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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1335 OF 2010

Essar Shipping Limited .. Petitioner

Vs.

Union of India & Ors. .. Respondents

Mr. Vikram Nankani, Sr. Advocate with Mr. Prithviraj Choudhari a/w Mr. Archit Virmani and i/by Mr. Nikhil Mengde for petitioner. Mr. Anil C. Singh, ASG a/w Mr. M. S. Bhardwaj, Mr. Aditya Thakkar and Mr. D. P. Singh for respondents.

C0RAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

RESERVED ON: DECEMBER 23, 2021
JUDGMENT ON: FEBRUARY 08, 2022

JUDGMENT: [Per Dipankar Datta, CJ.]

FACTS GIVING RISE TO THE WRIT PETITION

1. The petitioner is a company incorporated under the Companies Act, 1956 and, *inter alia*, engaged in the business of rendering maritime transport services.

2. The first respondent is the Union of India and the other 4 (four) respondents are the officers of the first respondent, who are obliged to exercise powers and discharge duties in terms of the Foreign Trade (Development & Regulation) Act, 1992 (hereafter "the FTDR Act", for short). Thereunder, the Central Government announces the Foreign Trade Policy (hereafter "FTP", for short) from time to time. For the purposes of the present writ petition, the relevant FTP is for the period 2004-2009 (hereafter FTP 2004-09, for short).

3. By instituting this writ petition, the petitioner seeks to challenge Policy Circular No.25 of 2007 dated 1st January, 2008 (hereafter "the said Circular", for short) issued by the Director General of Foreign Trade (hereafter "DGFT", for short), the second respondent. According to the petitioner, in the garb of purported clarification, the DGFT has curtailed benefits available to service providers, such as the petitioner, under the Served from India Scheme (hereafter "SFI Scheme", for short). Consequent upon the said Circular, the Joint Director General of Foreign Trade, Bengaluru, the third respondent, vide demand notice dated 28th January, 2010 (hereafter "demand notice", for short) and reminder dated 31st May, 2010 (hereafter "reminder", for short), post-facto and retrospectively, directed the petitioner to pay customs duty and interest on the basis of the benefits already availed and utilized by

the petitioner on account of its entitlement under the SFI Scheme, in a sum of Rs.27,40,35,827/-.

4. The essence of the petitioner's challenge is that the DGFT cannot take away the benefits conferred by the FTP 2004-09 by way of a circular, which is only administrative and/or executive in nature. It is also claimed that the third respondent does not have the power to deny the benefits conferred under the FTP 2004-09 long after the utilization thereof by the petitioner, when there is no provision whatsoever either under the FTDR Act or the FTP 2004-09 authorizing the third respondent to recall the benefits granted to the petitioner under the FTP 2004-09 for the past period, such benefits having accrued and granted to the petitioner in accordance with law.

5. Aggrieved by the said Circular as well as the the demand notice and the reminder, the petitioner has approached this Court under Article 226 of the Constitution of India seeking relief, which reads as follows:

> "(a) that this Hon'ble Court be pleased to declare the impugned Circular No. 25/2007 dated 1st January, 2008 (Exhibit-'K' hereto) *ultra vires* Article 14 and Article 19(1) (g) and Section 5 of the Foreign Trade (Development & Regulation Act, 1992 and paragraph 3.6.4 of Foreign Trade Policy 2004-09;
>
> (b) that this Hon'ble Court be pleased to issue a Writ of Certiorari, or a Writ in the nature of Certiorari, or any other appropriate Writ, Order or direction, leading to the issuance of the impugned demand Notices dated 28th January, 2010 and 31st May, 2010 (Exhibits-'N' and 'O' respectively hereto) and after going into the legality,

validity and propriety thereof, to quash and set aside the same;

(c) that this Hon'ble Court be pleased to issue a Writ of Prohibition or a Writ in the nature of Prohibition, or any other appropriate Writ, Order or prohibition, prohibiting the Respondents from implementing and/or carrying on and/or giving the impugned policy Circular No. 25/2007 dated 1st January, 2008 (Exhibit-'K' hereto);

(d) that this Hon'ble Court be pleased to issue a Writ of Mandamus, or a Writ in the nature of Mandamus, or any other appropriate Writ, Order or direction, directing the Respondents to forthwith withdraw the impugned demand Notices dated 28th January, 2010 and 31st May, 2010 (Exhibits-'N' and 'O' hereto)."

6. The pleaded case in the writ petition, in brief, is this.

a. The business of rendering maritime transport services, carried on by the petitioner, includes carriage of goods by ships which are owned or chartered by it. At times, maritime transportation services are also provided in cases where on the instruction of the shipper, located outside India, the petitioner transports the goods from place X to place Y, both located outside India without making any port call in India. Even in these cases, the contract of carriage is entered into by the petitioner situated in India as well as the payment for such transportation services is received by the petitioner in freely convertible foreign exchange in India.

b. There are various schemes to provide benefits to exporters engaged in exporting certain goods and services outside India. One of such schemes was the SFI Scheme, introduced by the first respondent in the year 2005 under the FTP 2004-2009 in its present

form, prior to which similar benefits were available since April 2003. The SFI Scheme introduced under the FTP 2004-2009 provided benefits, in the form of duty credit scrip certificates equivalent to an amount of 10% of such foreign exchange earnings, to notified Indian "Service Providers" engaged in exporting certain services and who had a total free foreign exchange earnings of at least Rs.10,00,000/- (Rupees Ten Lakh) in the current financial year. The scrips obtained by such notified Indian Service Providers under the SFI Scheme could then be used for setting off the applicable customs duty payable on import of any capital goods, spares, professional equipment, office furniture and consumables. However, the benefit under the SFI Scheme was not available to services specifically excluded out in the FTP 2004-2009 read with the Handbook of Procedures (HBP).

c. It is the petitioner's specific claim that the maritime transportation services provided by it were not specifically excluded from the ambit of the SFI Scheme and, accordingly, it applied for and was granted SFIS scrips to the tune of Rs.30 crore by the third respondent in 2007.

7. While the matter stood thus, we find that in line with a decision taken in the Port Officers Meeting dated 14th December, 2007 [Agenda 6, Decision No. 4(c)(ii)] presided over by the Joint Director General of Foreign Trade, New Delhi, such joint director issued the

said Circular wherein it was clarified that the benefits of the SFI Scheme will not be available to service providers, such as the petitioner, who have provided maritime transportation services from a place outside India to another place outside India without making a port call in India.

8. Subsequently, in the FTP 2009-2014, a specific amendment was brought to this effect and such services were specifically excluded from the ambit of the SFI Scheme.

9. The third respondent issued the demand notice and the reminder in line with the said Circular, directing the petitioner to return back the customs duty benefits along with interest claimed by it while utilizing the SFI Scheme scrips issued to it in 2007.

10. In such factual background, the petitioner has invoked the writ jurisdiction of this Court with prayers noted above.

CONTENTIONS OF THE PETITIONER

11. Appearing in support of the writ petition, Mr. Nankani, learned senior advocate contended on pleaded lines. According to him:

a. The said Circular cannot retrospectively amend or take away the benefits conferred under the FTP 2004-2009. In terms of paragraph 9.53 of the FTP 2004-2009, the term "Service Provider" includes a person *"(i) providing services from India to any other country".* At the relevant point in time, the

petitioner was rendering maritime transport services, which includes carriage of goods by ships owned or chartered by it. At times, maritime transportation services were also provided in cases where on the instruction of the shipper, located outside India, the petitioner transported the goods from place X to place Y, both located outside India without making any port call in India. Even in these cases, the contract of carriage was entered into by the petitioner situated in India as well as the payment for such transportation services was received by the petitioner in freely convertible foreign exchange in India.

b. Since the petitioner was engaged in providing the aforesaid services from India to any other country, the petitioner would qualify as a "Service Provider" and, thus, be entitled to claim the benefits under the SFI Scheme. Further, since the services provided by it were not specifically excluded from the ambit of the SFI Scheme, the petitioner had rightly applied for and was correctly granted SFIS scrips to the tune of Rs.30 crore by the third respondent in 2007.

c. It is the settled position in law that in terms of section 6 of the FTDR Act, an amendment to the Foreign Trade Policy can be brought about only by the Central Government and no amendment can be introduced by way of a policy circular. Reference in this connection was made to the decisions of this

Court reported in 2011 SCC OnLine Bom 728 (**Vodafone Essar Ltd. vs. Union of India)** and 2011 SCC OnLine Bom 838 (**Tata Communication Ltd. vs. Union of India).**

d. The issues here are also squarely covered by the latest decision of this Court in the case of **Atlantic Shipping Private Limited vs. Union of India** [Writ Petition No. 1827 of 2019, decided on 9th March, 2021] wherein, in a very similar situation, the writ petition was allowed in favour of the petitioners and while relying on its earlier decisions, this Court concluded that provisions of the FTP cannot be amended by issuing a circular.

e. In the present case, the said Circular has been issued with a view to circumvent the due process of law prescribed under the FTDR Act to amend the FTP 2004-2009 and benefits, otherwise correctly granted to the service providers, such as the petitioner, were curtailed by introducing a new condition which was not existing under the prevalent policy provisions of the FTP 2004-2009. Therefore, introduction of such a new condition in the FTP 2004-2009 by way of the said Circular is wholly unsustainable and contrary to the settled position in law.

f. At the time of issuance of the SFIS scrips in 2007, there was no specific restriction for availing benefit under the SFI

Scheme with respect to the services provided by the petitioner. The said restriction was sought to be introduced by way of a clarification vide the said Circular and was later incorporated in 2009 as part of the FTP 2009-2014. The benefits claimed and obtained under the SFIS Scrips issued in 2007 cannot be retrospectively taken away by issuance of the said Circular and the demand notice as well as the reminder when, at the relevant time of issuance of such scrips, the law did not provide for any specific restriction to that effect.

g. Further, the aforesaid view is also buttressed by the language used in the said Circular itself, the relevant extract of which reads:

> *"3. After due deliberations, with respect to services not originating from India, it has been decided that the following principles be applied while finalizing the claims:*
> ***"

h. The aforesaid language makes it abundantly clear that the content of the said Circular was meant to be applicable only for finalizing pending claims and would have no bearing whatsoever on the licenses already granted in the past.

i. The officers of the Directorate General of Foreign Trade, Ministry of Commerce (hereafter "the said directorate", for short) have no powers under the FTDR Act to recover any customs duty benefits granted to an importer.

12. Without prejudice to the above, it was submitted on behalf of the petitioner that the policy is framed, and license is granted by the said directorate; that the exporter applies for and is granted the license by the said directorate; that thereafter, the said license is registered with the concerned Customs authorities at the port of import; that the applicable Customs duties in future imports is thereafter adjusted by the customs authorities from the License registered by the importer; and that, accordingly, the benefit of lower customs duty is granted by the customs authorities which, while operating under the Ministry of Revenue, is the implementing agency for all FTP schemes. The actual benefit is in the form of Customs Exemption Notification which is Notification No. 92/2004-Cus dated 10th September, 2004 (Exhibit "I"). Since the effect of holding a License is that the customs duty is reduced in future imports, the power to recover such lower duty benefits has been granted to the customs authorities, earlier under section 28 of the Customs Act and presently, under section 28AAA of the Customs Act. There is no provision under the FTDR Act which confers any power whatsoever on the officers, such as the third respondent to issue the demand notice and the reminder. The only action contemplated under the FTDR Act is suspension/cancellation of license [section 8] and Imposition of Penalty [section 11]. Apart from the above, there is no provision under the FTDR Act which empowers the officers of

the said directorate to recover the customs duty benefits, the latter being the sole prerogative of the officers under the Customs Act. Thus, the demand notice as well as the reminder issued by the third respondent are without any authority of law and liable to be set aside on this count itself.

13. It was, accordingly, prayed that relief as claimed by the petitioner ought to be granted.

CONTENTIONS OF THE RESPONDENTS

14. It is the case of the respondents in their affidavit-in-reply that the challenge in the writ petition is misconceived and hence, the petitioner is not entitled to any relief in the writ jurisdiction of this Court.

15. Mr. Anil Singh, learned Additional Solicitor General for the respondents raised a preliminary objection to the maintainability of this writ petition. It has been his submission that the petitioner is not entitled to discretionary equitable relief since it has approached this Court with unclean hands. We were reminded by Mr. Singh that one who seeks equity must act in a fair and equitable manner.

16. While addressing us, Mr. Singh disclosed that the petitioner has deliberately suppressed its Application and the Declaration/Undertaking at the time of seeking benefits under the SFI Scheme and in view thereof, cannot and ought not to be heard

in the discretionary writ jurisdiction of this Hon'ble Court. According to him, the contents of the said application and declaration/undertaking ***(Exhibit 3 Pgs 109/110)*** are materially relevant since they evince, *inter alia*, that contrary to Ground D *(pg 14)* of the writ petition where reliance is placed on clause (iii) of paragraph 9.53 of the FTP, in the application the petitioner had shown no income under clause (iii) of paragraph 9.53 of the FTP and shown its entire income under clause (i) of paragraph 9.53 of the FTP. Clause (i) refers to service from India to any other country and is different and distinct from clause (iii), which refers to a situation of *"supply of a 'service' from India through commercial or physical presence in territory of any other country."* (emphasis supplied by him). The "Declaration/Undertaking" filed by the petitioner, it was submitted by Mr. Singh, specifically provides, *inter alia*, that *"I hereby certify that foreign exchange earned on account of services rendered from India alone has been taken into account for this application under SFIS and these do not fall under any category or service which are not eligible as per Para 3.18.1 of HBP VI"* (emphasis supplied by him).

17. A perusal of the above, according to Mr. Singh, would evince that the petitioner whilst seeking benefit under the SFI Scheme had specifically given an undertaking that the foreign exchange earned is on account of services *"rendered from India alone"* (emphasis

supplied by him). This was also supplemented by an assertion in terms of claiming the same under clause (i) of paragraph 9.53. Both these factors are directly material and relevant in the instant case, where the petitioner is now seeking to base his case on a plea contrary to its own application and undertaking.

18. These material and directly relevant document(s) having been suppressed by the petitioner, it was submitted by Mr. Singh that on this ground alone the petitioner is not entitled to any relief and the writ petition be dismissed.

19. Without waiving the objection that the writ petition is not maintainable, Mr. Singh next proceeded to address us on the merits of the issues.

20. Referring to paragraph 6 of the affidavit-in-reply, Mr. Singh sought to highlight the reason behind the introduction of the SFI Scheme. *Inter alia*, it says that "*…..under the Foreign Trade Policy, as a part of promotional measures, Government of India has introduced Served from Indian Scheme (SFIS). As per para 3.6.4.1 of the Foreign Trade Policy, the objective of the scheme is to accelerate growth in export of services so as to create a powerful and unique 'Served from India' brand, instantly recognized and respected world over...*" (emphasis supplied by him).

21. Our attention was then invited to the relevant provisions of the SFI Scheme providing, *inter alia*, as under:-

3.6.4 SERVED FROM INDIA SCHEME

3.6.4.1 Objective: The objective is to accelerate the growth in export of services so as to create a powerful and unique 'Served From India' brand, instantly recognized and respected word over.

3.6.4.2 Eligibility : All Service Providers, of services listed in Appendix 10 of HBP vl, who have a total free foreign exchange earning of at least Rs. 10 Lakhs in preceding financial year shall qualify for Duty Credit scrip. For Individual Service Providers, minimum would be Rs. 5 Lakhs:" (emphasis supplied by him).

22. Next, the expression "Service Provider" defined in paragraph 9.53 of the FTP was referred to by Mr. Singh with particular emphasis on clauses (i) and (iii). Paragraph 9.53, for facility of convenience, is quoted below: -

"Service provider" means a person providing:

(i) Supply of a 'service' from India to any another country:

(ii) Supply of a 'service from India to service consumer of any other country in India; and

(iii) Supply of a 'service' from India through commercial or physical presence in territory of any other country.

(iv) Supply of a 'service' in India relating to exports paid in free foreign exchange or in Indian rupees which are otherwise considered as having being paid for in free foreign exchange by RBI.

23. Moving forward, Mr. Singh referred to section 2(e) of the FTDR Act (as it stood prior to its amendment in 2010) defining import and export, *inter alia,* respectively as *"bringing into or taking out of India any goods by land, sea or air"* (emphasis supplied by him). He requested us to note that whilst the definition provides only for export of goods at the relevant time, the same would have to be applied even for export of services.

24. Mr. Singh submitted that on a plain and conjoint reading of the definition of 'export' under the FTDR Act, paragraph 9.53 of the FTP 2004-2009 and the provisions of the SFI Scheme, it is clear as crystal that the letter, intent and purpose of the SFI Scheme was always to grant a benefit only in respect of services which were originating from India or touching India. The said Circular, he contended, thus merely clarifies this position which was evident in the SFI Scheme itself.

25. It was further submitted by Mr. Singh that even the petitioner understood the SFI Scheme in the same manner and hence, in its Declaration/Undertaking (at pg 110) it specifically stated that the foreign exchange earned is on account of services "rendered from India alone".

26. Mr. Singh, therefore, submitted that in the light of the clear letter, purpose and intent of the SFI Scheme read with the manner

in which the petitioner itself understood the SFI Scheme, the challenge to the said Circular on the basis that it is not clarificatory but a substantial amendment is not only misplaced and misconceived but based on improper consideration of the past Declaration/Undertaking of the petitioner; hence, the said Circular is valid, being merely clarificatory in nature.

27. Dealing with the contention of the petitioner that the said Circular does not permit revising entitlements that have already been granted and hence, the subject demand notice and the reminder ought not to have been issued, it was contended by Mr. Singh that reliance placed by the petitioner on paragraph 3 thereof is misplaced. He submitted that a holistic reading of the said Circular clearly envisages that wrongful benefits that may have been granted cannot and ought not to be allowed. According to him, the contention of the petitioner is without basis for the following reasons, viz.

a. The said Circular read as a whole show that the entitlements can be revisited. This would be evident on reading of the paragraph below paragraph b which reads, *inter alia*, as "*Thus **payment might have been made** by a service provider in India to a Foreign Service Provider, who has provided some part service in the foreign country. Such services provided abroad **cannot be counted** as 'Services originating from India', and hence would not be*

eligible for benefits under SFIS Scheme…" (emphasis supplied by him).

b. The petitioner having wrongfully obtained benefits on the basis of an incorrect declaration cannot seek to unjustly enrich himself. It is evident from the record that irrespective of the SFI Scheme, the petitioner has himself undertaken that the foreign exchange earned is from "*services rendered from India only*". However, now, if the admission of the petitioner in the writ petition that the services were not rendered from India but must be deemed to be services under clause (iii) of paragraph 9.53 of the FTP is accepted, it would result in the Writ Court granting a relief of perpetuating a benefit claimed on an incorrect undertaking and thus allowing the petitioner to unjustly enrich itself. Considering that the benefit of the SFI Scheme is granted by the Government, the Department would be entitled to recover the benefits which have been wrongfully claimed by a party.

c. The Minutes of Meeting of the Port Officers dated 14th December, 2007 pursuant to which the said Circular came to be issued also clarifies that "Even in cases where RAs may have already granted SFIS benefits earlier, (including under the then EXIM policy (RE2003), this exercise should

be done and ***adjustment of excess grant*** in previous years may be carried out within the next 3 months. A compliance report may be submitted to DG by Mar 2008."

28. In the light of the above, it was submitted that the writ petition being devoid of merit was liable to be dismissed.

ISSUES AND DECISION THEREON

29. Having heard Mr. Nankani and Mr. Singh at considerable length, the issues that arise for our decision are:

(a). Whether the writ petition ought to be dismissed for suppression of any material fact or that the petitioner has approached the writ court with unclean hands?

(b). Should the answer to the above issue be in the negative, whether the said Circular is *ultra vires* Articles 14 and 19(1)(g) of the Constitution, section 5 of the FTDR Act and paragraph 3.6.4 of the FTP 2004-2009?

(c). Whether the said Circular is prospective, in the sense that it would apply only to claims that are yet to be finalized, or whether cases settled and/or closed could be reopened thereby?

(d). Whether the demand notice dated 28th January 2010 and the reminder 31st May 2010 seeking to recover the duty benefit received by the petitioner under the SFI Scheme are valid in law and hence, sustainable?

(e). To what relief, if any, is the petitioner entitled?

Issue (a)

30. Suppression of a material fact, undoubtedly, is a valid ground for refusing exercise of discretionary writ jurisdiction. Law seems to be well-settled that a party is disentitled to the extra-ordinary remedy of writ if material facts, which would have materially affected the merits of the reliefs claimed (either interim or final), are not disclosed in the writ petition. One may usefully refer to the decision of the Supreme Court reported in (2004) 7 SCC 166 [**S.J.S. Business Enterprise (P) Ltd. vs. State of Bihar**] where, in paragraph 13, it has been held that:

> "13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken…"

31. Applying the law as aforesaid, it needs to be considered whether non-disclosure by the petitioner of the Application or its Declaration/Undertaking in the writ petition ***(A/R - pg 109/110)*** while seeking benefits of the SFI Scheme amounts to suppression of material facts. The question that ought to be posed is, whether the Application and/or the Declaration/Undertaking have a bearing on

the main point in issue, i.e., the authority of the DGFT to issue the said Circular and the action of the third respondent to reopen proceedings by issuing the demand notice as well as the reminder based on the said Circular.

32. Mr. Singh's argument is that by reason of the contents of the Application and/or the Declaration/Undertaking and the disclosures now made, the petitioner was not entitled to any benefit under the SFI Scheme. If indeed that is so, it stands to reason that the petitioner was disqualified from seeking any benefit under the SFI Scheme, yet, the respondents granted the benefit to it. Once the benefit was granted and such benefit is not sought to be taken away by reason of any disqualification evident from the Application and/or the Declaration/Undertaking but in pursuance of the said Circular based whereon the demand notice and the reminder have been issued and such circular and notice/reminder are under challenge on the grounds noted above, we consider it too far-fetched for Mr. Singh to argue that the petitioner has been guilty of suppression of a material fact. Had the demand notice/reminder been issued without being goaded by the said Circular but on the ground that the petitioner in terms of its Application and/or the Declaration/Undertaking was not qualified to obtain any benefit of the SFI Scheme and such notice had been made the subject matter of challenge without such application and/or such

declaration/undertaking being brought on record of the writ petition, the decision on the issue could have been otherwise.

33. However, in view of the nature of challenge laid in this writ petition, non-disclosure of the Application and/or the Declaration/Undertaking by the petitioner, in our considered opinion, does not amount to suppression of material facts warranting dismissal of the writ petition.

34. The issue is, thus, answered against the respondents.

Issues (b), (c) and (d)

35. These issues are taken up for consideration together for the sake of convenience. A decision on these issues would require us to look at the terms of the said Circular closely, which purports to have been issued with the approval of the DGFT. For ease of understanding and clarity, we quote the said Circular below in its entirety:

> "POLICY CIR NO.25/2007, DT.01/01/2008
>
> Service not originating from India and Served From India Scheme (SFIS) for service providers, clarification thereof.
>
> Attention is invited to Served from India Scheme. It is mentioned in Para 3.6.4 of Foreign Trade Policy that Served from India scheme's objective is promotion of 'export of services' that are originating from India.
> 2. It has been brought to the notice of DGFT that applications have been received for grant of benefits under the scheme even where 'export of service from India' does not take place, although foreign exchange may have been earned. The issue was deliberated in the Port Officer's Meeting held on 14.12.2007. Instances like development of software

exclusively by an Indian wholly owned Subsidiary/Unit overseas (or by other Foreign Service Providers) and the sale of such software in International markets would lead to earning of foreign exchange for the Indian Company. However such providing of software service does not originate in India and cannot be covered under SFIS scheme for grant of benefits.

3. After due deliberations, with respect to services not originating from India, it has been decided that the following principles be applied while finalizing the claims.

(a) While examining the claim of Service Providers, the objective of promotion of export of services from India should be kept in mind.

(b) Services not originating from India would not be entitled for SFIS benefits.

(c) The definition of Services Provider, as given in Para 9.53 of FTP 2004-2009, clearly stipulates that supply of a service 'from India' is the first condition.

Thus payment might have been made by a service provider in India to a Foreign Service Provider, who has provided some part service in the foreign country. Such services provided abroad cannot be counted as 'Services originating from India', and hence would not be eligible for benefits under SFIS Scheme. Some other instances are detailed below.

i. Telecom Service providers earn Foreign Exchange (FX) for providing service that includes services not originating from India (e.g. global roaming charges). Such receipts of FX are not eligible for SFIS. Thus, FX earned would be mean 'receivables' minus 'payables' in a particular year, for telecom services. This shall also apply to Software and other service providers.

ii. Airlines, Shipping Lines Service Providers provide services which include services provided from Country X to Country Y routes (not touching India at all). Such services are not originating from India. Accordingly only receipts of FX for providing services from India (e.g. routes originating from India or touching India as per route charter) are entitled and therefore, route-wise bifurcation should be called.

This issues with the approval of the DGFT."

36. Validity of the said Circular is questioned by the petitioner on the ground that the same being administrative or executive in

nature, and not statutory in character, any attempt to add to or amend the SFI Scheme cannot take away the benefit conferred under the SFI Scheme by the FTP 2004-2009; and reliance in this regard has been placed on the decision of this Court in **Atlantic Shipping Pvt. Ltd.** (supra). The contention is sought to be countered by the respondents by arguing that the said Circular is merely clarificatory and not amendatory, and therefore will apply with retrospective effect.

37. In course of hearing we had called upon Mr. Singh to place before us the relevant records pertaining to the said Circular. The primary intention was to ascertain whether the said Circular was issued with the approval of the DGFT. Perusal thereof reveals this. On 28th December, 2007, Mr. A.K. Singh, Joint Director General of Foreign Trade, placed the following note before the DGFT:

> "Draft Policy Circular for SFIS has been attempted, in line with the decision recorded for POM dt 14/12/07.
> Submitted for approval, pl."

Thereupon, the DGFT appears to have endorsed on 1st January, 2008 as follows:

> *"As slightly modified"*.

It was thereafter that the said A.K. Singh signed the document and directed for its *"Web Hosting"*. In such circumstances, we are

inclined to record a satisfaction that the said Circular was not issued keeping the DGFT in the dark.

38. However, an interesting twist can be discerned if the decision taken in the Port Officers Meeting dated 14th December, 2007 is perused. We consider it appropriate to quote the relevant portion thereof below:

> *"c. Services not originating from India would not be entitled for SFIS.*
> *i. ****
> *ii. Airlines, Shipping Lines provide services which include services provided from Country X Country Y routes (not touching India at all). Such services are not originating from India. Accordingly only receipts of FX for providing services from India (i.e. routes originating from India or touching India as per route charter) are entitled and therefore, route-wise bifurcation should be called. Even in cases where RAs may have already granted SFIS benefits earlier, (including under the then EXIM policy (RE20003), this exercise should be done and adjustment of excess grant in previous years may be carried out within the next 3 months. A compliance report may be submitted to DG by Mar 2008.* ***Action: All RAs.****"*
>
> (bold in original)

39. The relevance of the aforesaid extract may immediately be noticed. The decision taken in the Port Officers Meeting on 14th December, 2007, as we read it, did not intend the exercise contemplated thereby to be restricted to claims which were yet to be finalized, but was required to be extended even to cases where SFI Scheme benefits had been granted earlier. What we need to find out is whether the said Circular simply toes the line of the said decision or says something which is at variance with the latter. What

slight modification the DGFT suggested of the *"Draft Policy Circular"* is unknown, since such draft has not been placed before us. We propose to come back to this point after taking note of certain relevant decisions of the Supreme Court on the tests that ought to be applied for ascertaining whether a clarification of the law that has been made is in reality clarificatory or amendatory.

40. In its decision reported in (2020) 4 SCC 484 (**Gelus Ram Sahu vs. Surendra Kumar Singh**), the Court had the occasion to observe that:

> "clarificatory notifications are distinct from amendatory notifications, and the former ought not to be a surreptitious tool of achieving the ends of the latter".

This statement was preceded by the following observation:

> "24. 'Clarificatory' legislations are an exception to the general rule of presuming prospective application of laws, unless given retrospective effect either expressly or by necessary implication. In order to attract this exception, mere mention in the title or in any provision that the legislation is 'clarificatory' would not suffice. Instead, it must substantively be proved that the law was in fact 'clarificatory', …"

While so observing, the Court affirmed its earlier decision reported in (2007) 9 SCC 665 (**Virtual Soft Systems Ltd. vs CIT**) where it was held that:

> "50. *** It is the well-settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statute itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory.

> 51. Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods."
>
> (emphasis ours)

41. We may also take note of the decision reported in (2009) 5 SCC 46 [**Atul Commodities (P) Ltd. vs. Commissioner of Customs**] where the Supreme Court had the occasion to observe that:

> "31. Under Para 2.3 of FTP (2004-2009) DGFT is empowered to interpret the Policy. If any doubt or question arises in respect of interpretation of any provision in FTP or in the matter of classification of any item in the ITC (HS) or in the Handbook, the said question or doubt shall be referred to DGFT, whose decision thereon shall be final and binding."

Thereafter, based on its consideration of provisions in section 5 and section 6(3) of the FTDR Act read with paragraph 2.3 of the FTP 2004-2009, it was reiterated that there is a clear demarcation between an amendatory provision and a clarificatory provision. The power to amend the FTP (Exim Policy) is exclusively vested in the Central Government whereas the power to clarify is vested in the DGFT.

42. In view of the law laid down in **Atul Commodities (P) Ltd.** (supra), if there be any doubt or question in respect of interpretation of any provision in the FTP, the DGFT has the authority to

interpret the same and provide suitable clarification. Therefore, *per se*, a purported clarification of the SFI Scheme issued upon approval by the DGFT is not impermissible. However, whether such clarification really clarifies or brings about an amendment of the terms of the SFI Scheme needs to be examined. We would also add that in so examining, the terms in which the clarification are worded would assume significance. Looking at the clarification and blindly applying it to cases not covered thereby without application of mind would not be a permissible act. For such purpose, every such clarification and in this case the said Circular must be read in its entirety.

43. Although following the guidance received from the aforesaid decisions we agree with the respondents that the said Circular is merely clarificatory, we are as of necessity tasked to analyze its contents to ascertain whether it could be made applicable to the petitioner, in a way, to withdraw a benefit that was granted to it earlier on its understanding and working of the terms of the SFI Scheme. In other words, even if the said Circular were clarificatory and despite clarifications being normally retrospective, it would need examination whether such clarification is intended to cover only pending claims yet to be finalized, or whether by reason of such clarificatory circular, settled and/or closed claims could be reopened.

44. Having read the said Circular in between the lines, we may now proceed to record our reasons to reach our conclusions.

45. Recital of the said Circular envisaging that the same was issued as a clarification of the SFI Scheme notwithstanding, we are not to be bound by such recital but as guided by the aforesaid decisions of the Supreme Court its contents have to be analyzed to find out whether (i) it is clarificatory in nature; and (ii) even though clarificatory, whether the same is applicable without restrictions. As earlier observed, we have little reason to doubt that the said Circular only highlighted what was implicit in the SFI Scheme. What would "Served From India" mean required a clarification and it was, accordingly, clarified by the DGFT that where *"export of service from India does not take place, although foreign exchange may have been earned"*, such of those services not originating from India (emphasis ours) would not qualify for the benefit under the SFI Scheme. Based on such clarification, it is indeed arguable as to whether the petitioner was qualified to seek the benefit of the SFI Scheme having regard to its admission that in the nature of export of services undertaken by it, the routes neither originated from India or touched India.

46. However, sight cannot be lost of two important aspects that appear on a bare reading of paragraphs 2 and 3 of the said Circular. At paragraph 2, it has been noted that *"applications have been*

received for grant of benefits under the scheme even where 'export of services from India' does not take place, although foreign exchange may have been earned" (emphasis ours). On consideration thereof, the decision crystalized in paragraph 3 is that *"the following principles be applied while finalizing the claims"* (emphasis ours).

47. Having regard to the above, the conclusion seems to be inescapable that though the DGFT by issuing the said Circular sought to clarify the terms of the SFI Scheme but such Circular was intended to be implemented to decide claims for grant of benefits under the SFI Scheme which were not finalized as on date the said Circular was issued. Had the DGFT intended to reopen claims which had already been finalized, we are inclined to the view that paragraph 3 of the said Circular, if not also paragraph 2 thereof, would have been differently worded to carry forward such an intention. The words *"while finalizing the claims"* definitely would pertain to claims which have not yet been finalized on the date the said Circular was issued and could not have been stretched to take within its coverage settled and/or closed claims. We are also of the view that the terms of the said Circular being at variance with the decision taken in the meeting of the Port Officers dated 14th December, 2007, where it was decided to undertake the exercise *"even in cases where RAs may have already granted SFI Scheme benefits earlier"* (emphasis ours), the said Circular would prevail over the said decision; consequently, it

would logically follow that it was never the intention of the DGFT while approving the said Circular to permit an exercise of reopening settled and/or closed cases.

48. Our attention has also been drawn to a further decision taken in the meeting of the Port Officers dated 25th November, 2008, where on Agenda Point No.3 pertaining to SFI Scheme, it was recorded that *"RAs have been advised to make recoveries wherever excess grant of benefits may have taken place earlier"*. This meeting too was chaired by the said A.K. Singh. Although it is recorded that the minutes had the approval of the DGFT, no such approval has been placed before us. Even otherwise, any statement recorded in the minutes of the meeting of the Port Officers dated 25th November, 2008, which is clearly contrary to the said Circular cannot be binding on any party. We unequivocally record that the said Circular does not, either expressly or by necessary implication, endorse the decision taken in the meeting of the Port Officers dated 14th December, 2007 and in the absence of any stipulation in the said Circular authorizing reopening of claims that have been settled and/or closed, it seems to us to have been impermissible to again take a decision in the meeting of the Port Officers dated 25th November, 2008 contrary to the terms of such circular and in the absence of issuing a further clarificatory circular.

49. We, thus, hold on the terms of the said Circular that though it is clarificatory in nature, it does not have retrospective operation. As such, it was not open for the third respondent to issue the demand notice and the reminder to recover Rs.27,40,35,827/- from the petitioner acting on the minutes of the meeting of the Port Officers dated 25th November, 2008.

50. Mr. Singh's contention, recorded in paragraph 27(a) and (c) supra does not advance the case of the respondents. We reiterate, the terms do not relate to cases settled and/or closed. Also, the contention recorded in paragraph (b) is of no assistance to the respondents. Benefit claimed in terms of the SFI Scheme was settled in favour of the petitioner without raising any question. It is an official act to which a presumption of legality is attached. If a benefit has been erroneously extended by the respondents, they can recover such benefit only if law authorizes them to do so but not otherwise.

51. Now, looking at the first paragraph of the demand notice, it is revealed as follows:

> "With reference to the subject mentioned above, I am directed to invite your attention to Para 3.(ii) of Policy Circular No.25 (RE-2007) 2004-2009 dtd. 01.01.2008 wherein it has been clarified that **receipt of foreign exchange for providing services from India (i.e. routes originating from India or touching India as per route charter) are only entitled for benefit under SFIS**."
>
> (bold in original)

It is, therefore, clear that but for the said Circular, the demand notice would not have been issued. The source of the authority of the third respondent to issue the demand notice is the said Circular and in view of what we have held above, on our analysis of paragraphs 2 and 3 thereof, settled and/or closed claims could not have been reopened. Since the clarification flowing from the said Circular was intended to be applicable only in respect of claims which had not been finalized, the third respondent erred in the exercise of his jurisdiction in issuing the demand notice/reminder.

52. Since the said Circular does not, in our view, take away the benefits that have accrued on the basis of the SFI Scheme prior to the contents thereof being clarified by the said Circular, we see no reason to hold such circular to be *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India as well as section 5 of the FTDR Act and paragraph 3.6.4 of the FTP 2004-2009. However, the demand notice dated 28th January 2010 and the reminder dated 31st May 2010 being unauthorized, are invalid in law and inoperative; hence, the same deserve to be set aside.

53. Issues (b), (c) and (d) are answered accordingly.

Issue (e)

54. The demand notice dated 28th January 2010 and the reminder dated 31st May 2010, for the reasons as aforesaid, are set aside.

55. The petitioner is discharged from the undertaking given by it at the time of admission of the writ petition on 14th September 2010.

56. However, since it appears to be the case of the respondents that the petitioner was disqualified, even on the basis of the contents of the Application and/or Declaration/Undertaking given by it while obtaining benefits under the SFI Scheme, the respondents may proceed against the petitioner to take away such benefits only if such an action is permissible in law.

OUTCOME:

57. The writ petition stands allowed to the extent mentioned above. However, the parties shall bear their own costs.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**

LATER**:**

58. Mr. Thakkar, learned advocate appearing for the Union of India prays for stay of operation of this order. The prayer is considered and refused.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**