

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 503/2021

Smarte Solutions Pvt. Ltd,
 A Private Ltd. Company registered
 under the provisions of the Companies
 Act, having its registered address at 1101,
 Vishwaroop IT Park, Navi Mumbai – 400 703.

...**PETITIONER**

VERSUS

1. Union of India through,
 - (a) The Joint Secretary,
 Department of Revenue, Ministry of Commerce,
 46/North Block, New Delhi – 110 001.
 - (b) The Joint Secretary,
 Ministry of Law, Justice & Company
 Affairs, having his office at Ayakar Bhavan,
 M. K. Road, Churchgate, Mumbai – 400 020.
2. Director General Foreign Trade Policy,
 Udyog Bhawan, H. Wing, Gate No.2,
 Maulana Azad Road, New Delhi – 110 011.
3. Regional Authority,
 Office of Addl. Director Gen. of Foreign Trade,
 Joint Director General of Foreign Trade,
 CGO Office, New Building,
 South East Wing, New Marine Lines,
 Churchgate, Mumbai – 400 020.

...**RESPONDENTS**

 Ms. Meetika Baghul, Advocate a/w. Ms. Anveshika Sing, Advocate i/b.
 Ms. Sharon Patole, Advocate for petitioner.
 Ms. Shehnaz V. Bharucha, Advocate a/w. Ms. Priyanka Chavan, Advocate i/b.
 A. A. Ansari, Advocate for respondents.

CORAM : **S.V. GANGAPURWALA AND**
VINAY JOSHI, JJ.

CLOSED FOR JUDGMENT : **08.04.2022**
DATE OF JUDGMENT : **27.07.2022**

JUDGMENT (PER VINAY JOSHI, J.)

Rule. Rule made returnable forthwith. Heard finally by consent of the learned counsel appearing for the parties.

2. The petitioner–Company raises a challenge to the non-consideration of the benefits under the Services Export from India Scheme (SEIS) for not holding a valid Import Export Code (IEC) number, at the time of rendition of services exported from India.

3. The petitioner is a Private Limited Company registered under the provisions of the Companies Act, 1956. The petitioner-Company is engaged in providing high quality data services. The petitioner’s services i.e. market research services falls under the list of services as per Appendix 3D which are eligible for SEIS benefits, as introduced under the Foreign Trade Policy 2015-20 (FTP).

4. After rendering services, the petitioner-Company tried in filing SEIS application for the year 2015 – 2016 and 2016-2017 before 31st March, 2019. However, the On-line system did not accept the petitioner’s application and displayed an error message as “Not a valid IEC”. The petitioner has approached to the Computer Cell at the office of respondent No. 3 – Director General of Foreign Trade (DGFT), but the problem was not solved. Since the petitioner was unable to make an On-line application, it has tendered it manually. However, the

Authorities of DGFT refused to entertain the same. Therefore, the petitioner has dispatched the application along with relevant documents through Post.

5. The petitioner has fulfilled the eligibility criteria as a Service Provider to apply for SEIS embodied under the FTP. The petitioner had approached to the Policy Relaxation Committee of DGFT vide application dated 22nd July, 2019. However, it was informed that the petitioner-Company should have held a valid IEC number at the time of rendition of export services, accordingly, the application was disposed of by the Policy Relaxation Committee of DGFT vide order dated 14th November, 2019. The petitioner has filed review application, however it was similarly disposed of vide order dated 3rd March, 2020. Being aggrieved by said rejection, the petitioner-Company has invoked the writ jurisdiction of this Court.

6. The petitioner would submit that the object of FTP is to encourage exports from the India. The petitioner's eligibility for availing benefit under SEIS was rejected merely on technicalities that the petitioner did not hold an active IEC number on the date of rendition of services. As per para 3.08 of the FTP, one of the condition to avail the benefit under the SEIS is that the service provider should have an active IEC number at the time of rendering services for which SEIS benefits have been claimed. The petitioner had obtained an IEC number on

12th March, 2018 i.e. before applying for the benefit of the scheme. It is submitted that the requirement of obtaining an IEC number at the time rendering services was not the statutory requirement. The requirement of IEC number has been envisaged in Section 7 of the Foreign Trade (Development and Regulation) Act, 1992 ('FTDR Act') which reads as below:-

"7. No person shall make any import or export except under an Importer-exporter Code Number granted by the Director General or the officer authorised by the Director General in this behalf, in accordance with the procedure specified in this behalf by the Director General.

***Provided** that in case of import or export of services or technology the Importer-exporter Code Number shall be necessary only when the service or technology provider is taking benefit under the foreign trade policy or is dealing with specified services or specified technologies."*

7. It is argued that, as per said provision the IEC number shall be necessary only when the service provider is taking benefit under the FTP i.e. the IEC number should have been held at the time of applying under the scheme. It is submitted that use of the words "only when" in the proviso to Section 7 of the FTDR Act has to be given an intended meaning which indicates the time period i.e. time of taking benefits under the FTP. Holding of an IEC number is mere procedural requirement which shall not be the basis for disallowing the exporters' right to apply for SEIS. The petitioner has complied with all the requirements of export of services, in which obtaining an IEC number was not a pre-condition.

8. It is argued that the condition regarding holding of an IEC number at the time of rendering services is contrary to the provisions of Section 7 of the FTDR Act. The condition embodied in para 3.08(f) of the FTP is against the very objective of the FTDR Act. The relevant provision of para 3.08(f) of the FTP reads as below:-

“3.08 Eligibility

(a)...

(b)...

(c)...

(d)...

(e)...

(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.”

9. It is argued that the FTP is notified by the Central Government in exercise of the powers conferred under Section 5 of the FTDR Act, therefore, policy notified under the FTDR Act should be in conformity with the provisions of the said Act. According to the petitioner by incorporating a policy condition under clause 3.08(f) of the FTP of holding an IEC number at the time of rendition of services, amounts to exceeding the Authority conferred under the FTDR Act. Inclusion of such excessive additional condition in delegated legislation is ultra-vires. It is submitted that the DGFT cannot frame conditions in contravention with the provisions of the FTDR Act. The FTDR Act is a principal legislation and the FTP is notified by drawing its power from Section 5 of the FTDR Act which

is delegated legislation.

10. The reply-in-affidavit has been filed by the the Deputy Director General of Foreign Trade, resisting the contents of the petition. It is submitted that as per para 3.08(f) of the FTP which came into force from 1st April, 2015, it is clear requirement to hold an active IEC number at the time of rendering services for which reward or benefit has been claimed under the scheme. The petitioner has rendered the services of export during the period from 2015 – 2018 whilst obtained an IEC number on 12th March, 2018. The petitioner has applied for the benefit on 27th March, 2019, whilst the FTP came into force prior to that on 1st April, 2015. It was within the petitioner's knowledge that it must possess an active IEC number at the time of rendering services in terms of the policy. It is submitted that the eligibility condition number 3.08(f) of the FTP for SEIS of holding an active IEC number at the time of rendering service is in consonance with Section 7 of the FTDR Act. It is denied that proviso to Section 7 speaks about holding an IEC number at the time of applying for benefits under the Scheme.

11. The petitioner contended that delegated legislation cannot be contrary to the original statute. The delegated powers are for making rules for carrying out the purpose of the Act without adding or substituting any right or obligation. There can be no

dispute about the said proposition of law. The only question falls for consideration is whether the eligibility criteria incorporated in para 3.08(f) of the FTP is inconsistent with Section 7 of the FTDR Act.

12. The learned counsel appearing for the petitioner has straneously argued that the proviso to Section 7 of the FTDR Act incorporates the condition of holding IEC number at the time of availing the benefit under the scheme. Much trace is laid on the words “only when” to contend that the term “when” indicates the time period i.e. time of taking benefits under the FTP. In the context, one has to read the entire section along with its proviso to cull out a true import thereof. Section 7 of the FTDR Act pertains to import-export code (‘IEC’) number and its requirement. The language employed in the Section is in negative form, which states that no one shall make any import or export except under a valid IEC number issued by the appropriate Authority. In other words, an import or export cannot be made without holding an IEC number. An exception has been carved out to the Section by introducing a proviso. The proviso clarifies that an IEC number is necessary only when the import or export is of services or technology and the service provider is taking benefits under the FTP scheme. In case, the service provider is not availing benefits under the scheme, there is no requirement to hold an active IEC number.

13. In case at hand, admittedly, when the petitioner-Company has rendered the services, it did not have a valid IEC number, however while applying for the reward/benefit under the scheme, it has obtained an IEC number and applied accordingly.

14. Undoubtedly, in terms of eligibility Clause 3.08(f) of the FTP, the condition is of having an active IEC number at the time of rendering services for claiming reward. It is to be examined whether the said condition is inconsistent or casts an additional obligation on the exporter which was not intended or led under the principal statute. The learned counsel for the petitioner would submit that the FTP has been framed in pursuance of powers delegated under Section 5 of the FTDR Act. It is the prime submission that FTP being delegated legislation, it should be in conformity with the principal statute. In other words, by way of delegated legislation, additional rights or obligations cannot be imposed. In this regard, reliance is placed on the decision of the Supreme Court in case of *Kunj Behair Lal Butail and others Vs. State of H. P and others, AIR 2000 SC 1069*, wherein it is ruled that delegated power to legislate by making rules is for carrying out the purposes of the Act is a general delegation without laying down any guidelines. It cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

15. In reported case of *Supreme Court Employees Welfare Association Vs. Union of India AIR 1990 SC 334*, the Supreme Court ruled that a delegated legislation or a subordinate legislation must confirm exactly to the power granted. Meaning thereby, the rules must be consistent with the parent law under which power has been derived. In another decision of the Supreme Court in case of *General Officer Commanding-in-Chief Vs. Dr. Subhash Chandra Yadav, AIR 1988 SC 876*, it has been ruled that, before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule.

16. In the light of said legal position, we have examined the eligibility Clause 3.08(f) of the FTP requiring IEC number at the time of rendering services. We have particularly examined whether said condition is consistent with the statute or it has exceeded the Authority under which delegation was made. Reverting to the Section 7 of the FTDR Act, it pertains to the mandatory requirement of IEC number for making import or export of general goods. However, exception has been carved out by the proviso particularly in cases of import or export of services or technology. In the said eventuality, IEC number shall be necessary only when the service

provider is taking the benefits under the FTP. The proviso does not lay down that the IEC number is essential at the time of rendering services of said specified kind. The requirement of IEC number is only for taking benefits under the scheme. Therefore, it is abundant clear that the eligibility criteria of Clause 3.08(f) of the FTP has imposed additional restriction of having IEC number at the time of rendering services which was not intent or purport of the statute. Therefore, we are of the considered view that the said condition is against the principal legislation and therefore, it cannot be termed as of mandatory nature for availing benefits under the scheme.

17. In that view of the matter, we hereby allow the petition and direct the respondents to consider the petitioner's application without insisting for an active IEC number at the time of rendering services. The respondents shall take appropriate decision within three months from the date of receipt of this order and shall communicate its decision to the petitioner.

18. Writ petition stands disposed of in above terms.

[VINAY JOSHI, J]

[S.V. GANGAPURWALA, J]

Gohane