

**Dlf Ltd. Vs. Union of India and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/907562](http://sooperkanoon.com/907562)

**Court :** Delhi

**Decided On :** Dec-24-2010

**Judge :** S. Muralidhar, J.

**Acts :** Foreign Trade (Development and Regulation) Act, 1992 - Sections 2 (g), 9(2), 9(4), 11

**Appeal No. :** W.P.(C) 48/2009 & CM 103/2009

**Appellant :** Dlf Ltd.

**Respondent :** Union of India and ors.

**Advocate for Def. :** Mr. A.S. Chandhiok; Mr. Ravinder Agarwal; Mr. Ritesh Kumar; Mr. Nitish Gupta, Advs.

**Advocate for Pet/Ap. :** Mr. S. Ganesh; Mr. Tarun Jain, Advs.

**Judgement :**

1. Does the sale of a residential building against the payment in free foreign exchange amount to service for the purposes of the grant of a Duty Free Credit Entitlement (DFCE) Certificate (duty free scrip) under the Served From India Scheme (SFIS) announced as part of the Foreign Trade Policy 2004-09 (FTP 2004-09)? This is the principal question that arises for consideration in the present writ petition, in which the communication dated 25/26th June 2008 issued by the Joint Director General of Foreign Trade (JDGFT) answering the question in negative has been challenged by the Petitioner DLF Ltd. The other questions are

whether the duty free scrip is a licence within the meaning of Section 2 (g) of the Foreign Trade (Development and Regulation) Act 1992 and whether the show cause notices dated 16th July 2007 sent to the Petitioner by the JDGFT proposing cancellation of the duty free scrips on the ground of misrepresentation of facts by the Petitioner are liable to be quashed?

## Factual Background

2. The Petitioner states that it is a company engaged in development and construction of residential and commercial properties in India and selling them to the customers in India and abroad. In terms of para 3.6.4 of the FTP 2004-09 and para 3.18 of the Hand Book of Procedures 2004-09, (HBP 2004-09) the Petitioner applied for the grant of DFCE certificate (or duty free scrip) under the SFIS against the exports made during the years 2003-04 and 2004-05. Pursuant thereto, the Directorate General of Foreign Trade (DGFT) granted the Petitioner two duty free scrips - one dated 4th February 2005 for Rs. 5,64,04,700/- and another dated 9th January 2006 for Rs. 7,62,60,848/-.

3. On 2nd November 2006, the JDGFT wrote to the Petitioner as under:  
"Gentlemen,

This has reference to the Licence No. 0510150403 dt. 4/2/05 under Served From India Scheme issued to you under our above-mentioned file No. The audit team of the Directorate General of Audit has pointed out that the foreign exchange earned certified by the CA includes receipt of remittances of sale consideration for immovable properties located in India purchased by the customers abroad. This has been mentioned somewhere in the annual report of the company.

You are requested to furnish your comments in this respect and if the CA certificate has not been issued properly, you are required to submit the custom duty along with interest within 30 days from the issue of this letter. The licence may not be utilised any further."

4. On the receipt of the above letter, the Petitioner on 10th November 2006 wrote to the Ministry of Commerce (MoC), Government of India seeking clarification on

the activities/services covered under the heading Real estate services mentioned in Appendix 10 at Serial No. 1(D) of the HBP 2004-09 of the Exim Policy. Serial No. 1(D) of Appendix 10 reads as under: "D. Real estate services

a. Involving own or leased property

b. On a fee or contract basis."

5. On 7th December 2006, the Deputy Director of the Department of Commerce, (Trade Policy Division), MoC wrote to the Petitioner as under: "Dear Sir,

Please refer to your letter no. nil dated 10 th November, 2006 on the above subject. In this connection, I would like to clarify that Real Estate Services contained in appendix 10 of the Hand Book of Procedure of Exim Policy are as per the classifications of services adopted under the General Agreement on Trade in Services (GATS) of the WTO vide document no. W/120. Detail description of the two sub-sectors of Real Estate Services i.e. (i) Involving own or leased property; and (2) On a fee or contract basis; are contained in UNCPC 821 and 822. A copy of UNCPC 821 and 822 is enclosed for your information."

6. It may be mentioned that the reference to UNCPC in the above letter is to the United Nations Central Product Classification, copies of the relevant pages of which were enclosed with the said letter. Group 821 of the UNCPC deals with Real Estate Services and Group 822 with Real Estate Services on a Fee or Contract basis. Sub-Class 82103 of the UNCPC includes sales of residential buildings and land. The said entry reads as under: "82103 Residential buildings and land sales Sales on own account of residential buildings and land in cases where the sales are treated as sales of trading stock by the seller, but not sales of property where the sales are disposals of the fixed assets of the selling unit. Examples of residential properties include houses with land, multiple dwelling buildings with land and individual dwelling units within such buildings, such as individual apartments or condominiums. Such property can be either leasehold or freehold. Also included are own account sales of residential buildings that have been constructed on contract by a construction unit for the selling unit and which are treated as trading stock by the seller.

Exclusion: Sales of property that has been physically constructed by the selling unit are classified in group 512 (Construction work for buildings)."

7. On 21st December 2006, the Petitioner wrote to the JDGFT drawing attention to the clarification dated 7th December 2006 received from the MoC and requested that the letter dated 2nd November 2006 be withdrawn with immediate effect.

8. On 13th April 2007, two letters were issued to the Petitioner by the JDGFT. By the first it was stated that the DGFT had since clarified that "only those foreign exchange receipts that are realised for rendering of service can alone be taken into account for SFIS benefit. Therefore foreign exchange earnings on account of sale of immovable properties are not eligible for benefits under SFIS. Under category Real Estate Service only the portion of earning on account of services provided such as commission/ fee/brokerage etc. can be counted towards benefit under SFIS." Consequently, the Petitioner was asked to submit the duty credit amount to the extent of utilisation of the DFCE certificate dated 4th February 2005 under the SFIS within 30 days. By the second letter dated 13th April 2007, the Petitioner was asked to submit the duty credit scrip dated 9th January 2006 and not to utilise such scrip further till clearance was received from the office of DGFT.

9. The Petitioner made detailed representations on 27th April 2007 and 21st May 2007 in reply to the said letters dated 13th April 2007. On 16th July 2007, the JDGFT issued two separate show cause notices under Sections 9(2) and 9(4) FTDR Act directing the Petitioner to show cause why the two duty free scrips (licences), one dated 4th February 2005 and the other dated 9th January 2006, should not be cancelled "ab initio for misrepresentation of facts" in terms of Section 9(4) FTDR Act. On 30 th July 2007, the Petitioner submitted its detailed reply to the show cause notices.

10. On 13th September 2007, the JDGFT wrote to the Petitioner explaining that the letter dated 7th December 2006 issued by the Trade Policy Division, Department of Commerce merely referred to the classification of Services in the World Trade Organisation (WTO) and did not by any way justify the claims of the Petitioner. It was reiterated that "sale of a residential unit comes within goods not services, as they are disposals of fixed assets." It was clarified that "the entries in

the UNCPD are referring to only services under those respective codes." The letter proceeded to state as under: "Accordingly, the two digit code heading is 82- Real Estate Services is disaggregated to four digit code namely, 8210-Real Estate Services involving own or leased property and this has been further disaggregated to a five digit code namely, 82103- Residential buildings and land sales. What is critical to note is that it is not the sale of residential building or land per se which comes under this heading but the services relating to these activities like fees/commission/brokerage can come under this entry. The issue is also similar with respect to 82203-Residential buildings and land sales on a fee or contract basis."

11. The Petitioner was given a personal hearing on 3<sup>rd</sup> October 2007 and it also filed its written submissions on 25<sup>th</sup> October 2007. On 25/26<sup>th</sup> June 2008, the impugned order was issued by the Secretary, Ministry of Commerce stating as under:

"a) The sale of property for a consideration would not amount to providing services other than those which are part and parcel of any sale, whether they be for the sale of a moveable or immovable property. This kind of a sale would not appear to be as per the letter and spirit of the Served from India Scheme (SFIS), which is only for the export of services.

b) A clarification has been provided by the Trade Policy Division (Services) of Deptt. of Commerce in December, 2006 to M/s DLF Ltd. In response to their query, which was specifically to help the company " in understanding the International Business under "REAL ESTATE SERVICES" as we wish to go Globally to capture Global Market of "REAL ESTATE

SERVICES". The clarification, therefore, provided by TPD only referred to the textual definition from a standard W/120 list used in Market Access negotiations under the General Agreement on Trade in Services (GATS) of the WTO. Since W/120 is

sometimes used in Market Access negotiations together with the more detailed United Nations Central Product Classification (UNCPD) relating to International

Trade Services, a cross- reference to the UNCPC had also been made in the above clarification. However, since there is no reference in Appendix 10 of the Foreign Trade Policy (FTP) either to W/120 or the sub- sectors under Real Estate Services listed in the UNCPC, no claim to be governed by the definitions under the sub sectors of the UNCPC would be sustainable.

In view of the above the sale of immovable property is not covered under the Served from India Scheme (SFIS) which is only for the export of services. This has the approval of Commerce Secretary."

12. The Petitioner states that it gave a detailed reply dated 16th July 2008 requesting the DGFT to review and reconsider the matter and refer it to the MoC once again. Meanwhile, the Commissioner of Customs, ICG, Tughlakabad issued a show cause notice to the Petitioner on 23rd June 2008 demanding the customs duty of Rs. 7,62,55,947/-. The plea of the Petitioner for issuance of duty free scrips under the SFIS towards exports made for the year 2005-06 was not acceded to. In the circumstances the present writ petition was filed by the Petitioner praying for a declaration that sale of residential buildings against the payment in free foreign exchange amounted to service for the purposes of the grant of a DFCE Certificate under the SFIS; that the communication dated 25/26th June 2008 issued by the JDGFT be directed to be withdrawn; that the adjudication proceedings pursuant to the show cause notices dated 16th July 2007 sent to the Petitioner by the JDGFT be dropped and the Respondents be directed to issue the Petitioner duty free scrip for the year 2005-06.

13. In response to the notice issued in the writ petition on 7th January 2009, a counter affidavit has been filed by the Respondents on 17th September 2009 reiterating the stand of the Government as contained in the impugned decision dated 25/26th June 2008. It is reiterated that the interpretation given under the General Agreement on Trade in Services (GATS) of the WTO "is not fully relatable" to the SFIS. It is stated as under: "Under GATS negotiations, the services like construction and/or real estate service would be defined, but in a particular context only. For instance, Indian Expertise in Engineering Field, or Medical Field is not recognized worldwide. Trade in these services is not allowed

unless an agreement of movement of natural persons is put in place. Once such an agreement is in place, and then Indian Engineer would be allowed in WTO member countries, and similarly for Medical field as well as for Real Estate Services, whereby Indian Real Estate Companies may be permitted to carry on real estate business in such nations. All this has no connection with Export of Service and eligibility of a service provider under the Served from India Scheme (SFIS).

Moreover, Department of Commerce has themselves re-examined the issue and given DGFT a reply with their comments vide their letter dated 19.05.2008 [Annexure-E], which are reflected in DGFT letter dated 26.6.2008 [Annexure-B]. Hence their earlier letter dated 7.12.2006 [Annexure-F] has become irrelevant, particularly in light of the usage beyond the GATS filed. This cannot be used under SFIS, in our view." Whether DFCE certificates are 'licences' under the FTDR Act?

14. Mr. S. Ganesh, learned Senior counsel appearing for the Petitioner first urges that the impugned show cause notices dated 16th July 2007 under Sections 9(2) and 9(4) FTDR Act are misconceived and untenable in law since according to the Petitioner the two DFCE certificates dated 4th February 2005 and 9th January 2006 were not licences within the meaning of Section 2(g) FTDR Act. Consequently, Section 9 has no application to the duty free scrips issued to the Petitioner. It is submitted that even Section 11 FTDR Act, which in any event has not been invoked by the JDGFT, would have no application in the instant case. According to Mr. Ganesh, all that duty free scrip does is to entitle the Petitioner to avail of duty credit while making imports of other goods subsequently. As such the duty scrip cannot permit import or export. In any event, the duty free scrip could be used only for import of goods which were freely importable.

15. Mr. A.S. Chandhiok, learned Additional Solicitor General (ASG) on the other hand refers to the definition of licence under Section 2(g) FTDR Act and submits that it includes a customs clearance permit and any other permission issued or granted under the FTDR Act. He points out that the duty free scrip issued to the Petitioner is on the face of it described as a licence. It permits the holder of such licence to avail of duty credit while making subsequent imports of freely importable

goods. Reference is made to the averments made in para 2 of the writ petition and para 10 of the rejoinder where the Petitioner itself states that the two DFCE certificates were licences. Reliance is placed on the decision in DKM Cassette Pvt. Ltd. v. Union of India 2010 IX AD (Del) 218.

16. In order to determine whether the DFCE certificates are licences within the meaning of the FTDR Act, a reference may be made to Section 2 (g) thereof which reads as under:

"2. Definitions In this Act, unless the context otherwise requires - (g) "licence" means a licence to import or export and includes a customs clearance permit and any other permission issued or granted under this Act; "

17. A plain reading of the definition shows that a licence for the purpose of the FTDR Act is not restricted to a licence to import or export. The second part of the definition is an inclusive one. It includes a customs clearance permit and any other permission issued or granted under the FTDR Act. Importantly, Section 2 begins with words "In this Act, unless the context otherwise requires". Section 9 empowers the DGFT to cancel any licence after giving the holder of the licence a reasonable opportunity of being heard. It is in this context that the Petitioner seeks to urge that since the DFCE certificates are not licences at all, this power could not have been invoked.

18. In the considered view of this Court, it is not possible to place a narrow interpretation on the word licence while interpreting Section 2(g) of the FTDR Act. The DFCE certificates issued under the SFIS would indeed qualify as licences since they permit the holders of such certificates to avail of duty credit while making subsequent imports of freely importable goods. To this extent, this Court negatives the submission of the Petitioner that the two DFCE certificates dated 4th February 2005 and 9th January 2006 are not licences within the meaning of Section 2(g) of the FTDR Act. Whether DGFT was justified in initiating proceedings to cancel the duty free scrips under the FTDR Act?

19. The next submission of Mr. Ganesh, learned Senior counsel for the Petitioner is that non-payment of duty or wrongful availment of duty credit is really a matter

for the Department of Customs and not the DGFT. Therefore, no action could have been taken whatsoever under the FTDR Act by the DGFT. Mr. Chandhiok, learned ASG countered this argument by pointing out that the scheme of the FTDR Act clearly shows that for an import made contrary to a licence issued under the FTDR Act, the provisions of Section 9 would clearly stand attracted. Even under Section 12, for an import made contrary to the export and import policy, the levy of penalty in terms of Section 11(2) of the FTDR Act does not prevent the imposition of any other punishment to which the person affected thereby is liable under any other law.

20. As regards the second submission of the Petitioner, this Court is of the view that the action taken by the DGFT under the FTDR Act for an import that is contrary to the export and import policy is independent of the action that can be taken by the Customs Department under the Customs Act for any wrongful availment of duty arising out of the same transaction. It is possible that same cause of action can give rise to distinct consequences under two different enactments. It is not possible to agree with the learned counsel for the Petitioner that no action could have been taken under the FTDR Act by the DGFT, if it was of the view that the licence issued under the FTDR Act was not properly utilised by the Petitioner.

Whether the Respondents' omission to entertain Petitioner's applications for issuance of DFCE certificates is justified?

21. Mr. Ganesh next submitted that the Petitioner's request for issuance of DFCE certificates for the years 2005-06 onwards was not acceded to by the Respondents on an erroneous interpretation of the relevant Clauses of the FTP 2004-09 as is evident from the impugned letter dated 25/26th June 2008 which holds that real estate services as mentioned in Appendix 10 of the HBP 2004-09 did not include sale of immovable property. He relied upon the judgment in *Mouat v. Betts Motors Ltd.* [1958] 3 All ER 402 to emphasise that it would be strange if one wing of the MoC is unaware of the position taken by the other wing. He further submitted that valuable foreign exchange has in fact been earned by the sales made abroad by the Petitioner of immovable property and, therefore, the object of

the Exim Policy was served. Therefore even on an application of the rule of purposive construction real estate services in Appendix 10 to the HBP ought to include sale of immovable property. He submitted that the position taken now by the DGFT that the relevant Clauses of the Exim Policy could not be interpreted by referring to the GATS or the UNCPC was erroneous. He referred to para 3.6.1 of the FTP 2004-09 which adverts to GATS and para 9.52 which defines "services" to include all tradable services covered under the GATS and earning free foreign exchange. Mr. Ganesh further pointed out that a perusal of the Services Sectoral Classification List prepared by the WTO way back on 10th July 1991 showed that while classifying Real Estate Services, it refers to the corresponding UNCPC divisions 821 and 822. The wording of the UNCPC was identical to the wording of Sl. 1 (D) of Appendix 10 of the HBP 2004-09. Mr. Ganesh submitted that the wording of Article 1(2) of the GATS was no different from para 9.53 of the FTP 2004-09 which defines Service Provider. He accordingly submitted that for all practical purposes, the words and expressions not defined in detail in the FTP 2004-09 or the HBP 2004-09 will have to be interpreted with reference to the GATS read with the UNCPC.

22. Mr. Chandhiok, learned ASG, on the other hand submitted that Appendix 10 of the HBP 2004-09 does not expressly refer to either GATS or the UNCPC. Nowhere does Serial No. 1(D) of Appendix 10 mention sale of immovable property. It only talks about real estate services involving own or leased property. It is submitted that even going by the definition of Service Provider in para 9.53 of the FTP 2004-09, the sale of property does not involve supply of any service. It is submitted that service includes all tradable services and in relation to sale of property, it would be the service provided by a commission agent or a broker. The brokerage or commission earned for providing such service would alone qualify for the issuance of a DFCE certificate. He referred to the averment in the counter affidavit in this regard which reads as under:

"In the transaction for sale of property,

(a) Para 9.53(i) is not satisfied [since there is no supply of service to any other country, like in Software],

(b) Para 9.53(ii) is not satisfied [since the foreign customers of any other country (including NRI) is not present in India (like in foreign tourist in India)];

(c) Para 9.53(iii) is not satisfied [since there is no commercial or physical presence overseas]; and

(d) Para 9.53(iv) is not satisfied [since there is no supply of service relating to exports in this case].

Hence in conclusion, the applicant is not a service provider under the definition Para 9.53 of FTP."

23. The above submissions have been considered. Appendix 10 to the HBP 2004-09 lists out in Serial No. 1(D) real estate services which could include service in relation to "owned or lease property" or "on a fee or contract basis." While it is correct that there is no express reference to the GATS or UNCPC in Appendix 10, it appears that a reference is made to those documents during the course of market access negotiations under the GATS of the WTO. An Office Memorandum dated 19th May 2008 appears to have been issued by the Department of Commerce, (Trade Policy Division) dissociating itself from the earlier stand taken by it on 7th December 2006 and stating that no claims governed by the definitions under the sub-sectors of the UNCPC would be sustainable since there is no reference to either the GATS of the WTO (Document W/120) or the sub-sectors under Real Estate Services listed in the UNCPC.

24. In the considered view of this Court, the stand now taken in the counter-affidavit by the Respondents that it is only such service that is relatable to the sale of immovable property that would be eligible for issuance of DFCE certificate under the SFIS is a plausible one to take. While it does not completely repudiate the reference to the definition contained in the UNCPC, it contextualises the services relatable to sale of immovable property, for which alone the entitlement would be available. In a sense, it harmonises the Clause at Serial No. 1(D) in Appendix 10 of the HBP 2004-09 with the sub-sector definition of real estate services under the UNCPC. The title of the scheme, which is Served from India Scheme, emphasises the service component of the transaction. The emphasis has

to be at all times on services as understood under the FTP 2004-09 and in particular Para 9.53 thereof. The foreign exchange receipts realised for rendering such services alone would qualify for the DFCE certificate under the SFIS. Consequently this Court finds merit in the contention of the Respondents that although real estate service has been shown in the UNCPC to include sale of immovable property, such service have to be contextualised in the light of the benefit under the SFIS.

25. Consequently, this Court negatives the submission of the Petitioner on the interpretation to be placed on Serial No. 1(D) of the Appendix 10 to the HBP 2004-09. It is held that sale of immovable property is as such not included within the expression real estate services involving owned or lease property. The purport of the inclusion of sale of immovable property within the expression real estate services in Division 821 of the UNCPC is only to emphasise that only the amounts corresponding to the earnings by way of brokerage or commission on such sales, and not the entire sale consideration, will qualify for the issuance of the DFCE certificate.

26. Resultantly, the position is that the Respondents are justified in not entertaining applications of the Petitioner for issuance of DFCE certificates under the SFIS for years 2005-06 onwards on the ground that the Petitioner is claiming the entire sale consideration, and not just the commission or brokerage if any on such sales, for the purposes of the DFCE. Whether the show cause notices issued to the Petitioner on the ground of 'misrepresentation of facts' are sustainable in law?

27. The last submission of learned Senior counsel for the Petitioner is that the impugned show cause notices dated 16 th July 2007 issued to the Petitioner by the JDGFT proposing cancellation of the licences (duty free scrips) proceed on the footing that the Petitioner had misrepresented the facts while applying for such scrips. He submitted that this was the only ground cited in the said show cause notices. It is pointed out that it is only after seeking a clarification from the MoC that the Petitioner proceeded to avail the duty credit on the second scrip dated 9th January 2006 and, therefore, the Petitioner could not be said to have

misrepresented facts. In fact, the communication dated 2nd November 2006 showed that the Petitioner had disclosed the full facts concerning duty credit availment in its Annual Report, which then led to the query raised by the DGFT. There was, therefore, no valid ground on which the show cause notices could have been issued. Moreover, there was no question of cancellation of a duty free scrip after the scrip was fully utilised, as in the instant case, by the Petitioner.

28. In reply to this submission, Mr. Chandhiok points out that the claim for issuance of a DFCE certificate on the basis that the Petitioner was providing real estate services would itself amount to misrepresentation of facts by the Petitioner when in fact it was claiming the entire sale consideration of the immovable property for the purposes of DFCE. Therefore, the issuance of the show cause notices was justified, notwithstanding the clarification sought by the JDGFT and later provided on 7 th December 2006 by the MoC. The Respondents, after the final hearing concluded, produced a copy of the declaration made by the Petitioner to the JDGFT on 24th December 2004 stating that it had applied for duty free entitlement under the SFIS only against those remittances which had been received by it as service charges and fee charges for Real Estate Services. It was submitted that this document could be discovered from the record only recently. It is submitted that it is only on the basis of the above declaration that the Petitioner's application for grant of duty free scrips was allowed. However, the Petitioner in fact claimed amounts constituting the entire sale consideration and this was therefore a clear case of misrepresentation.

29. This Court finds that the document dated 24th December 2004 did not figure in any of the letters dated 13th April 2007 or the show cause notices dated 16th July 2007. Indeed it was not even produced during the hearing to enable the counsel for the Petitioner to reply to it. Nevertheless it is not a document that can possibly be overlooked for determining if there is any misrepresentation by the Petitioner.

30. There is no decision yet taken by the JDGFT on the show cause notices issued on 16th July 2007 to the Petitioner to which the Petitioner has replied. In the circumstances it is directed that the Respondents shall not proceed to take any decision on the said show cause notices dated 16 th July 2007 but issue within a

period of four weeks to the Petitioner a supplementary show cause notice enclosing the documents forming part of the record of the Respondents including the declaration dated 24th December 2004 and give the Petitioner sufficient opportunity to reply to the same. A decision will be taken thereon only after giving the Petitioner an opportunity of being heard. Conclusion

31. For the above reasons, this Court upholds the view of the DGFT as expressed in the impugned communication dated 25th/26th June 2008 negating the claim of the Petitioner for issuance of the DFCE certificates for the years 2005-06 onwards based on the entire sale consideration of residential flats received by it from buyers abroad. This Court further holds that a DFCE certificate (duty free scrip) is a licence within the meaning of Section 2(g) of the FTDR Act 1992. Further, it is directed that the Respondents will not pass final orders on the show cause notices dated 16 th July 2007 issued to the Petitioner but will follow the procedure as directed by this Court in para 30 of this judgment.

32. The writ petition is disposed of in the above terms. Application also stands disposed of.

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