

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

F. No. 11/02/2017-18/ECA-I/47

Date of Order: 14TH May, 2018

Date of Dispatch: 17th May, 2018

Name of Appellant : M/s Orkayam Apparel Ltd.,
47D, Kangeyam Main Road,
Near Velan Hotel,
Tirupur-641604.

Order Appealed against : Order-in-Original No. 32/36/021/00362/AM04 dated
28.01.2016 passed by Deputy Director General of Foreign
Trade, Coimbatore.

Order-in-Review passed by : ShriAlokVardhanChaturvedi, Director General of Foreign
Trade

Order-in-Review

M/s Orkayam Apparel Ltd., 47D, Kangeyam Main Road, Near Velan Hotel, Tirupur-641604 has filed a Review Petition u/s 16 of FT(DR) Act, vide letter dated 14.14.2017 against the Order-in-Original No 32/36/021/00362/AM04 dated 28.01.2016 passed by Deputy Director General of Foreign Trade, Coimbatore.

Facts of the case:

2. M/s Orkayam Apparel Ltd., Tirupur obtained an EPCG Authorization No. 3230002478 dated 22.01.2003 for CIF value of Rs. 32,67,019/- from RA, Coimbatore for import of capital goods with an obligation to export of Readymade Garments for an FOB value of US \$568177 (5 times the CIF value of capital goods imported) and also the average EO to the extent of US \$573169 within a period of 8 years from the date of issue of the authorization.

3. An Order-in-Original dated 28.01.2016 was passed by the Deputy Director General of Foreign Trade (Adjudicating Authority), Coimbatore, in exercise of the powers vested in him u/s 13 of FT(DR) Act, imposing a fiscal penalty of Rs. 32,67,019/- (one time of CIF value) on the firm and its Partners as no reply to the Show Cause Notice and No appearance of Personal Hearing granted to them. It was further ordered that no further authorization would be issued to the firm or to any other firm in which the Proprietor / Partners / Directors of the firm in which

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the Proprietor / Partners / Directors was/were directly involved in the day to day activities of the firm as per Provision of Handbook read with Clause 7(1) of the FT (Regulation) Rules, 1993.

3.1 It is noted by the Adjudicating Authority that the firm has failed to submit any original documents like statement of exports, original shipping bills, etc.

3.2 A Demand Notice cum Show Cause Notice dated 31.12.2012 was issued to the firm. The cause of the notice arose due to the allegation that the firm had not fulfilled the export obligation against the EPCG authorization.

4. The firm had option of filing appeal against the Order-in-Original. But they did not opt within the prescribed period of 90 days. Hence the firm has filed Review Petition under Section 16 of FT (DR) Act, 1992, as amended, against the Order-in-Original dated 28.01.2016 passed by the Deputy Director General of Foreign Trade (Adjudicating Authority), Coimbatore stating inter alia that:

4.1 The Adjudicating Authority has imposed a penalty of Rs. 32,67,019/- in terms of Section 11(2) of the FT (DR) Act, 1992 and put the firm on denied entity list No. 221.

4.2 Under the EPCG Authorization No. 3230002478 dated 22.01.2003, the firm was allowed to import capital goods to the extent of Rs. 32,67,019.36 under concessional rate of duty.

4.3 The export obligation fixed under the authorization was quantified at USD 5,68,177.27 which was scaled down to USD 1,13,227.31 of readymade garments proportionate to the actual imports and duty saved on the import of capital goods on FOB basis within a period of eight years from the date of issuance of the authorization.

4.4 The authorization also stipulated that the firm was required to maintain its average of the past three years exports performance of the same or similar products, fixed as per the authorization.

4.5 They imported power operated over lock / flat lock sewing machines with parts under three bills of Entry through Customs Port in Chennai. Duty saved was Rs. 6,50,355/- on account of extension of Notification benefit by the Custom Authorities in terms of Notification No. 55/2003 dated 01.04.2003 on the strength of the authorization.

4.6 The machines were installed in the factory premises on 06.01.2004. The firm utilized the imported machines for production of garments namely 100% cotton knitted men's T-Shirt and caused exports of the same under 13 shipping bills between the period 13.05.2005 to 20.03.2006 to the tune of USD 1,10,357.56 and had maintained annual average of exports as stipulated in the authorization.

4.7 Pursuant to the fulfillment of export obligation, the firm made an application on 03.08.2006 to the office of the Joint Director General of Foreign Trade, Coimbatore for grant of EODC accompanied by Form ANF-9 and documents showing the exports and realization of the export proceeds thereof and all other relevant documents duly attested by the Chartered Accountant.

4.8 In July, 2006, on allegation that imported machines under the authorization had not been installed or used in the manufacture of export products, officers attached to Customs Intelligence Unit, Coimbatore seized the machineries which were found in the premises of the firm under the provisions of the Custom Act, 1962. On account of the pressure exerted by the Customs authorities, the firm had to pay up a sum of Rs. 10 lakhs towards the alleged duty forgone under two Challans dated 10.08.2006 and 16.08.2006.

4.9 Pursuant to the application, the office of the Joint DGFT, Coimbatore issued a demand cum show cause notice dated 12.12.2006 proposing to initiate action under F.T. (D&R) Act, 1992 on allegation that the Chartered Engineer's certificate is not correct and that the Central Excise authorities had informed that the firm had not installed the imported machineries in the factory premises.

It is noteworthy to submit that the demand cum show cause notice accepts the fact that the firm had fulfilled the export obligation in terms of the authorization.

4.10 The office of Joint DGFT issued a communication dated 15.03.2007 and directed the firm to produce a copy of the Bill of Entry and TR6 Challan for having paid the duty plus interest. In response to this communication, the firm submitted reply dated 30.03.2007 furnishing copies of the B/E, copies of the bank statement, copies of the Challan dated 10.08.2006 and 16.08.2006 for total sum of Rs. 10 lakhs and copy of the authorization.

4.11 Consequent to the action of the Customs authorities, a show cause notice came to be issued by the office of the Commissioner of Customs, Chennai dated 12.12.2007. The show

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cause notice was adjudicated and a demand of differential duty to the tune of Rs. 6,50,283/- was made besides confiscation of the imported goods, imposition of fine and penalty. The applicant had deposited an amount of Rs. 10 lakhs during the course of the investigation which was also ordered to be appropriated against the duty, fine and penalty. The order was challenged by the firm before the Tribunal, which by final order dated 28.02.2017 rejected the appeal. The firm has since moved the Hon'ble High Court of Madras by means of a statutory appeal under section 130 of the Customs Act, 1962 and the same is pending.

4.12 The firm again approached the office of the Joint DGFT, Coimbatore on 23.12.2008 for grant of EODC. Pursuant to the same, the office of the Joint DGFT informed the firm that their request for EODC can not be considered at that stage due to alleged violation of Actual User condition of the authorization and adjudication proceeding having been initiated.

4.13 The office of the Joint DGFT, Coimbatore, thereafter, issued a demand cum Show Cause notice dated 31.12.2012 under Section 14 of the FT (DR) Act, 1992 for action under Section 11(2) of the Act. The firm was directed under show cause notice to appear before the Joint DGFT, Coimbatore on 22.01.2013 with the relevant documents.

4.14 They attended the personal hearing fixed by the office of the Joint DGFT on 23.01.2013 with the relevant documents and requested for issue of EODC notwithstanding the fact that they had been preceded against the Customs authorities on allegation of non-utilization and alleged diversion of the imported goods.

4.15 No personal hearing was given by the successor Deputy Director General of Foreign Trade before passing the impugned order dated 28.01.2016. There is no mention on the face of the order itself as to the date of personal hearing fixed by the successor Deputy Director General of Foreign Trade.

4.16 Thus, the impugned order imposing penalty and putting the firm on denied entities list is plainly violative of the Principle of Natural Justice as also the mandate of Section 14 of the FT (DR) Act, 1992.

4.17 The impugned order of the Deputy Director General of Foreign Trade, Coimbatore requires to be revised at hands of revisionary authority by set aside the same.

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5. The applicant was granted Personal Hearing on 18.04.2018 at 3.15 PM before me. Shri B. Satish Sundar, Shri S. Aravind and V. Balu, Learned Advocates and also A. Mahalingam, Proprietor of the firm appeared before the undersigned. During the personal hearing, they reiterated the same facts, as agitated in written submission. They contended that Order in Original is passed without following the principle of natural justice and also without any independent inquiry by RA, Coimbatore, which is contrary to the law. In support of their contention, they cited the High Court of Gujarat order dated 02.03.2016 reported as 2016(336)E.L.T.449(Guj) in the matter of Krishna Trading Co. Vs Addl. Director General of Foreign Trade in the special Civil Application No 10589 of 2015 with S.C.A.Nos 10590 of 2015. In the said order, Hon'ble court has observed that *"in the opinion of this court, the respondents herein, namely, Additional Director General of Foreign Trade and Joint Director General of Foreign Trade are independent Authorities constituted under Foreign Trade(Development and regulation)Act, 1992 and are not governed by the directions of the Central Excise or Customs Authorities. Therefore, the respondent Authorities are not justified in acting as per the dictates of the DRI, Ahmedabad instead of carrying out independent inquiry on its own and acting in terms thereof."*

5.1 They further contended saying that penalty cannot be imposed on the ground of non-fulfillment of export obligation against EPCG Authorisation under section 11(2) of F.T.(DR)Act. They cited the Hon'ble Delhi High Court order dated 27.05.2005 in the matter of Dencap Electronics (P) Ltd vs Addl. Director General of Foreign Trade wherein it was held that:

"When a person is permitted to import a second hand machinery with certain benefits, on furnishing bank guarantee to be encashed on failure to discharge obligations, it is required to be noted that the same is done for development of business in the country and to provide employment to persons. The revenue is protected by taking the bank guarantee of the differential duty required to be paid. It is not the case of the respondents that the machinery which was imported was prohibited and could not have been imported on payment of customs duty. Metal like gold which was prohibited could not have been imported at the relevant time. That apart, when on account of failure to carry out the obligation, due to reasons beyond control of a person, if the customs duty which is otherwise required to be paid by the person concerned is received by encashing the bank guarantee, the state exchequer does not suffer, except the loss of interest for the period during which the amount remained unpaid and remained in the form of bank guarantee. On account of failure not only the bank guarantee came to be encashed so as to recover the difference of customs duty, but the machinery came to be disposed of in view of the violations of the Customs Act, 1962. As the appellant failed to export, there was a breach of Section 111(o) of the Customs Act, 1962 and, therefore, the machinery came to be confiscated.

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For the breach which was committed, the appellant was penalized as the machinery came to be confiscated. This happened because the export obligation could not be fulfilled. Therefore, in the opinion of the Court, when by passing an order not only the customs duty has been recovered, but the machinery having been confiscated, there will be no occasion to invoke the provisions of Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, more particularly, when there is no breach of Section 11(2) of the said Act and a contrary stand is taken by the Union of India specifically in the case of Gokaldas Images Ltd and Others (supra) that Section 11 of the said Act would be attracted to a stage after the export. Therefore, in the opinion of the Court, it cannot be said that there is a contravention of Section 11(2) of the said Act but not fulfilling the export obligation."

6. I have gone through the materials placed before me and the facts of the cases, carefully. It is noted that the EPCG Authorisation under question was issued with 'Actual User' condition on payment of 5% concessional rate of duty. The exporter was required to submit installation certificate within six months from the date of import of capital goods and documents, as prescribed, towards discharge of export obligation immediately after expiry of export obligation period to the concern Regional Authority. However, the applicant did not submit the prescribed documents. Therefore, the Adjudicating Authority adjudicated the case imposing fiscal penalty. However, as per records made available by the petitioner, they have imported goods vide three B/Es dated 31.10.2003, 31.10.2003 and 21.11.2003 and fulfilled stipulated export obligation through 13 shipments made during May, 2005-March, 2006. They had submitted documents towards discharge of EO vide their letter undated in August, 2006. However, no acknowledgement towards proof of submission of said documents to RA was made available by the petitioner.

6.1 On perusal of "Mahazar" (statement of independent Pancha witness) recorded by Customs Intelligence unit, Coimbatore on 26.07.2006 it is transpired that the petitioner has imported 584 Siruba Brand sewing machines under the EPCG Authorisation in question. Out of that he installed only 12nos of machine at his factory premise and 318nos were found lying in the factory in original packing condition and 254 were not available in the factory, which were admittedly to have been sold to one ShriKarim of M/s Bharat Machinery work, Tirupur.

6.2 From the above facts, it is evident that imported machine were not installed except 12Nos in the factory premise as declared in the Application for EPCG Authorisation was made by the applicant. Further, no acknowledgement for producing documents to RA is submitted by the applicant, which could prove that RA has not accepted their documents towards discharge of EO. Exports made without installing imported goods cannot be accepted towards discharge of

export obligation. Further, the applicant has paid Rs.10 lakh to Customs Authority as duty and applicable interest on accepting the facts that imported goods were not utilised the purpose for which it were allowed to import on concessional rate of duty. Sale and transfer of capital goods imported under EPCG Authorisation is not allowed. It has been established from investigation conducted by Customs Intelligence unit that out of 584nos of imported machines, 254nos were sold by the applicant. Therefore, Actual User condition of the Authorisation has been violated.

6.3 It is observed that the order-in original was issued without giving opportunity of being heard in person. No order under section 11(2) of F.T.(D&R)Act, 1992, as amended should be passed without affording reasonable of personal hearing. However, it is upto the wisdom of Authority to conduct either independent inquiry or arrive at a decision based on the documents/ report of other investigating agency of government after following the due procedure of law. In this case statement of independent Pancha Witnesses recorded during spot verification conducting by Customs Intelligence Unit, has been considered as sufficient evidence that imported goods were sold in the domestic market. No doubt that DGFT is independent Authority hence it cannot be directed or influenced by other agency. However, there is no bar in accepting the finding of other Government agency if the Authority is satisfied with the report. Therefore, the case cited in the matter of Krishna Trading Co. Vs Addl. Director General of Foreign Trade in the special Civil Application No 10589 of 2015 with S.C.A. Nos 10590 of 2015 has no bearing in this case.

6.4 Learned Advocates submitted that penalty cannot be imposed on the ground of non-fulfillment of export obligation against EPCG Authorisation under section 11(2) of F.T.(DR)Act. They cited the Hon'ble Delhi High Court order dated 27.05.2005 in the matter of Dencap Electronics (P) Ltd vs Addl. Director General of Foreign Trade. It is true that penalty under section 11(2) of F.T.(D&R)Act cannot be imposed for non-fulfillment of export obligation where duty has been paid by the Authorisation holder. However, penalty could be imposed for violation of condition of Authorisation or contriving the provisions of Foreign Trade Policy or F.T.(D&R)Act or Rules made there under. In the case in hands, the applicant has violated "Actual User" condition of the Authorisation. Hence, the case cited above is not applicable in this case.

6.5 Considering the facts that the applicant has paid duty and applicable interest to the Customs Authority and Adjudication order has not been passed following the principle of natural justice, the following order is passed.

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Order

F. No. 11/02/2017-18/ECA-I/⁴⁸ Date of Order: 14TH May, 2018

The appeal is admitted.

The case is remanded to the RA for de novo consideration. The matter will be decided a fresh after giving reasonable opportunity of personal hearing to the appellant.



Alok V. Chaturvedi
Director General of Foreign Trade

To

1. M/s Orkayam Apparel Ltd.,
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Near Velan Hotel,
Tirupur-641604.
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Tika Ram Majhi
Dy. Director General of Foreign Trade

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