

## UHDE India Pvt. Ltd. vs. Union of India & Others<sup>1</sup> – Bombay High Court

In a writ petition filed before the Hon'ble Bombay High Court, the issue was the eligibility of the Petitioner-Company to duty credit scrips under the Served From India Scheme ("SFIS"). Majority shareholding in the Petitioner-Company is with foreign persons, and the brand involved was one with overseas roots – therefore not regarded by the office of the Director General of Foreign Trade as an 'Indian Brand'.

The division bench of the Court, in its order dated 05.12.2014, held that the issue requires attention of and should be examined by the Ministry of Commerce, since the issue is one of policy and, so that any doubts as to the interpretation of Foreign Trade Policy ("FTP") and more particularly the SFIS are cleared.

### FACTS

1. The Petitioner-Company incorporated under the Companies Act, 1956, is engaged in wide range of engineering, procurement, construction and management services, as well as lumpsum turnkey execution of projects for various industrial plants, often together with its parent company (situated in Europe).
2. The Petitioner is a recognized export house for more than a decade, and since the year 2003-2004, has been applying for and consistently been availing benefits under the SFIS - the DGFT has since granted the Petitioner scrips. The Petitioner, on the basis of its entitlement under the SFIS applied for duty credit scrip (for the year 2012-13).
3. The Assistant Director General of Foreign Trade ("Asst. DGFT"), without providing an opportunity of hearing to the Company, rejected the application for grant of duty credit scrip and had also sought to recall the benefits (scrips) granted in previous years, on the ground that:
  - i. the Company does not represent an Indian brand (in support of this view, the minutes of the meeting dated 27.12.2011 of the Policy Interpretation Committee ("PIC") chaired by Director General of Foreign Trade ("DGFT") were relied upon); and
  - ii. the Company is not having majority of shareholding by an Indian or Indian firm.
4. Owing to lack of alternate efficacious remedy, the Petitioner-Company filed a writ petition before the Bombay High Court, challenging the communication by which its application was rejected, and SFIS scrips previously granted was sought to be rejected. Also challenged in the writ petition were the PIC minutes on the basis that these minutes had sought to amend / rewrite the FTP, which is illegal.

### JUDGEMENT

The Hon'ble Court disposed off the writ petition, and *inter-alia* held that:

1. The manner in which foreign trade needs to be developed and regulated is essentially decided by authorities under parliamentary statute. If such authorities can evolve any policy, it is equally open for them to consider the present issue of the Petitioner-Company and the Court must not examine these issues as not only these issues are intricate but, essentially of a policy decision and to be taken by the executive. It is in the larger public interest and of promoting foreign trade and equally developing but regulating it that the state or the Central Government must take such decisions.
2. The Secretary in Department of Commerce will hear the Petitioner-Company and consider the grievances raised by the Company, i.e. whether SFIS scrip can be granted in case of foreign shareholding in Indian Company and the interpretation to be placed on PIC minutes dated 27.12.2011 with regard to promotion of Indian brand.

<sup>1</sup> Writ Petition No.2011 of 2014

3. The decision of Ministry should be taken uninfluenced by any pleadings in Court (by Respondent) and stand of the DGFT reflected therein. Such decision is to be taken in terms of FTP and the matter is to be disposed off in the time-bound manner indicated.

## ELP COMMENTS

This judgment of the Bombay High Court is the first definitive pronouncement on the issue of grant of duty credit scrip in case of companies having foreign shareholding and a brand, not of Indian origin. Interestingly similar issue is pending in various writ petitions before the Delhi High Court.

The situation before the Bombay High Court involved the interpretation of the FTP, where the SFIS neither suggests examination of the shareholding of an applicant, nor is it restricted so as not to be available to a brand of overseas origin (the SFIS does not require the promotion of Indian brand). The discrimination introduced by the DGFT and its officers has no basis in the FTP. This judgement presents a Court-authored opportunity for affected parties to represent against the discrimination and resolve the concerns arising on the interpretation of the SFIS, more so since the judgment directs that the Ministry remain un-influenced by the submissions and pleadings before the Court. The services sector is a significant contributor to the nation's GDP and foreign exchange and parties have here the chance to support the theme of 'Make in India' and 'Served from India'.

In view of the clear directions from the High Court, it is incumbent on the Ministry to clear the doubts surrounding the SFIS and clarify its policy. It is hoped that the Ministry of Commerce will appreciate that the thrust of the Government of the day is to attract FDI, which cannot be such that a brand of overseas roots or having foreign shareholding is discriminated against and dis-incentivised for bringing in FDI into India.

## ELP'S ROLE

ELP had been involved in the matter from the beginning. The team devised the strategy to be adopted, advised the client, drafted petition and pleadings, briefed the senior advocate and appeared along with him before the Hon'ble Bombay High Court.

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