

**GOVERNMENT OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY
DEPARTMENT OF COMMERCE
OFFICE OF THE DIRECTOR GENERAL OF FOREIGN TRADE
Udyog Bhawan, New Delhi-110011**

F. No. 18/05/2018-19/ECA-I/287

Date of Order December, 2018

Date of Dispatch December, 2018

10.01.2019

Name of Appellant : M/s Amol Associates,
484/93A, Saphalya,
Mitra Mandal Colony,
Parvati, Pune,
Maharashtra-411009.

Order Appealed against : Order-in-Appeal No. 03 / 16 / 144 / 00016 / AM18 /
0065 dated 26.03.2018 passed by the Additional
DGFT, Mumbai.

Order-in-Review passed by : Shri Alok Vardhan Chaturvedi, Director General of
Foreign Trade

Order-in-Review

M/s Amol Associates, Pune has filed Review Petition against Order-in-Appeal No. 03/16/144/00016/AM18/0065 dated 26.03.2018 passed by Additional Director General of Foreign Trade, Mumbai.

Facts of the case:

2. M/s Amol Associates, Pune obtained an EPCG Authorization No. 3130007225 dated 26.02.2013 from RA, Mumbai for a duty saved Rs. 1,26,96,750/- with an export obligation equivalent to US\$ 1377585.89 (Rs 7,61,80,500/-) to be fulfilled within a period of 6 years from the date of issue of the authorization for export of Printed Cartons, Offset Printed Paper Products, Pamphlet, Leaflets, Labels, Brochures, Exercise Note Books and Allied Products. Average Export to be maintained was Nil.

2.1 The firm requested for extension of export obligation period on 19.01.2017. It was noticed that the firm had not fulfilled any export obligation and their VAT returns also showed only job work activity. A physical check revealed that the firm did only printing on job work basis and had no facility to manufacture the products endorsed in their authorization for fulfillment of export obligation. Hence, the firm's request for export obligation extension was rejected and a Demand-cum-Show Cause Notice dated 08.06.2017 was issued to the firm. An opportunity of personal hearing was also granted on 15.06.2017.

2.2 In response, the firm's Proprietor Shri Amol Arun Despande, appeared along with a private person Shri Vaibhav Nagarkar and submitted a copy VAT return and copy their Income Tax Return and also submitted copy of export orders. They contended that Demand-cum-Show Cause Notice dated 08.06.2017 was without authority and grounds of violation

enunciated in the Show Cause Notice were not at all valid ones. They also contended that if they were given an export obligation extension as per Para 5.8.3 of HBP 2009-2014, they would be able to fulfill export obligation.

2.3 On 23.06.2017, the firm in continuation of their earlier reply dated 15.06.2017 submitted a letter wherein again the firm stated that they were "Manufacturer" and not "Service Provider" and they listed four firms to whom they had stated that they would do "Deemed Exports / Third Party Exports" and fulfill the export obligation, if extension in Export Obligation sought was allowed.

2.4 Upon examining the records available and produced by the firm and evaluating the Inspection Report of the Foreign Trade Development Officer and considering the oral and written statement made on 15.06.2017 during personal hearing and also after examining the written statement submitted on 23.06.2017, the Adjudicating Authority, keeping in view the various provisions of FTP 2009-2014 and HBP 2009-2014, governing the issue and monitoring of EPCG Authorization, passed Order-in-Original No.31/89/021/00718/AM13 dated 29.06.2017:

- (i) Rejecting the request for export obligation extension as the firm had been using the imported capital goods only for domestic printing on job work basis and did not even have the infrastructure to manufacture the export products endorsed on authorization for export obligation (as revealed by the Inspection Report). Granting further extension would only aid the continued misuse of the imported machine for domestic printing on job work basis.
- (ii) Imposing penalty of Rs. 3,45,00,000/- (Rupees Three Crores Forty Five Lakhs only) under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, as amended for not using the imported capital goods for fulfillment of export obligation thereby violating the conditions of the authorization.

3. Aggrieved by the Order-in-Original No. 31/89/021/00718/AM13 dated 29.06.2017, the appellant filed appeal on 08.08.2017 under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, before the Additional Director General of Foreign Trade (Appellate Authority), Mumbai with a request:

- (i) To consider the appeal by condoning the waiver of the deposit of the penalty amount in terms of Section 15(1)(b) of the Foreign Trade (Development and Regulation) Act, 1992, as amended;
- (ii) To dispense the deposit of the penalty charges since the same would cause severe undue hardship in the difficult times;
- (iii) To set aside the Adjudication Order dated 29.06.2017 passed by the Joint DGFT, Pune;
- (iv) To issue directives to Joint DGFT, Pune to extend the block export obligation period in terms of Para 5.8.3 of the HBP 2010-14.

3.1 An opportunity of personal hearing was given on 26.09.2017. Shri Amol Deshpande, Proprietor of the firm appeared for personal hearing before the Appellate Authority on the

said date and explained that they had to complete 50% export obligation during the first block in terms of 5.8.1 of the HBP 2010-14. Para 5.8.3 of the HBP 2009-14 provides that in case of failure to fulfill the block export obligation in the first block, the firm can apply for the extension of the block export obligation period within 3 months from the expiry of the block period by paying 2% of composition fee on the duty proportionate to the short fall in the block export obligation.

3.2 The appellant further stated that they had imported the capital goods and installed it at the premises declared in the application and started the use of capital goods for manufacturing of items as declared in the authorization and had also submitted Central Excise Certificate confirming the availability of the machinery which shows that the machine was put in to actual user condition.

3.3 He also stated that the observation of the Adjudicating Authority that the appellant was a service provider and not a manufacturer was not correct, as at the time of applying of EPCG authorization, they had submitted copy of SSI Registration Certificate and Registration Certificate issued by the Central Excise Authority mentioning that they were manufacturer. He denied to have contravened Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, as amended, and conditions of the authorization.

3.4 After hearing the appellant and going through the Adjudication Order / written submissions in appeal as well as the documents available on record, the Appellate Authority found following:

- (i) The Appellant had submitted their request for Export Obligation Extension as per Para 5.11(a) of the HBP 2009-14 which "states Regional Authority may consider request for export obligation period, since word used is 'may' and not 'shall', it is not an automatic entitlement and has to be decided based on various provisions of Foreign Trade Policy and Hand Book of Procedures 2009-14".
- (ii) As per the conditions of the authorization, imported goods should be used for manufacture of exported goods only and not for job work purpose. The documents submitted by the firm along with their request for EO Extension revealed that they had not done any exports and their VAT returns also shows only job work activity, which was in violation of the conditions specified in EPCG authorization.
- (iii) The Joint DGFT, Pune had carried out independent investigation and had specifically investigated the case regarding use of imported goods being used for manufacture of exported goods. Physical check made by the Foreign Trade Development Officer revealed that the appellant did not even have the infrastructure to manufacture the export products endorsed on the authorization for fulfillment of export obligation and only did printing on job work basis. Therefore, granting further extension would only aid the continued misuse of the imported machine for domestic printing on job work basis.

3.5 In view of the above findings, finding no justification to interfere with the Order-in-Original passed the Adjudicating Authority, the Appellate Authority, in exercise of the powers vested in her under Section 15 of the Foreign Trade (Development and Regulation)



Act, 1992, as amended, rejected the appeal vide Order-in-Appeal No. 03/16/144/00016/AM18/0065 dated 26.03.2018.

4. Aggrieved by the decision of Appellate Authority, the petitioner filed the present Review Petition dated 08.05.2018 under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, stating that:

(i) They had obtained the EPCG Authorization No. 3130007225 dated 26.02.2013 for duty saved value of Rs. 1,26,96,750/- with an export obligation equivalent to US\$ 1377585.89 (Rs. 7,61,80,500/-).

(ii) This obligation period was to be fulfilled over a period of 6 years in two blocks. The first block was from 26.02.2013 to 26.02.2017 and the second block was from 27.02.2017 to 26.02.2019.

(iii) They had to fulfill a minimum of 50% export obligation during the first block period in terms of Para 5.8.1 of the HBP 2009-14.

(iv) Para 5.8.3 of the HBP 2009-14 provides that in case of failure to fulfill the block export obligation in the first block, they could apply for extension of the block export obligation period within 3 months from the expiry of the block period by paying 2% composition fee on the duty proportionate to the short fall in the block export obligation.

(v) On approaching the Joint DGFT, Pune for extension of the obligation period in terms Para 5.8.3 of the HBP 2009-14, the Joint DGFT, Pune issued a Show Cause Notice alleging contravention of the provision of the FTP and FTDR Act. On their reply in detail to the allegations made in the said Show Cause Notice, the Joint DGFT subsequently on 29.06.2017 passed an order against their firm in respect of the EPCG Authorization citing contravention of Section 11(2) of FTDR Act.

(vi) The order passed by the Joint DGFT is arbitrary, unreasonable and unwarranted and in conflict with the provisions of the FTP. The Joint DGFT has imposed unreasonable penalty on them for non-existent, imaginary facts presumed by him in pure abuse of powers.

5. They have explained the facts of the case and the grounds of this petition as below:

(i) M/s Amol Associates is a Pune based printing manufacturer – exporter catering to various customers since the year 1996 for the products leaflets, booklets, brochures, labels, cartoons etc.

(ii) They have imported the Capital Goods, submitted the installation certificate from Chartered Engineer and started use of Capital Goods for manufacturing of finished goods.

(iii) They have tried hard to get export order but due to high transaction cost, they were unable to complete and hence, they have not been able to fulfill any obligation as stipulated during the first block of 4 years (26.02.2013 to 26.02.2017).

- (iv) In January 2017, they got couple of third party export enquiries and hence wanted to extend their block export obligation period accordingly.
- (v) So, as per Para 5.8.3 of the HBP 2009-14, they submitted a request to the Joint DGFT, Pune for extension of block export obligation period of the said EPCG Authorization on 19.01.2017 along with composition fee of Rs. 2,31,277.44/-.
- (vi) The Joint DGFT rejected their case on 29.09.2017 after issuing 2 deficiencies on 16.02.2017 and 08.04.2017 respectively. Further, the Joint DGFT vide Show Cause Notice dated 29.06.2017 asked to show cause as to why action against them should not be initiated for violation of the Section 11(2) of the FTDR Act.
- (vii) They had submitted a detailed reply to the Joint DGFT on the allegations made against them in the said Show Cause Notice. However, the Joint DGFT did not consider any of the submissions made by them in their reply and passed an order which is arbitrary, unreasonable and unwarranted and is in clear conflict with the provisions of the FTP.
- (viii) The allegation made by the Joint DGFT that they are a service provider and not a manufacturer is baseless and without appreciation of the provision of the FTP.
- (ix) At the time of obtaining the EPCG Authorization, they had submitted their valid SSI registration.
- (x) Also their last 3 years VAT return shows that they have purchased inputs and they have sold Finished Goods and fulfilled the regulatory requirements.
- (xi) The Section 11(2) of the FTDR Act talks about export or import in contravention of any provision of the Act or any Rule or order there under.
- (xii) Since they have not done any export so far, export in contravention is not applicable for them. Regarding import, they have imported Capital Goods under EPCG, done installation and put to use for producing Finished Goods as declared at the time of application for the said EPCG Authorization.
- (xiii) Further they have submitted 15% Bank Guarantee along with Bond to safeguard customs import duty foregone.
- (xiv) As they were not able to fulfill the stipulated block export obligation, they had requested for extension of the block export obligation period in terms of Para 5.8.3 of the HBP.
- (xv) In fact, they do have open export orders in their hand.
- (xvi) In spite of the provisions of the FTP / HBP allowing them the facility of getting the extension of the obligation period, the Joint DGFT has presumed that they have done contravention.



- (xvii) Condition No. 2 of the Condition Sheet of the EPCG authorization is all about list of Finished Goods to be exported. The Joint DGFT has presumed that they have violated even though they have significant time left in the authorization for fulfilling the export obligation through the export of the products specified in the Condition Sheet of the authorization. The Joint DGFT has himself prevented them from fulfilling the export obligation under the said authorization by denying them the opportunity given in the FTP / HBP.
- (xiii) The Condition No. 6 of the Condition Sheet of the authorization is about the Capital Goods usage on Actual User Condition. They have done installation at their premises exactly as per condition sheet Para 8(ii). Further, they use the Capital Goods exclusively for operations, utilize for manufacturing for their own use for manufacture of the export products endorsed on the EPCG Authorization.

6. In view of the above, the petitioner requested to set aside the Order-in-Original dated 29.06.2017 passed by the Joint DGFT, Pune and also to issue directives to the Joint DGFT to extend the block export obligation period in terms of Para 5.8.3 of the HBP 2009-14.

7. The petitioner was granted Personal Hearing on 25.10.2018 at 5.00 PM to be heard by the Reviewing Authority. Shri Amol Arun Deshpande, Proprietor of the firm appeared before the undersigned on the given date and explained his case.

8. I have gone through the facts and records of the case carefully. It is observed that the Adjudicating Authority did not assess the facts of the case properly. As per the definition of Manufacture in the FTP 2009-2014 "Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labeling, re-conditioning, repair, remaking, refurbishing, testing calibration and re-engineering. From this definition and SSI registration, it is evident that the Appellant firm is covered under the category of manufacturer instead of service provider.

8.1 The adjudication order has two parts i.e. the first part pertains to denying extension in the export obligation period and the second part pertains to imposing a penalty. Extension in the export obligation period has been denied on two grounds i.e. (i) the firm has been using the capital goods for doing domestic job work and (ii) it does not have any infrastructure to manufacture the export product. In this connection, it is seen that there is no bar on the EPCG Authorisation holder to use the machine so imported for the domestic purposes. If the Petitioner does not have any export order, it is rather better to do some economic activity than to keep the machine idle. Secondly, if they are already doing the printing work, naturally they are capable to execute export orders as well. Several of the export products like pamphlets, leaflets, labels and brochures won't require any other infrastructure. Hence, I intend to disagree with the grounds on the basis of which the request of the Petitioner for extension is the export obligation period has been denied.

8.2 The Petitioner has not fulfilled EO for the first block, that is why it had been requesting for extension in the export obligation period. The question of penalty could not arise at this point of time, if the party is granted extension in the export obligation period. In view of my observations in the para above, the imposition of penalty at this stage would be premature and is uncalled for. Secondly, I do not find any violation of condition no. 6 as the



Petitioner has installed the machinery in his premises and is using the same. Hence, the reasons given for imposition of penalty do not stand to any test.

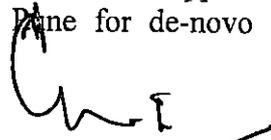
6. I, therefore, in exercise of powers vested in me under Section 16 of the FTDR Act, 1992, as amended, pass the following order:

Order

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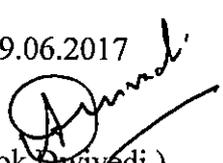
Date of Order ~~December, 2018~~
10.01.2019

The Review Appeal is admitted. Order-in-Original dated 29.06.2017 and Order-in-Appeal dated 26.03.2018 are set aside. The case is remanded back to RA, Pune for de-novo consideration.


Alok V. Chaturvedi
Director General of Foreign Trade

To

1. M/s Amol Associates,
484/93A, Saphalya,
Mitra Mandl Colony,
Parvati, Pune,
Maharashtra-411009.
2. O/o Addl. Director General of Foreign Trade,
CGO Complex, Nishtha Bhawan,
New Marine Lines, Churchgate,
Mumbai-400020
w.r.t. her Order-in-Appeal No. 03/16/144/00016/AM18/0065
Dt. 26.03.2018
3. O/o Joint DGFT,
'C' Block, PMT Commercial Complex,
Shankarseth Road, Swargate, Pune- 411 037
w.r.t. her Order-in-Original No. 31/89/021/00718/AM13 Dt. 29.06.2017


(Alok Dwivedi)
Deputy Director General of Foreign Trade