

Clarificatory circular by DGFT cannot retrospectively amend or take away the benefits granted – Bombay HC

22 February 2022



Summary

The Bombay High Court (HC) has held that a clarificatory circular issued by the Directorate General of Foreign Trade (DGFT) cannot retrospectively amend or take away the benefits granted under the Served From India (SFIS) scheme. The HC stated that the DGFT has powers to issue clarification but cannot retrospectively amend the provisions. The HC further ruled that since the circular does not take away the benefits accrued, it cannot be said to be ultra vires the provisions of the Constitution of India and the Foreign Trade Policy (FTP).

Facts of the case

- The petitioner¹ is engaged in rendering maritime transport services.
- The petitioner has challenged² the policy circular³ issued by the DGFT⁴ curtailing the benefits granted to the exporters under the SFIS scheme⁵ and has demanded customs duty along with interest on the benefits availed. The petitioner contended that DGFT cannot take away benefits conferred under FTP⁶ by way of a circular.
- The petitioner stated that as the maritime transport services were not excluded from the ambit of SFIS scheme, it had been correctly granted SFIS scrips.
- The petitioner submitted that the circular was applicable on pending claims and not on licences already granted in the past.
- Further, it was also submitted that the DGFT had no powers⁷ to recover any Customs duty benefits granted to an importer. Thus, the demand notice, as well as the reminder issued, are without any authority of law and liable to be set aside.
- **No suppression of material facts:** The nature of challenge i.e., non-disclosure of application and/or declaration/undertaking by the petitioner does not amount to suppression of material facts. The allegation of authorities is too far-fetched as the benefit was granted but was taken away by way of a circular, which is under challenge in the present case.
- **Power to clarify and not amend:** The provisions⁹ clearly differentiate an amendatory provision and a clarificatory provision. The power to amend the FTP is exclusively vested with the Central Government whereas the power to clarify is with DGFT. If there is any doubt or question in respect of the interpretation of any provision in the FTP, the DGFT has the authority to interpret the same and provide suitable clarification. Therefore, a purported clarification of SFIS scheme issued upon approval of DGFT is not impermissible, however, whether such clarification really clarifies or brings about an amendment of the terms of the SFIS Scheme needs to be examined.

Bombay HC observations and ruling⁸:

¹ Essar Shipping Limited

² Writ Petition No. 1335 of 2010

³ Policy Circular No.25 of 2007 dated 1st January 2008

⁴ Director General of Foreign Trade

⁵ Served from India Scheme

⁶ Foreign Trade Policy (FTP) 2004-09

⁷ Foreign Trade (Development & Regulation) Act, 1992

⁸ Judgment dated 8 February 2022

⁹ Section 5 and section 6(3) of the FTDR Act read with paragraph 2.3 of the FTP 2004-2009

- **No intention to open settled/closed claims:** Though the circular seems to clarify terms of SFIS scheme, but such circular is intended to be implemented on claims not finalised as on the date of circular. The words 'while finalising the claims' pertains to claims that have not been finalised on date and could not be stretched to take within its coverage the settled and/or closed claims. Hence, the DGFT never intended to reopen settled and/or closed claims.
- **Recovery as per law:** The benefit under SFIS scheme was settled in favour of the petitioner without raising any question. If a benefit has been erroneously extended, it can be recovered only if the law authorises the authorities to do so but not otherwise.
- **Circular does not have retrospective operation:** The circular is clarificatory in nature but does not have any retrospective operation. Accordingly, the demand notice/reminder would not have been issued. The demand notice and reminder being unauthorised, are invalid in law and inoperative and hence, the same to be set aside.

Our comments

Earlier, it had been held by the Apex Court in case of Atul Commodities Pvt. Ltd.¹⁰ that there is a clear demarcation between an amendatory provision and a clarificatory provision. The power to amend the FTP is exclusively vested in the Central Government and it is not given to the DGFT, whereas the power to clarify is vested in the DGFT.

Recently, even the Bombay High Court in case of Atlantic Shipping Private Limited¹¹ had held that the provisions of the FTP cannot be amended by issuing a circular and the amendment in policy decisions has to be carried out only by the Central Government.

The present decision by the Bombay HC aligns with the above judgment and is a welcoming decision that shall provide due relief to businesses.

¹⁰ 2009 (2) TMI 18 - SUPREME COURT

¹¹ Writ Petition No.1827 of 2019

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