IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1960 OF 2024

Essar Shipping Limited .. Petitioner

Versus

1. Union of India
through the Joint Secretary
Department of Commerce

2. Director General of Foreign Trade

3. Zonal Additional Director General

4. Deputy Director General of Foreign Trade

5. Joint Director General of Foreign Trade ... Respondents

Mr. Prithwiraj Choudhury *a/w. Archit Virmani and Atul Gupta, for Petitioner.*

Mr. Jitendra Mishra *a/w. Ashutosh Mishra, Rupesh Dubey, Vikas Salgia, for Respondents.*

CORAM : B. P. COLABAWALLA AND
SOMASEKHAR SUNDARESAN, JJ.

Reserved on : January 20, 2025

Pronounced on : February 7, 2025

Judgement : (Per, Somasekhar Sundaresan, J.)

1. Rule. Respondents waive service. Rule made returnable forthwith. With the consent of the parties taken up for final hearing.

Context and Factual Background:

2. This is a Writ Petition challenging the issuance of a show cause notice dated January 13, 2023 ("***Impugned SCN***") issued by the Director General of Foreign Trade ("***DGFT***") to the Petitioner, Essar Shipping Ltd. ("***Essar***") under Section 14 of the *Foreign Trade (Development and Regulation) Act, 1992* ("***FTDR Act***") and subordinate law thereunder. The allegation is that Essar availed of the benefits under the Foreign Trade Policy 2004-2009 ("***FTP***") by furnishing information, making declarations and relying on certificates, that were allegedly wrong.

3. For the reasons set out in this judgement, we hold that the Impugned SCN deserves to be quashed and set aside, since it is primarily based on a mis-reading of a judgement of a Learned Division Bench of this Court, in a Writ Petition filed by this very Petitioner, namely, Writ Petition No. 1335 of 2010 decided on February 8, 2022 ("***DB Judgement***"). In fact, the Impugned SCN is untenable by reason of the very decision of the Learned Division Bench, as would be seen from the analysis below.

4. Under the FTP, a "Served from India Scheme" ("***SFIS***") was formulated. The intent was to incentivise a unique brand identity for export of services and to create a "***Served From India***" brand. Under the SFIS, on

the basis of the quantum of free foreign exchange earned out of services exported in the previous financial year, "duty credit scrips" would be issued to the service exporters for a value equivalent to 10% of the export earnings. These 'scrips' could then be used to offset Customs Duty payable on imports of any capital goods, spares, equipment and the like.

5. At all times relevant to this Petition, Essar was in the business of providing shipping services to clients – an export of services by an Indian company. It is common ground that export of shipping services was eligible under the SFIS. Ships owned or chartered by Essar would ply in international waters and deliver goods i.e. "freight" to consignees around the world. Essar's clients availed of such services to export goods from India or to import goods into India. Some international clients would also avail of services between intermittent stops on the routes of such ships – on its voyage, a ship may carry freight between two foreign countries. For example, if a ship were to sail from Singapore to Mumbai, some clients may consign freight from Singapore to Colombo, and the ship would shed such cargo in Colombo *en route* to Mumbai. Essar would earn foreign exchange from such services too. Based on all earnings from export of services including from fright between two foreign countries, Essar sought duty credit scrips linked to foreign exchange earnings between 2006 and 2007.

The duty credit scrips were also utilised for setting off Customs Duty on imports from time to time.

6. The DGFT's case is that the file opened on May 3, 2007 by Essar seeking SFIS benefits ("***SFIS File***"), containing documents, information and certificates, was misleading. The Impugned SCN was issued, evidently over 15 years later. The basis of alleging that the SFIS File was untruthful, is based on the assertion that Essar's certification of the SFIS File being in conformity with the SFIS, was a material mis-statement.

Policy Circular of August 1, 2008:

7. The basis for such a view is rooted in the change in policy by a Policy Circular No. 25/2007 dated January 1, 2008 ("***Policy Circular***"). Under the Policy Circular, based on deliberations held on December 14, 2007, the DGFT took a view that the earnings from export of services that would qualify for the benefit of duty credit scrips, ought to be from exports that physically "originate ***from*** India". The Policy Circular stipulated that "while examining the claim of "Service Providers" for duty credit scrips, there ought to be a connection to India which providing services. Specifically, with regard to airlines and shipping services, it was stated that ***"services provided from Country X to Country Y routes (not touching India at all)"*** are not

services originating from India. Only the receipts of foreign exchange from services on routes originating from India or touching India as per the route applicable to the consignment would be entitled for benefit of duty credit scrips. Therefore, it was stipulated in the Policy Circular that a route-wise bifurcation should be called for when examining and finalising any claims for duty credit scrips. In the FTP for 2009-2014, a specific amendment was made, to explicitly exclude services on routes not touching India from the ambit of the SFIS.

8. On December 8, 2009, the DGFT issued a letter to Essar asking for a break-up of foreign exchange earned between April 1, 2006 and March 31, 2007, in line with the clarification issued in the Policy Circular. After receiving such data, the DGFT issued two notices dated January 28, 2010 and May 31, 2010 ("***Recovery Notices***") seeking recovery of Customs Duty benefits along with interest, to the extent the duty credit scrips were attributable to the foreign exchange earnings from routes that were serviced between two foreign countries, not touching India.

9. The basis for such notices was the Policy Circular that clarified the SFIS. Efforts from the industry seeking to protect the duty credit already

availed of and already utilised prior to the Policy Circular, too did not lead to any change in the stance of the DGFT.

10. In light of the stand taken by DGFT, Writ Petition No. 1335 of 2010 was filed by Essar, on the premise that the definition of "Service Provider" in the SFIS would make it clear that what mattered was that the exporter was Indian, and not the routes on which the ship plied for earning the foreign exchange. It was argued that the export contracts were booked by the Indian company and foreign exchange was earned by the Indian company, and earnings from such export of services would be aligned with the policy objective of the SFIS. The Policy Circular was attacked on the premise that it was a substantial amendment, disguised as a clarificatory amendment, and that it required due process for issuance of any amendment. It was argued that a circular could not be the instrument to make such amendments. The constitutional validity was therefore challenged since the Policy Circular was utilised as an instrument of retrospective amendment, rendering it arbitrary.

11. The Policy Circular was defended by the DGFT as being clarificatory and not substantive in its amending effect, thereby allowing it to be retrospective. The records and files of the DGFT were called for by the

Learned Division Bench of this Court, to examine the real intent and policy purpose behind the Circular. Eventually, in the DB Judgement, the Learned Division Bench was pleased to rule that the Policy Circular was clarificatory in its terms, but was intended to be a prospective clarification. It was noted that in the discussions held on December 14, 2007, it had originally been proposed that even settled benefits already granted and utilised should be revisited, and duty credit granted in the past should be reversed within three months. However, the final Policy Circular did not make this stipulation.

12. The DB Judgement held that the Policy Circular inherently contained the stipulation that the clarified position would be adopted only when examining cases that are still pending with the DGFT. The DB Judgement clearly ruled that settled and closed claims could not be re-opened. The Policy Circular was held to be constitutionally valid as not being arbitrary, since it was not retrospective in its reach, and since it only applied to applications that were yet to be examined and finalised. Consequently, the Recovery Notices issued to Essar were quashed and set aside.

13. The DB Judgement held that if the Recovery Notices had not been motivated by the Policy Circular but had been based on the ground that Essar was not otherwise qualified to obtain benefits under the SFIS, the

Court's view would have been otherwise. Specifically, it was ruled that the benefits had been examined and settled in favour of Essar by the DGFT on the basis of its understanding of the pre-Policy Circular position that the DGFT had, without any question being raised. The processing of such benefits was an official act, to which a presumption of legality is attached, and on this ground, the Recovery Notices were quashed.

Basis of Overcoming the DB Judgement:

14. It is one paragraph in the DB Judgement that the Learned Counsel for DGFT relies on, to defend the Impugned SCN . This is Paragraph 56, which bears reproduction:-

> *"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."*
>
> *[Emphasis Supplied]*

15. The import of this paragraph is easy to discern. The DB Judgement, having ruled on how to read and apply the Policy Circular, (even quashing the Recovery Notices) left a limited scope for penal or remedial intervention in Paragraph 56 of the DB Judgement. Such intervention would necessarily be dependent on any mis-statement or suppression in the information

provided by Essar at the time it applied for the benefits, ***outside of*** the scope of what was dealt with and ruled upon by the DB Judgement.

16. The Policy Circular has already been upheld. It is not in our remit to examine whether the decision to exclude Indian aviation companies and Indian shipping companies that make a mark globally by serving foreign clients on routes between two foreign countries, was a valid one. Whether such information would turn the needle against a shipping company that already availed of the duty credit scrips, is also a matter that has already been ruled upon. For any show cause notice to be issued in reliance on Paragraph 56 of the DB Judgment, despite the explicit ruling on the prospective nature of the clarificatory Policy Circular, and the resultant quashing of the Recovery Notices, there ought to have been a suppression of information outside of the route-wise break up, for such action to be tenable.

17. It is seen from the DB Judgement that the Learned Counsel for the Union of India had sought a stay on the operation of the DB Judgement, and it was turned down. Learned Counsel for the Respondents in this Petition confirms that no appeal was actually filed – meaning thereby, that the DB Judgement became final. Therefore, to then issue the Impugned SCN in January 2023, there would need to be material outside the scope of what

was already considered and ruled upon in the DB Judgement. For the DGFT to now state that Essar's earlier confirmations that the data provided in the SFIS file had been in conformity of the SFIS, automatically resulted in a material mis-statement, is wholly impermissible and untenable.

18. The DB Judgment has already ruled that closed and settled claims of the past cannot be re-opened and that they were legitimate. It would also stand to reason that the term "Service Provider" contained in Paragraph 9.53 of the FTP had not made any exception for foreign exchange earned by an Indian shipping company on the basis of routes outside Indian territory. Paragraph 9.53(iii) defines a "Service Provider" to mean a person providing *"Supply of a 'service'* ***from*** *India* ***through*** *commercial or physical* ***presence in territory of any other country****"*. Shipping lines and the DGFT had always understood this to cover services from Country X to Country Y (both countries outside India), until the Policy Circular was issued. That Policy Circular has been held to be prospective in character by the DB Judgement, which has not even been challenged.

19. A careful scrutiny of the Impugned SCN shows that it does not allege any mis-statement other than the assertion by Essar that the SFIS File was

in conformity with the SFIS. Such an approach in the Impugned SCN is directly in the teeth of the DB Judgement, and is completely untenable.

Conclusion and Direction:

20. In these circumstances, we have no hesitation in holding that the Impugned SCN is covered by *res judicata*, and is unreasonable and arbitrarily attempts to re-open an issue already closed. The Recovery Notices having been quashed, the Impugned SCN is a circumvention of the effect of such quashing. Paragraph 56 of the DB judgment is of no assistance to the Respondents. Consequently, the Impugned SCN is hereby quashed and set aside.

21. Rule is made absolute and the Writ Petition is disposed of in the aforesaid terms. No order as to costs.

22. All actions required pursuant to this order shall be taken upon receipt of a downloaded copy of this order as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.] **[B.P. COLABAWALLA, J.]**