as also the applicable provisions of Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016, Foreign Trade (Development and Regulation) Act, (for short "**FT (D & R) Act**") and Hand Book of Procedures (HBP) 2015-20; the policy circulars alter

and amend the provisions of FTP issued under section 5 of the FT (D & R) Act; FTP issued in terms of the powers conferred under the FT (D & R) Act is statutory in nature whereas the impugned circulars are administrative ones and as such no new conditions or restrictions can be added to or read into the statutory procedure prescribed by the FTP; It is only the Central Government which in exercise of powers conferred by section 5 of the FT (D & R) Act has the right to make amendment to the FTP by means of notification in the public interest; it is not open either to respondent No.2 or respondent No.3 to amend or add additional conditions into the FTP by circumventing the statutory process by issuing the impugned circulars; intent of issuing the impugned circulars is to retrospectively amend the conditions of the FTP and is thus a colourable exercise of power, malafide and contrary to the principles of reasonableness and fair play enshrined in articles 14 and 21 of the Constitution of India.

5.2. He submitted that para 1.02 of the FTP states that any amendment in the policy can be done only by respondent No.1 by issuance of a notification in terms of section 5 of the FT (D & R) Act; para 1.03 of the FTP states that respondent No.2 through a policy circular can lay down the procedure to be followed by an exporter / importer or by any licensing / regional authority for implementing provisions of FT (D & R) Act, the rules and orders made under the provisions of FTP; respondent No.2 is empowered to notify the procedures to be adopted in the Handbook of Procedures (HBP), including appendices and Aayat Nirayat Forms or amendments thereto; Handbook of Procedures (Vol.1) is a supplement to the FTP and contains relevant procedures and other details; procedure for availing benefit under various schemes of the FTP are stated in the HBP.

5.3. He submitted that from the aforesaid provisions it is clear that respondent No.2 is only authorized to issue policy notices for implementing the provisions of the FT (D & R) Act, the rules and orders of the FTP; for any amendment which alters the provisions of the FTP, the powers are exclusively vested in respondent No.1 in terms of section 5 of the FT (D & R) Act.

5.4. He submitted that the petitioner is supplying tradable services under the Major Head "Maritime Transport Services" and Minor Head "Supporting Services for Maritime Transport" as appearing in Appendix 3D notified vide public notice No.03/2015-20 dated 01.04.2015 to overseas principals / ship-owners / foreign clients after purchasing such services in INR from downstream local services providers / ports; such services supplied by the petitioner are 'tradable services' as envisaged by the General Agreement on Trade in Services (for short "**GATS**"); petitioner earns free foreign exchange for the supply of such services on the basis of exclusivity of contract with its principals / ship-owners / foreign clients and accordingly applies for benefit under SEIS; SEIS benefits are given to promote manufacture and export of notified goods / products; service providers of notified services located in India such as the petitioner are thus rewarded under SEIS for the services rendered in the manner as described in para 9.51(i) and para 9.51(ii) of the FTP on the basis of rates of rewards for the notified services listed in Appendix 3D; payment in Indian Rupees for service charges earned on specified services is treated as receipt in deemed foreign exchange for the services enumerated in Appendix 3D; service provider needs to have an active IEC at the time of rendering such services for which rewards are claimed which the petitioner possesses; services provider of eligible services is thus entitled to

'duty credit scrips' at notified rates on net foreign exchange earned.

5.5. He submitted that the two impugned policy circulars usurp the powers of respondent No.1 i.e. the Central Government to render notified provisions of the FTP redundant; policy circular No.08/2018 dated 21.06.2018 is ultra vires the provisions of para 3.17(a) of the FTP 2015-2020 as it allows transfer of export performance from the foreign exchange earner (IEC holder) to downstream INR earning service sellers (selling the service to the petitioner) and contradicts the contents of para 9.50 of the FTP to the extent that the definition of 'service' in para 9.50 is defined as tradable services covered under GATS, which are earning free foreign exchange; definition of service as in article 1 of the provisions of GATS defines 'services' as "services includes any service in any sector except services supplied in the exercise of governmental authority"; since all services defined in para 9.50 of the FTP include all tradable services covered under GATS, the services rendered by major ports stand excluded from the provisions of FTP; as such the major ports are not entitled for SEIS benefit provided under the FTP and therefore the aforesaid policy circular goes beyond the mandate of the FTP by granting SEIS benefits to major ports; policy circular No.06/2018 dated 22.06.2018 issued by respondent Nos.2 and 3 attempts to illegally legislate and modify the major conditions / restrictions and attempts to introduce and insert an undefined and alien term "Aggregator" which is not defined either in the FTP or in the FT (D & R) Act; both circulars prescribe a procedure for deeming foreign exchange earning; such major statutory decisions ought to have been brought through issuance of notification under section 5 of the FT (D & R) Act by following the due process of law and not by way of policy circulars.

5**.6.** He submitted that both policy circulars attempt to modify the provisions of FTP 2015-2020; policy circular No.08/2018 dated 21.06.2018 is based upon erroneous interpretation of the wordings of para 3.08(c) of the FTP 2015-2020 read with public notice No.07/2015-20 dated 04.05.2016 with respect to services notified under Appendix 3E in as much as the deeming provision in the policy circular is not in adherence with the RBI guidelines for the purpose of provisions of section 8 of the FEMA Act and the regulations framed thereunder. He therefore contended that the payments made to ports do not qualify as "Deemed Foreign Exchange earning" in view of the existing RBI guidelines; payments made by the petitioner to ports for the services purchased are not covered in para 3.08(c) of the FTP and as such do not entitle the ports for benefit under SEIS; service charges collected by major ports are in exercise of powers as a government authority operating under the statute and therefore the port charges collected against such governmental services are excluded from GATS as per article 1 clause 3(b) and 3(c) and also from the purview of the definition of services in para 9.50 and para 3.08 of the FTP; petitioner receives port services of major ports as representative of its principal / foreign client, as such the petitioner is supplying / trading in such services to its clients through bills of agents and therefore directly earning foreign exchange against such cross border supply of the purchased services purely on sound commercial basis in freely convertible foreign exchange; such services being specified as supporting maritime services in Appendix 3E to the public notice No.07/2015-2020 dated 04.05.2016 and also in the list of tradable services covered under GATS for cross border supply of services.

5.7. He has referred to the 'general agency agreement' dated 04.12.2013 between its principal / foreign client i.e. M/s. Pleiades Shipping Agents S.A., 262, Kifissias Ave., 14562, Greece and the petitioner, inter alia, contending that the owner of the ship has appointed the petitioner as its agent in India to perform all duties and functions customarily performed by shipping agents for handling owner's vessels calling on the west coast of India; submitting that though the petitioner is entitled to an agency fee for the entire work undertaken, however, the owner of the ship provides the entire funds in US dollars i.e. foreign exchange to cover all disbursements and expenses to the petitioner in respect of virtually all duties and functions carried out by the petitioner which are mentioned in the agreement. He submitted that the petitioner has already been granted duty free scrips i.e the benefit under the FTP for the financial year 2015-16 whereas the application for such benefit for financial year 2016-17 was pending with the respondents. However, pursuant to issuance of the impugned circulars the order of refusal dated 25.10.2018 has been passed calling upon the petitioner to return the benefit received.

5.8. He submitted that the petitioner first appoints various service agents in respect of various works required to be done locally in India and only thereafter receives foreign exchange from the owner of the vessel; while referring to the invoice raised by the petitioner on the owner of the ship / vessel, it is contended that the various services provided by the petitioner are inherently documented with all details corresponding to the appointment of agents / service providers by the petitioner in INR; it is only thereafter the foreign exchange is received by the petitioner in its account in US dollars which is thereafter converted into INR by virtue of the privity of contract

between the petitioner and its principal.

5.9. Definition of service provider in paragraph 9.41 of Chapter 9 of the FTP therefore has a significant meaning in as much as service provider means a person providing supply of a service from India to any other country or to service consumers of any other country; services as defined under section 9.50 include all tradable services covered under General Agreement on Trade in Services (GATS) and earning free foreign exchange; thus, contending that the avowed object of the Foreign Trade Policy was concerned with earning net foreign exchange in respect of the services provided and it is the petitioner who having received the entire foreign exchange has earned the said foreign exchange or is deemed to have earned / received the said foreign exchange under the FTP.

5.10. Petitioner is an independent foreign exchange earner for the purposes of the FTP and is entitled for SEIS benefit in terms of the quantum of foreign exchange earned by the petitioner in conformity with para 3.08(d) of the FTP which allows net amount of foreign exchange earned (after adjusting expenses in foreign exchange) for entitlement of SEIS benefit; petitioner being an independent business entity is liable to comply with all applicable laws including the Foreign Exchange Management Act, 1999; the impugned circulars attempt to mitigate benefit received by the petitioner in the form of duty credit scrips against the foreign exchange earned and recover the same in the garb of clarifications; such actions indirectly tantamount to granting convertibility to INR payments in favour of government authorities which is impermissible in law; petitioner cannot be categorized as "aggregator" of services purchased by it for onward supply of such services to its overseas

principal and therefore the impugned policy circulars attempt to unlawfully amend the FTP without following the due process of law.

5.11. He has referred to and relied upon the following judgments in support of the petitioner's case.

(i) **Vodafone Essar Ltd Vs. Union of India**[1]**;**

(ii) **Tata Communication Ltd. Vs. Union of India**[2]**;**

(iii) **Commissioner of Sales Tax, M.P. , Indore Vs. Jaswant Singh Charan Singh**[3]**;**

(iv) **Maheshwari Fish Seed Farm Vs. T.N. Electricity Board & Anr.**[4]

5.12. In the case of **Vodafone Essar Ltd (supra)**, it was urged on behalf of the petitioners that minutes of the Policy Interpretation Committee meeting and the consequential circular that was issued thereafter on 15.07.2010 enforcing the said minutes amounted to an amendment of the Foreign Trade Policy 2008-2014 and therefore not capable of being sustained as a clarification or an interpretation. Petitioners in the said case submitted that the FTP had been framed by the Central Government in exercise of the powers delegated under section 5 of the FT (D & R) Act, 1992 and as such a policy circular would be ultra vires and unlawful where it purports to amend the terms of the FTP. It was argued that any such action which results in denial of benefit under the scheme would amount to a breach or modification of the terms of the policy. Supreme Court while considering the above submissions which are closest in terms of facts in the present case held that the directions contained in the circular dated 15.07.2010 to implement the decisions taken in the meeting of the PIC dated 05.07.2010 is ultra vires to the FTP. Reliance has

1 2011 SCC OnLine Bom 728
2 2011 SCC OnLine Bom 838
3 (1967) 2 SCR 720
4 (2004) 4 SCC 705

been placed on paragraph No. 17 and paragraph No. 28 of the said judgment which read thus:-

> "17. The submission which has been urged on behalf of the Petitioners is that the minutes of the PIC meeting of 5 July 2010 and the consequential circular that was issued on 15 July 2010 enforcing them amount to an amendment of the Foreign Trade Policy and are not capable of being sustained as a clarification or as an interpretation. The submission of the Petitioners is that the Foreign Trade Policy has been framed by the Central Government in exercise of powers delegated to it by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. A policy circular would be ultra-vires and unlawful where it purports to amend the terms of the policy. According to the Petitioners, in each of the three situations, namely those at serial nos. 1, 2(a) and 2(b) of the circular, the Indian Service Provider is entitled to receive the benefit of SFIS upon the plain terms of the policy. The denial of benefits in the first situation and the restriction of benefits to the extent of fifty percent in the second and the third situations is, it is submitted, an attempt to a breach or modify the terms of the policy. On the other hand, it has been urged on behalf of the Respondents by the learned Additional Solicitor General that the minutes of the PIC dated 5 July 2010 constitute no more than a clarification of what is implicit in the Foreign Trade Policy and would, therefore, amount to a lawful exercise of power.
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> 28. For the reasons which we have indicated above, we are of the view that the circular dated 15 July 2010 in so far as it directs the implementation of the decision taken in the meting of the Policy Interpretation Committee dated 5 July 2010 is ultravires the Foreign Trade Policy for 2004-09. However, we clarify that the challenge in the present case is confined only to the decisions taken at serial nos. 1, 2(a) and 2(b) of the PIC meeting on 5 July 2010. Hence, the striking down of the circular would operate only in respect of the direction contained therein to implement the decisions which have been taken at serial nos. 1, 2(a) and 2(b)."

5.13. In the case of **Tata Communications Ltd** (supra) decided by a division bench of this Court, our attention is invited to paragraph No. 13 wherein this court held that in the process of construing the Foreign Trade Policy 2008-14, it would not be open to

the PIC or for that matter, any administrative authority to modify the policy or amend the policy by modifying the conditions of eligibility for availing the benefit of Served From India Scheme (SFIS) entitlement under the said FTP. It was submitted that eligibility was defined with reference to the service providers who had a total free foreign exchange earning of the stipulated amount in the preceding financial year and as defined in paragraph 9.53 of the said FTP. Reliance is placed on paragraph Nos. 10 to 13 which read thus:

> "10. The challenge in these proceedings by the Petitioners is to the decision contained at points 2(b), 4(ii) and 4(iii) of the minutes of the PIC. The first part of the challenge, as noted earlier, is covered by the judgment delivered by this Court on 17 June 2011 in the case of Vodafone Essar Ltd. In serial no. 4 of the minutes, the PIC has dealt with other services provided by Telecom service providers. Clause 4(ii) deals with rentals from optic fibre cables in India, while 4(iii) deals with rentals from optic fibre cables overseas. The PIC has opined that these services do not fall within the purview of paragraph 9.53 of the Foreign Trade Policy. According to the PIC, foreign exchange earnings earned from optic fibre cables can be categorised as rentals from international private leased circuits. According to the Committee, these would not be entitled to SFIS benefits.
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> 11. The narrow issue which falls for determination in these proceedings is whether the Petitioners fall within the purview of the expression "service provider" in Paragraph 9.53 of the Foreign Trade Policy. Clause (i) of Para 9.53 brings within the purview of that expression, the supply of a service from India to any other country. Clause (iii) comprehends the supply of a service from India through commercial or physical presence in the territory of any other country. The Handbook of Procedures provides in Appendix-10 a list of eligible services. Telecommunications services were a sub-category of Communication services (item 2C). Among the sub-categories of Telecommunications services were circuit switched data transmission services and private leased circuit services. The minutes of the PIC meeting dated 5 July 2010 accept the position that the foreign exchange earnings of the Petitioners could be categorised as rentals from private leased circuits. The nature of the service provided is hence an eligible service.
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> 12. The Petitioners have moved the Court on a specified factual basis which is that: (i) The Petitioners

provide dedicated bandwidth services through the use of an optic fibre cable network owned by them; (ii) The optic fibre cable which runs from the territory of India to overseas destinations is continuous; (iii) The Petitioners contract with foreign Telecommunications carriers for the provision of a dedicated bandwidth which can be used by the customer for the carriage of data/voice/video to and from India; (iv) The bandwidth is utilised between a location within India to an overseas destination and the Petitioners do not offer any service for the carriage of data between two locations outside India. On these facts, which have not been disputed at the hearing, the Petitioners would fall within the definition of the expression "service provider" in Paragraph 9.53 of the Scheme. Transmission of data, voice or video utilising the facility of an optic fibre cable laid by the Petitioners undersea from a point within India to an overseas destination in one continuous and scamless transaction would constitute a supply of a service from India to any other country within the meaning of clause (i) or the supply of a service from India through commercial or physical presence in the territory of any other country within the meaning of clause (iii).

13. Counsel appearing on behalf of the Respondents submitted that the PIC, in the course of its decision rendered on 5 July 2010, proceeded on the basis that the rentals from optic fibre cables in India could be dealt with as a separate category from rentals from optic fibre cables overseas. Counsel submitted that the situation which the Petitioners have postulated before the Court namely of a transmission of data/voice/video on a continuous fibre optic cable from a point in India to an overseas destination was not before and was not hence considered by the PIC. The grievance of the Petitioners is that the PIC minutes purport to artificially split the transaction in which a dedicated bandwidth is provided between a place located in India and a place outside India into two separate transactions relating to the portion of the optic fibre cables physically located in India and the portion located overseas. According to the Petitioners, they provide a dedicated bandwidth as a part of a cohesive service involving the use of the cable located in India and overseas and the entire transaction falls within clause (i) of Para 9.53. Alternatively, it has been urged by the Petitioners that the service would clearly fall within clause (iii) and on a purported interpretation of SFIS, the element of service through the use of the fibre optic cable which is located on high seas (and therefore technically not present in the territory of any country) cannot be denied an SFIS entitlement. The conditions of eligibility for availing of the benefits of SFIS entitlements are prescribed in clause 3.6.4.2. The eligibility is defined with

> reference to service providers who have a total free foreign exchange earning of at least the stipulated amount in the preceding financial year. Who is a service provider is elucidated in Para 9.53. Evidently, on the facts which have been stated before the Court, the Petitioners provide services of the nature described in Appendix-10 and as noted earlier, this has been accepted by the PIC. The transmission of data, voice or video through an optic fibre cable laid undersea from a point within India to an overseas destination constitutes a supply of service from India to any other country within the meaning of clause (i) of Para 9.53. The task of the PIC was to interpret Foreign Trade Policy. In the process of construing the policy, it would not be open to the Committee or, for that matter, to any administrative authority to modify the policy or amend the policy. The reasons which weighed with the PIC in holding that the Petitioners do not fall within the description of a service provider in Paragraph 9.53 are fallacious. Hence, the interference of this Court in the exercise of writ jurisdiction under Article 226 would be warranted."

5.14. In the case of Commissioner of **Sales Tax, Madhya Pradesh, Indore** (supra), Additional Sales Tax Officer, Ujjain and Additional Appellate Assistant Commissioner, Indore both held that 'charcoal' in which the appellant was dealing with was not covered by Entry 1 of Part III of Schedule 2 to the Madhya Pradesh General Sales Tax Act, 1958 but it fell under the residuary Entry I of Part VI of that Schedule and was consequently liable to be assessed at the rate of 4% of its price. In further appeal before the Board of Revenue, the Board held that charcoal would be included in the term 'coal' by relying on the dictionary meaning of the word 'coal' and as such would be assessible at 2% only. Further appeal to the High Court at the instance of the Commissioner of Sales Tax came to be dismissed by the High Court by holding that while construing entries in statute like the Sales Tax Act, the Court should prefer the popular meaning of the terms used in such entries and that charcoal would be included in the word 'coal' and was taxable at 2%. Supreme Court upheld the decision of the High Court. Petitioner has placed reliance upon

paragraph 7 of the said judgment to emphasis the intention of legislature in a statute which reads thus:-

> "7. Counsel then relied upon Section 5 of the Colliery Control Order, 1945, in order to show that the Legislature there had dealt with coal in its strict and technical meaning. He also relied upon certain other statutory provisions with a view to show that the Legislature has all along been using the word 'coal' as a mineral product only. The Colliery Control Order deals with collieries and obviously, therefore, the term 'coal' there is used as a mineral product. It is a well-settled principle that in construing a word in an Act caution is necessary in adopting a meaning ascribed to that word in other statutes. As Lord Loreburn stated in Macbeth v. Chislett, it would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone'. The strict sense in which such a word is to be found in another statute may mean the etymological or scientific sense and would not in the context of another statute be applicable. From the Colliery Control Order, 1945 or the other provisions to which our attention was drawn, it would neither be possible nor safe to adopt the meaning of the word 'coal' given in those provisions for the purposes of the Act under construction. Nor can we infer that there is a Legislative policy consistently followed by the Legislature merely because the word 'coal' has been used as meaning a mineral product in the context of these statutes, It would not, therefore, be possible to discard the meaning of the word "coal" in this statute as understood in its commercial or popular sense and to adopt its connotation from other statutes passed for different purposes or in context of different objects".

5.15. In the case of **Maheshwari Fish Seed Farm** (supra), reliance was placed on paragraph Nos. 5 to 9, 13 and 16 to contend that definitions coined by the legislature for the purpose of a particular enactment cannot be freely used for finding out meaning to be assigned to a term of common parlance used in an altogether different setting. The said paragraph Nos. 5 to 9, 13 and 16 read thus:-

"5. The Act, either in the main part, or in the Schedule detailing the tariff rates, does not define agriculture. We have, therefore, to proceed to examine how the term agriculture is understood amongst the agriculturists and whether it was the intention of the State Legislature while enacting the Schedule as originally framed or of the State Government while issuing the notification dated 19.11.1990 to include pisciculture within the meaning of agriculture.

6. It is settled rule of interpretation that the words not defined in a statute are to be understood in their natural, ordinary or popular sense. According to Justice Frankfurter,

> "After all, legislation, when not expressed in technical terms, is addressed to common run of men, and is, therefore, to be understood according to sense of the thing, as the ordinary man has a right to rely on ordinary words addressed." (Wilma E. Addison v. Holly Hill Fruit Products, 322 US 607, at p.618).

In determining, therefore, whether a particular import is included within the ordinary meaning of a given word, one may have regard to the answer which everyone conversant with the word and the subject-matter of statute and to whom the legislation is addressed, will give if the problem were put to him. (Justice G.P. Singh : Principles of Statutory Interpretation, Ninth Edition, 2004, p.95)

7. 'Agriculture' is the science or art of cultivating the soil, growing and harvesting crops, and raising livestock. The art of making land more productive is practiced throughout the world - in some areas by methods not far removed from the conditions of several thousands of years ago, in other areas with the aid of science and mechanization, as a highly commercial type of endeavour. (New Encyclopaedia Britannica, Vol. 1, p.156). According to Oxford lllustrated Encyclopedia of Invention and Technology, 'agriculture' is cultivation of the soil, including the allied pursuits of gathering crops and rearing livestock. (at p.7). 'Fish farming' is a branch of aquaculture involving the rearing of fish under controlled conditions. Ideally, the environment is controlled so that natural predators are eliminated, optimum nutrition is provided, and the fish flourish. (at p. 133).

8. 'Pisciculture' is the breeding, rearing and preservation of living fish by artificial means. (Oxford English Dictionary, Vol. 7, p.904). According to McGraw-Hill : Encyclopedia of Science & Technology, (6th Edition, Vol.7), 'aquaculture' is the artificial propagation of fishes and other aquatic organisms. (p. 129). The term 'fishing' is used to mean the taking or propagation of fishes or other

aquatic life in inland or oceanic water (p. 128). 'Aquaculture' is the cultivation of fresh water and marine species. (The latter type is often referred to as mariculture) (McGraw- Hill, ibid, Vol. 2, p. l.)

9. The High Court has delved deep into the issue and examined the question from very many angles taking into consideration several dictionaries and books on fish farming brought to its notice and also dealt with several decided cases to draw the conclusion that pisciculture is not agriculture. We have a direct decision of this Court available on the point and being a three-Judge Bench decision binds us. It is CIT V. Benoy Kumar Sahas Roy : AIR 1957 SC 768 wherein the term 'agriculture' as occurring in sub-Section (1) of Section 2 of the Income-tax Act, 1961 which defines 'agricultural income' as meaning, amongst other things, 'any income derived from land by agriculture' came up for the consideration of this Court. Bhagwati, J., (as His Lordship then was) spoke on behalf of the three-Judges Bench. A reading of the judgment shows a research by looking into several authorities, meaning assigned by dictionaries and finding out how the term is understood in common parlance. The Court held that the term 'agriculture' has been defined in various dictionaries both in the narrow sense and in the wider sense. In the narrow sense agriculture is the cultivation of the field. In the wider sense it comprises of all activities in relation to the land including horticulture, forestry, breeding and rearing of livestock, dairying, butter and cheese- making, husbandry etc. Whether the narrower or the wider sense of the term 'agriculture' should be adopted in a particular case depends not only upon the provisions of the various statutes in which the same occurs but also upon the facts and circumstances of each case. The definition of the term in one statute does not afford a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally.

.....

13. The relevant entry in the Act as its historical background show was intended to provide electricity at concessional rates or free of any charge to the farmers by dividing them into classes such as small farmers and others farmers. A farmer would be an agriculturist in the traditional sense and narrow meaning of the term. A person engaged in aquaculture or fish farming would not be called a farmer. Neither the legislature while enacting the schedule to the Act as it originally stood nor the State Government issuing the notification amending the

schedule can be attributed with the intention that they had intended to make available electricity at concessional rate or without charge to aquaculturists whose activity is purely commercial. We are also not prepared to hold that in the circle of agriculturists fish farming is understood as agriculture.

.....

16. The learned senior counsel for the appellants invited our attention to the definition of term 'agriculture' as given in definition sections or interpretation clauses of several other enactments such as sub-section (2) of Section 2 of Tamil Nadu Agricultural Produce Marketing (Regulation) Act, 1987, clause (b) of Section 2 of Tamil Nadu Agricultural University Act, 1971, clause (a) of Section 2 of Agricultural and Rural Debt Relief Scheme, 1990, so defining the term 'agriculture' as to include therein 'pisciculture'. These definitions were pressed in service by Shri Iyer, the learned senior counsel, to support his submission for a similar meaning being assigned in the present case. Suffice it to observe that the common parlance meaning of the term 'agriculture', in the context in which it has been used and is arising for determination before us, cannot be determined by reference to definition given in other statutes. This we say for more reasons than one. Firstly, none of the statutes reffered to by Shri Iyer, the learned senior counsel, can be called statutes in *pari materia*. Secondly, it is common knowledge that the definition coined by the Legislature for the purpose of a particular enactment is often an extended or artificial meaning so assigned as to fulfill the object of that enactment. Such definitions given in other enactments cannot be freely used for finding out meaning to be assigned to a term of common parlance used in an altogether different setting. And lastly, as Justice G.P. Singh points out in "*Principles of Statutory Interpretation*" (9th Editin, 2004, at page 163) :

> "[I]t is hazardous to interpret a statute in accordance with a definition in another statute and more so when such statute is not dealing with any cognate subject or the statutes are not in *pari materia*."

The same view has been taken in the decision of this court in CIT Vs. Benoy Kumar which we have extensively referred to earlier in this judgment.

6. ***PER CONTRA,*** Mr. Rajiv Chavan, learned senior counsel for Respondent Nos. 1(a), 1(c), 2, 3 and 4, the principal contesting respondents, while referring to the affidavit in reply dated 18.09.2018

filed by respondent No.2 i.e. Dy. Director General, Directorate General of Foreign Trade contended that the petitioner is ineligible for reward under SEIS because the petitioner merely acts as an agent for providing steamer agency service on behalf of its principal / foreign client; the remittances received by the petitioner are paid to the actual service providers who render various services to the said foreign clients; petitioner being an agent therefore cannot claim benefit of the entire free foreign exchange earning or INR payments as allowed under the scheme merely because it is received in its bank account and is is simply routed through the petitioner for onward transmission to the actual service providers; petitioner merely provides agency service or representative service to its principal / foreign client and is not covered by the definition of service provider under paragraph 9.51 read with paragraph 3.08 of the FTP.

6.1. He submitted that the objective of SEIS as envisaged under para 3.07 of the FTP reads thus:-

> "**3.07 Objective**
>
> Objective of Service Exports from India Scheme (SEIS) is to encourage and maximize export of notified services from India."

6.2. He submitted that as canvassed by the petitioner objective of the SEIS scheme or for that matter, Exports from India Schemes is not merely earning foreign exchange but is to encourage and maximize export of notified services from India; thus the thrust of the petitioner's submissions that the petitioner was earning foreign exchange and therefore should be rewarded under the scheme is contrary to the objective of the scheme provided under the FTP; since it being an admitted position that petitioner merely receives the foreign exchange in its account for making onward payment /

transmission to the actual service providers namely the ports and other service providers; petitioner therefore cannot claim entitlement to benefit in respect of services which the petitioner does not provide; the ports and other agencies render the notified services and not the petitioner and the impugned policy circulars merely reiterate this position; impugned policy circulars are clarifications issued to clear doubts and do not seek to amend the FTP as alleged by the petitioner.

6.3. In the present case petitioner is entitled to benefit under SEIS but only to the extent of the agency fee it receives which is declared before the statutory authorities as per its agency contract with its principal; the objective of SEIS in terms of para 3.07 of the FTP is to encourage export of notified services and not to provide benefit for any inflow of foreign exchange in the Indian bank account held by the petitioner; petitioner admittedly having not rendered notified services such as port dues, towage and pilotage, berth hire charges etc. for which foreign exchange is received in its account for onward transmission to the actual service provider therefore cannot claim SEIS benefit in lieu of the said services; policy circular dated 21.06.2018 merely reiterates the position that service provider of the notified services located in India shall be rewarded under SEIS which essentially means that the ports who are the real service providers of the notified services under Appendix 3E are eligible to get the reward under SEIS; the actual service providers whether it is the port or port trust or any other entity is therefore required to get a certificate of receipt of payment for that particular service from the entity (i.e the petitioner) which had received the foreign exchange in its bank account in India. On the basis of the above submissions, he has urged for upholding the order of refusal dated 25.10.2018 and prayed

for dismissal of the writ petition.

7. Mr. Jetly, learned senior counsel appearing on behalf of respondent Nos. 1(b), 5 and 6 while adopting the submissions made by Mr. Rajiv Chavan, learned senior counsel in addition has submitted that as per para 3.09(a) of the FTP read with Trade Notice 11/2015-20 dated 21.07.2016 issued by the Directorate General of Foreign Trade, only foreign exchange remittances received in lieu of the services rendered by the service exporter are counted towards entitlement under SEIS. He submitted that if the service provider has not rendered the actual service for which remittances have been received, such remittances cannot be counted towards entitlement under SEIS; Appendix 3E has listed certain services rendered in the customs notified area to a foreign liner and the port and other agencies / entities rendering such notified services to the foreign lines are the real beneficiaries under SEIS and not the petitioner; the impugned policy circulars reiterate the above position; petitioner in its statutory filing before service tax authorities and the Registrar of Companies is a 'steamer agent' and is accordingly entitled only to agency fee as its income / revenue earned in foreign exchange; all other charges beyond the agency fee received by the petitioner in its bank account in foreign exchange are the receipted charges of the actual service providers i.e third parties who are entitled to the benefit under SEIS; foreign exchange remittances received by the petitioner from its principal (foreign client) are actually utilized by the petitioner in paying for the actual services rendered by the notified service provider located in India and the same cannot be construed to have been received towards rendering service output as a steamer agent; the impugned policy circular Nos. 06 and 08 have reinforced and reiterated the meaning and contention in para 3.08, 3.09 and 9.50 of

the FTP 2015-20 and do not seek to amend any statutory provision whatsoever; petitioner is merely a ship agent and acts on behalf of its foreign client i.e the vessel owner and earns an agency fee on the basis of the agency contract entered into with its foreign client and as such cannot unjustly enrich itself by applying for SEIS benefit in respect of services which had not been actually rendered by the petitioner and hence, the order of refusal dated 25.10.2018 has been correctly passed and deserves to be upheld.

8. Mr. Nankani, learned senior counsel in his rejoinder submission has contended that the reply, response and the affidavits in reply filed by the respondents do not deal with the three essential tests to be applied for determination of eligibility of a service provider under the FTP 2015-20, namely, the definition of 'service provider' as envisaged and contemplated under para 9.51 of the FTP, that such service provider is required to render the notified services as appearing in Appendix 3D and 3E and most importantly, such service provider should earn the net foreign exchange. He submitted that these tests are required to be made applicable to a service provider conjunctively and not disjunctively; objective of the scheme is derived from para 3.00 of the 'Exports from India Scheme' which states that the objective is to provide rewards to exporters to offset infrastructure inefficiencies and associated costs and the nature of reward envisaged under the scheme is in the form of duty credit scrips; the eligibility criteria under para 3.08 refers to service provider having minimum net free foreign exchange earnings in a year and to have an active IEC licence at the time of rendering of such notified services (which is possessed by the petitioner solely) therefore underlying the criteria of eligibility under the scheme with regard to income earned through foreign exchange and not on the basis of disbursement /

expenditure of the income received by the service provider. He submitted that the petitioner qualifies itself in respect of the aforementioned three tests and it is only the petitioner and not the actual service provider who can seek benefit under SEIS.

9. Submissions made by the respective counsel have received the due consideration of the Court. Materials on record have been perused.

10. Before we advert to the submissions made by the respective counsel, it would be apposite to consider the provisions of Foreign Trade Policy 2015-20 and the Exports from India Schemes namely Service Exports from India Scheme (SEIS) which is relevant for the purpose of the present case.

11. The Foreign Trade (Development & Regulation) Act, 1992 (already referred to as the FT (D & R) Act hereinabove) is an Act enacted to provide for the development and regulation of foreign trade by facilitating imports into and augmenting exports from India and for matters connected therewith or incidental thereto. Section 5 of the said Act empowers the Central Government to formulate the Foreign Trade Policy at regular intervals. The said section reads as under :

> "Foreign Trade Policy :
> 5. 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 the 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."

11.1. In terms of section 5 of the Foreign Trade (Development & Regulation) Act, 1992 the Foreign Trade Policy (FTP) 2015-2020 was notified incorporating provisions relating to export and import of goods and services, which came into force with effect from 1st April 2015 to remain in force up to 31st March 2020, unless otherwise specified.

11.2. The scheme of the Foreign Trade Policy 2015-2020 is contained in Chapter-1 to Chapter-9.

11.3. Chapter 3 of the Policy governs the benefits under Export from India Schemes. Clause 3.07 of Chapter 3 of the FTP 2015-2020 introduced a new reward scheme, i.e. Service Exports from India Scheme (SEIS), to encourage and maximize export of notified services from India. Clause 3.08 of the FTP 2015-2020 lays down the eligibility condition for the said reward. The same is enumerated below :

"3.08 Eligibility

(a) Service Providers of notified services, located in India, shall be rewarded under SEIS. 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.

(b) Such service provider should have minimum net free foreign exchange earnings of US$15,000 in preceding financial year to be eligible for Duty Credit Scrip. For Individual Service Providers and sole proprietorship, such minimum net free foreign exchange earnings criteria would be US$10,000 in preceding financial year.

(c) Payment in Indian Rupees for service charges

earned on specified services, shall be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India. The list of such services is indicated in Appendix 3E.

(d) Net Foreign exchange earnings for the scheme are defined as under :

Net Foreign Exchange = Gross Earnings of Foreign Exchange minus Total expenses / payment / remittances of Foreign Exchange by the IEC holder, relating to service sector in the Financial year.

(e) If the IEC holder is a manufacturer of goods as well as service provider, then the foreign exchange earnings and Total expenses / payment / remittance shall be taken into account for service sector only.

(f) In order to claim reward under the scheme, Service provider shall have to have an active IEC at the time of rendering such services for which rewards are claimed."

11.4. Chapter 9 defines the terms used in the Policy. Para 9.50 and para 9.51 state the definition of "service" and service provider", as referred to in the Policy. Paras 9.50 and 9.51 are reproduced herein below :

"Para 9.50
"Services" include all tradable services covered under General Agreement on Trade in Services (GATS) and earnings free foreign exchange."

Para 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 of 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.)"

12. In the present case, the petitioner has been granted SEIS benefit / reward in the form of duty free scrips for the financial year 2015-16 by the respondents. For the financial year 2016-17, petitioner's application for seeking benefit under SEIS was pending. In the meanwhile upon representations received from the industry, the impugned circular Nos. 06/2018 dated 22.05.2018 and 08/2018 dated 21.06.2018 have been issued by the respondents.

13. Policy circular No. 06/2018 dated 22.05.2018 states that the actual service providers (and not ports) are eligible for SEIS benefit in respect of their share of earnings made by performing the notified services under the SEIS scheme. Further, the aggregator of services (ports) shall be entitled for benefits under SEIS only for services exclusively rendered by the ports and for which the foreign exchange earnings (or INR payments as allowed under the scheme) are received and retained by them on this account. The port cannot claim benefits to the extent of free foreign exchange earnings (or INR payments as allowed under the scheme) simply routed through it as receipt of service charges with regard to services rendered by other actual service providers.

14. Policy circular No. 08/2018 dated 21.06.2018 states that service providers like steamer agents, etc. shall be entitled for benefits under Service Exports from India Scheme (SEIS) for the services exclusively rendered by them and for which the foreign exchange earnings (or INR payments as allowed under the scheme)

are received and retained by them on this account. Further, such service providers like the Port Trusts cannot claim benefits to the extent of free foreign exchange earnings (or INR payments as allowed under the scheme) simply routed through them for making payment for service charges with regard to services rendered by other service providers. It further clarifies that the actual service provider, whether it is the Port Trust or any other entity, is required to get a certificate of receipt of payment for that particular service from the entity which had received the foreign exchange earnings (or INR payments as allowed under the scheme) in its account in India.

15. On the basis of the above two circulars an order of refusal and renewal of further licenses dated 25.10.2018 calling upon the petitioner to refund the amount of Rs. 22,10,00,000.00 and Rs. 2,88,365.00 received against SEIS scrips numbers 0319087350 and 0319087351 dated 03.10.2016 came to be passed. Petitioner had filed appeal against the order of refusal before respondent No. 2 i.e. Director General of Foreign Trade. Show cause notice dated 10.05.2019 is issued by respondent No. 3 seeking to improve penalty on the petitioner and show cause notice dated 30.05.2019 is issued by respondent No. 6 seeking refund of the amount of Rs. 21,04,02,303.00 from the petitioner, being the SEIS benefit received by the petitioner.

16. We may state that section 5 of the FT (D&R) Act provides that the Central Government may from time to time formulate and announce the Exim Policy by issuing notification in the official gazette. Thus, it is the Central Government which has power to amend the policy by adopting the procedure as stated in the Act; the power to announce the policy and to amend as such solely remains within the

domain of the Central Government and cannot be delegated.

17. Chapter 1 paras 1.01, 1.02 and 1.03 of the Foreign Trade Policy 2015-20 are also relevant. In para 1.01 of the FTP, it is stated that in pursuant of the provisions of para 1.03 of the FTP, DGFT notifies the procedure to be followed by an exporter or importer or by the licensee / regional authority or by any other authority for the purpose of implementing the provisions of FT (D&R) Act, the rules / orders made thereunder and the provisions of FTP. Such procedure is contained in the Hand Book of Procedures (HBP) and Appendices and Aayat Niryat forms and Standard Input Output Norms (SION) as amended from time to time. Para 1.02 of the FTP relates to amendment to FTP and states that Central Government in exercise of powers conferred by section 5 of the FT (D&R) Act 1992, as amended from time to time, reserves the right to make any amendment to the FTP by means of notification in the public interest. Para 1.03 relates to Hand Book of Procedures and Appendices and Aayat Niryat forms.

17.1. From a conjoint reading of the above statutory provisions it is clear that for any amendment to alter or modify the provisions of FTP 2015-20, the powers are exclusively vested in respondent No. 1 i.e the Central Government in terms of section 5 of the FT (D&R) Act, 1992. In such circumstances we have to examine as to whether by way of the two impugned policy circulars any new conditions or restrictions can be added or read into the FTP or whether respondent Nos. 2, 3 and 6 can add / alter / amend the provisions of the FTP without recourse to exercise of powers conferred by section 5 of the FT (D&R) Act upon the Central Government.

18. By virtue of the two circulars, modification and alteration of provisions of para 3.08(c) of the FTP 2015-20 has been made which stipulates the provisions of deeming INR earning as foreign exchange in terms of the Reserve Bank of India guidelines. Policy Circular No. 8/2018 dated 21.06.2018 clearly overrides the authority of the Reserve Bank of India and an attempt is made to introduce a provision for issuance of a certificate by the petitioner enabling the local domestic service provider, such as, ports to deem their INR billing as in foreign exchange. Such overriding policy decisions inour view would require an amendment in the FTP 2015-20 and as mandated under the provisions of section 5 of the FT (D&R) Act would have to be carried out only by the Central Government.

19. The two impugned policy circulars clearly curb the right of the petitioner as an independent foreign exchange earner for the purposes of FTP 2015-20 and its consequential SEIS benefits in conformity with para 3.08(d) of the FTP. The designation or description of the petitioner as "aggregator" of services purchased by them is not in conformity with the underlying ethos of the FTP 2015-20 read with the FT (D&R) Act, 1992.

20. We also have to bear in mind the objective of the Exports from India Schemes as envisaged in para 3.00 and the objective of Service Export from India Scheme (SEIS) as envisaged in para 3.07 in consonance with the eligibility criteria stated in para 3.08 of Chapter 3 and the definition of 'service provider' provided in para 9.51 of the FTP. The said relevant provisions are reproduced hereunder :-

Exports from India Scheme

"**3.00 Objective**

The objective of schemes under this chapter is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs.

3.07 Objective

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

3.08 Eligibility

(a) Service Providers of notified services, located in India, shall be rewarded under SEIS. 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 Appendix3D.

(b) Such service provider should have minimum net free foreign exchange earnings of US$ 15,000 in year of rendering service to be eligible for Duty Credit Scrip. For Individual Service Providers and sole proprietorship, such minimum net free foreign exchange earnings criteria would be US$10,000 in year of rendering service.

(c) Payment in Indian Rupees for service charges earned on specified services, shall be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India. The list of such services is indicted in Appendix 3E.

(d) Net Foreign exchange earnings for the scheme are defined as under:

Net Foreign Exchange = Gross Earnings of Foreign Exchange minus Total expenses / payment / remittances of Foreign Exchange by the IEC holder, relating to service sector in the Financial year.

(e) If the IEC holder is a manufacturer of goods as well as service provider, then the foreign exchange earnings and Total expenses / payment / remittance shall be taken into account for service sector only.

(f) In order to claim reward under the scheme, Service provider shall have to have an acting IEC at the time of rendering such services for which rewards

are claimed.

3.10. Entitlement under SEIS
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.

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 of 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.)"

21. On thorough consideration of the above statutory provisions together with the definition of 'service provider' and the provisions of the Exports from India Schemes pertaining to eligibility, it is clearly discernible that the petitioner's activity falls within the definition of 'service provider' and is therefore eligible for benefit / reward under SEIS. We may also refer to the application form ANF-3B for seeking benefit under SEIS filed by petitioner which is annexed at page 89 of the paper book. This application form states that the petitioner has been registered for the following products/services in terms of its main line of business: (i) marine transport service; (ii) rental of commercial vehicles with operator; (iii) road transport services - passenger transportation and (iv) supporting services for road transport services.

22. That apart we may also refer to the return filed by the

petitioner under section 70 of the Finance Act, 1994 read with rule 7 of the Service Tax Rules, 1994 i.e form ST-3 (revised) wherein the petitioner has applied for computation of service tax as a steamer agent service as taxable service (s) for which tax is being paid for the entire gross amount for which bills / invoices / challans or any other documents are issued relating to services provided or to be provided (including export of service and exempted service) for all services. It would therefore be wrong to hold that the petitioner has been appointed by its foreign client as a mere agent to pay to the actual service providers in view of the definition of the word 'services' and 'service provider' in paras 9.50 and 9.51 alluded to herein above. Further it would also be incorrect to hold that the petitioner is merely an agent of its foreign client to the extent of receiving the foreign exchange in its bank account and disbursing the same to the actual service providers. The work agency contract entered into by the petitioner with its foreign client clearly stipulate and prescribe in detail the duties and functions that are required to be carried out by the petitioner; as such the petitioner is directly responsible for carrying out the said duties and functions. In fact, it is the petitioner who is directly responsible to ensure that it carries out its duties and functions to the satisfaction of its foreign client in terms of the work agency contract. The petitioner therefore qualifies to be a service provider of the notified services as contemplated under para 3.08 of the SEIS. That apart the conditions of eligibility in para 3.08 of the SEIS for availing benefits under the scheme are fulfilled by the petitioner to be a service provider of the notified services in as much as petitioner had provided the notified services and that petitioner should had a minimum net free foreign exchange earning of US dollars 15,000 in a year of rendering service. Once the above eligibility criteria is fulfilled by the petitioner as service provider in respect of the services stated

in Appendix 3D and 3E, there is no doubt left that the petitioner is a service provider under the FTP.

23. It is submitted by the respondents that the benefit / reward is to be construed only in respect of the net foreign exchange which would be calculated after deducting the net foreign exchange agency fee received by the petitioner for the other charges given to the actual service providers by the petitioner. With respect we cannot agree to this submission for more than one reason. Firstly, having regard to what we have discussed above, this would not be a permissible interpretation. For this reason we would like to refer to para 22 in the case of **Vodafone Essar Ltd** (supra) which has clearly distinguished such a submission. Paragraph 22 of the said judgment reads thus:-

> "22. The learned ASG sought to submit that for the purposes of clause 3.6.4.3 the amount earned must refer to the net amount earned. Ex-facie, this would not be a permissible interpretation. For one thing, the amount earned cannot be different while defining entitlement and for determining eligibility. The amount earned can only mean the same thing, while applying the conditions of eligibility and for defining the extent of the entitlement. Secondly, where the Foreign Trade Policy postulates that a net foreign exchange earning should be computed, express provisions to that effect have been made by the Policy. For instance, in paragraph 6.5 of Chapter VI which relates interalia to export oriented units and paragraph 7.4 of Chapter VII which deals with Special Economic Zones, the policy has made a reference to net foreign exchange (NFE). Similarly, an NFE criterion has been provided for in paragraph 7.A.7 of Chapter VII.A which deals with free trade and warehousing zones. Clause 9.4(1) of Chapter IX defines NFE to mean net foreign exchange earning. Advisedly, the policy has not used the expression "net foreign exchange earning" either while defining the conditions of eligibility or the conditions of entitlement for the Served From India Scheme. Where the same policy document employs two distinct phrases, each of those phrases must be given a separate meaning according to

> its plain and natural interpretation. For the purposes of defining eligibility and entitlement under SFIS, the words that have been used are `total free foreign exchange earning' and `free foreign exchange earned'. The Central Government while defining the extent of the entitlement has confined it to ten per cent of the free foreign exchange earned. If the Government intended to restrict the entitlement to ten per cent of the net foreign exchange earned, it could have so stipulated. 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 the policy."

23.1. From a reading of the above intention of the legislature to restrict the policy in formulating the eligibility and entitlement condition is clearly discernible. It would therefore not be possible for us to restrict the benefit of SEIS with reference to the concept of net foreign exchange as canvassed by the respondents as the same would result in an amendment or change in the policy.

24. In view of the above discussion and findings, we hold and order as under:

(i) Circular Nos. 06/2018 dated 22.05.2018 and 08/2018 dated 21.06.2018 in so far as they seek to add and amend the provisions of the FTP 2015-20 by inserting additional conditions to curtail the rights / benefits claimed by the petitioner as service provider are ultra vires the Foreign Trade Policy for 2015-20;

(ii) Impugned order of refusal dated 25.10.2018 passed by the Additional Director of Foreign Trade, Mumbai cannot be sustained and is accordingly quashed and set aside;

(iii) Show Cause Notice dated 10.05.2019 issued by respondent No.4 is quashed and set aside;

(iv) Show Cause Notice dated 30.05.2019 issued by respondent No.6 is quashed and set aside.

25. Writ petition is accordingly allowed in the above terms. However, there shall be no order as to costs.

[MILIND N. JADHAV, J.] **[UJJAL BHUYAN, J.]**