

## IEC required to be obtained by service providers only at the time of making the SEIS application and not when services are rendered

### Smarte Solutions Pvt. Ltd. v Union of India<sup>1</sup>

The Bombay High Court came to examine whether the eligibility criteria of mandatorily holding an Importer Exporter Code ('IEC') at the time of rendition of services [as incorporated in para 3.08(f) of the Foreign Trade Policy 2015-2020 ('FTP')], is inconsistent with the provisions of section 7 of the Foreign Trade (Development and Regulation) Act, 1992 ('FTDR Act').

#### Facts of the case

The question came to be examined in the factual background where the Director General of Foreign Trade ('DGFT') declined to consider the Services Export from India Scheme (SEIS) application filed by the petitioner for reasons of not holding a valid IEC number, at the time of rendition of services exported from India. The Petitioner only obtained the IEC at the time of filing of the SEIS application. The DGFT was of the view that as per the condition prescribed under para 3.08(f) of the FTP, the Petitioner should have obtained the IEC at the time of rendition of service.

#### The Petitioner argued that:

- Section 7 of the FTDR Act only requires the service provider to obtain the IEC when taking benefit under

the FTP, as is indicated by use of the words "only when" in the proviso to Section 7 of the FTDR Act.

- Holding of an IEC number is a procedural requirement which should not be the basis for disallowing the exporters their right to apply for SEIS who are otherwise eligible and fulfil all the conditions to avail the benefit of the scheme under the FTP which aims to promote exports from India. Denial of the SEIS benefit on procedural grounds bearing no consequence on the export of services defeats the objective of the scheme announced under the FTP.
- The condition of holding an IEC is embodied in para 3.08 (f) of the FTP. Section 5 of the FTDR Act, empowers the government to notify the FTP therefore, the policy notified under the FTDR Act should confirm with the provisions of the FTDR Act. Thus, the extension of the condition under the FTP of holding an IEC to the time of rendition of services is contrary to what is stipulated in the FTDR Act [which only provides for obtaining IEC at the time of claiming the benefit] amounts to exceeding the authority conferred to the Government under the FTDR Act. This would render the delegated legislation i.e., FTP, as ultra-vires the FTDR Act.

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<sup>1</sup> Writ Petition no. 503/2021



### The department argued that

- The eligibility condition in para 3.08(f) of the FTP for holding an active IEC at the time of rendering the service is in consonance with Section 7 of the FTDR Act. The proviso to Section 7 does not speak about holding an IEC at the time of applying for the benefits under the Scheme.

### **Held**

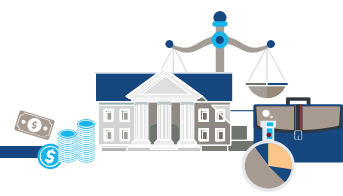
- The Hon'ble Bombay High Court held that section 7 of the FTDR Act pertains to the IEC and its requirement. It states that import or export from India cannot be made without holding an IEC number; however, an exception has been carved out in the proviso to the Section 7 of the FTDR Act. The proviso states that an IEC 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.
- On examination of the whether the eligibility condition incorporated in clause 3.08(f) of the FTP requiring the service provider to hold an IEC at the time of rendering services was consistent with the section 7 of the FTDR Act or if has it exceeded the authority delegated under Section 7 of the FTDR Act, the court concluded that by virtue of the exception carved out in proviso particularly in cases of import or export of services or technology, an IEC number is necessary only when the service provider is taking the benefits under the FTP.
- It was held that 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 was held to be abundantly 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 the intent or purport of the statute. Hence the condition in the FTP is not a mandatory condition.

- The court allowed the petition and directed the respondent to consider the petitioner's SEIS application without insisting for an active IEC number and to decide the application within three months from the date of receipt of this order.

### **Dhruva Comments:**

It is a settled principle of law that a delegated legislation cannot go beyond the provisions of the principal legislation. The Hon'ble High Court on this premise has read down the condition prescribed under the FTP to hold that the condition of holding an IEC at the time of rendition of services is declaratory and not mandatory. It would be interesting to see how the rights of the other applicants in similar circumstances would get impacted.

We would be happy to have a discussion, if any of your SEIS application has been rejected by DGFT on grounds of non-availability of IEC at the time of rendition of service.





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