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. 18/18/2018-19/ECA-I /221 **Date of Order** **November, 2018**

Date of Dispatch 14th **November, 2018**

Name of Appellant	:	M/s Mahabali Innovative Technologies Pvt. Ltd., Monarch House, Master Royal Palms, Aarey Milk Colony, Goregaon (East), Mumbai-400065.
Order Appealed against	:	Order-in-Appeal No. 03/16/144/00036/AM.18/0507 dated 29.03.2018 passed by the Addl. DGFT, Mumbai.
Order-in-Review passed by	:	Shri Alok Vardhan Chaturvedi, Director General of Foreign Trade

Order-in-Review

M/s Mahabali Innovative Technologies Pvt. Ltd., (formerly known as Monarch Innovative Technologies Pvt. Ltd.) Monarch House, Master Royal Palms, Aarey Milk Colony, Goregaon (East), Mumbai-400065 has filed Review Petition against the Order-in-Appeal No. 03/16/144/00036/AM.18/0507 dated 29.03.2018 passed by Additional Director General of Foreign Trade, Mumbai.

Facts of the case:

2. M/s Mahabali Innovative Technologies Pvt. Ltd., Mumbai obtained an Advance Authorization No. 0310575942 dated 25.05.2010 from RA, Mumbai for import of 24 items as per the list attached with the authorization for a total CIF value of Rs. 28,13,340/- (US$62,518.70) subject to fulfillment of export obligation to export Addage Analoge to Digital HD / SD converter with Genlock for FOB value of Rs. 36,45,000/- (US$ 81,000) within a period of 36 months from the date of issue of the authorization. One of the conditions of the authorization was that the firm would submit the export documents within the prescribed period after the expiry of the export obligation period.

2.1 The export obligation period expired on 01.06.2012. The firm failed to furnish documentary evidence showing fulfillment of export obligation against the authorization. The firm was, therefore, issued a Demand Notice dated 03.04.2014 asking to show cause as to why action under Rule 7 of the Foreign Trade (Regulation) Rules, 1993 should not be initiated and renewal of further authorizations should not be suspended in case the firm failed to take action as directed in the Demand Notice. Thereafter, the firm was declared defaulter vide Circular dated 22.09.2014.

2.2 Since the firm failed to furnish the required documents showing fulfillment of export obligation, Show Cause Notice under Section 14 of the Foreign Trade (Development and

Regulation) Act, 1992, was issued on 04.04.2016 directing to explain as to why action should not be taken against the firm under Section 11(2) the Foreign Trade (Development and Regulation) Act, 1992. An opportunity of personal hearing was also granted to the firm on 25.04.2016 directing the firm to explain the case in person. But the firm failed to avail the opportunity of personal hearing nor they furnished any reply in this regard.

2.3 On going through the facts and records of the case, the Adjudicating Authority noticed that the firm had submitted a letter dated 26.05.2014 requesting RA office to issue letter showing description of raw material components and its quantity to pay custom duty with interest. Accordingly, RA office had issued letter to the firm on 29.05.2014 showing description and quantity of raw material components imported for payment of custom duty with interest. However, the firm did not furnish any evidence to prove that they had paid custom duty with interest against the advance authorization. Hence, the Adjudicating Authority held the firm guilty of violation of the provisions of Section 11(3) of the Foreign Trade (Development and Regulation) Act, 1992 and Rule 7(c) of the Foreign Trade (Regulation) Rules, 1993.

2.4 In consideration of above facts, the Adjudicating Authority, in exercise of powers conferred upon him under Section 13 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, passed Order-in-Original No. 03/01/002/00003/AM17 dated 29.09.2017 imposing fiscal penalty of Rs. 5,00,000/- on the firm under Section 11(2) of the said act.

3. Aggrieved by the Order-in-Original No. 03/01/002/00003/AM17 dated 29.09.2017, the appellant filed appeal under Section 15 of FT (DR) Act, 1992, as amended, before the Additional Director General of Foreign Trade (Appellate Authority), Mumbai.

3.1 Personal Hearing was granted to the appellant on 23.01.2018 by the Appellate Authority. Nobody attended the personal hearing nor was any written submission received from the appellant. A fresh opportunity of personal hearing was granted to them on 22.02.2018. Shri Roy Lawrence, Exim Manager of the firm, appeared for personal hearing before the Appellate Authority.

3.2 He reiterated what had been given in the written statement. He stated that they had not been given sufficient opportunity to defend their case. They were given only one opportunity of personal hearing on 23.02.2017 by the Adjudicating Authority which could not be attended as the concerned person was indisposed. He stated that due to advancement in technology, they could not export the resultant product. Their firm became a sick unit. In the written statement, they had stated that they had asked the RA office to issue them a letter to enable them to pay duty on excess import but could not pay duty on the entire excess import due to financial crunch.

3.3 The appellant had also stated in the written statement that they had received an Adjudication Order dated 24.03.2017 from the Customs against which they had filed an appeal with the Commissioner of Customs, New Delhi and had stated that they could not be penalized by two Government agencies for non-fulfillment of export obligation for the same authorization.

3.4 The appellant further stated that there had been no malafide intention on their part in obtaining the authorization and failing to export the resultant product due to change in technology and upgrading of products in international markets.

3.5 After going through the Adjudication Order as well as the documents available on record, the Appellate Authority found the followings:

(i) The appellant had alleged that they could not be penalized by two Government agencies for non-fulfillment of export obligation for the same authorization. In this context, the appellant may refer to Sl. No. 10 of the Order-in-Original dated 29.09.2017 wherein it was clearly mentioned "this order is issued without prejudice to any other action that may be taken under any other act, rules or regulation in force".

(ii) The appellant's contention that they were not given sufficient time and opportunity is incorrect. It is pertinent to note that Show Cause Notice was issued on 04.04.2016 granting opportunity of personal hearing. The allegation made by the appellant is denied; no one attended the personal hearing. A second opportunity of personal hearing was granted to the appellant on 23.02.2017. Despite the fact that appellant was given sufficient time and opportunity to submit the documentary evidence towards regularization of the case, they failed to submit the same before the Adjudicating Authority.

(iii) The appellant was required to submit the documents towards regularization of the case without waiting for Show Cause Notice or any correspondence from the Licensing / Adjudicating Authority.

3.6 In view of the above findings, 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. 03/16/144/00036/AM.18/00507 dated 29.03.2018.

4. Aggrieved by the decision of Appellate Authority, the appellant has filed the present Review Petitions stating that:

4.1 Due to rapid advancement in technology, they could not export the resultant product.

4.2 They wrote to Addl. DGFT, Mumbai to issue them a letter to enable them to pay duty on excess imports and obtained a letter under File No. 03/86/160/00313/AM15 dated 12.05.2014 wherein it was pointed out that there was excess import of items. They could not pay duty on the entire excess imports due financial crunch.

4.3 Vide letter dated 25.04.2016, they explained their case and further produced auditor certified net worth certificate showing erosion of more than 50% of capital, confirming that they have become a sick unit. Therefore, it is not correct that they have not furnished any reply to the Department as mentioned in Para 7 of the order which was passed mechanically without appreciating their position.

4.4 Only one personal hearing had been granted on 25.04.2016 which could not be attended as the concerned person was indisposed. The meeting was attended with Mr. K.P.

Singh and informed that due to constant upgradation – they could not export and auditor net worth certificate was issued.

4.5 It was further explained that the situation being in the nature of business risk they were committed to pay duty on the excess imports and that levy of penalty and confiscation of goods for no malafide action / intention is not applicable for excess imports. Thus, no natural justice has been extended to them and on this account the Order needs to be set aside.

4.6 As per Customs Notification No. 96/2009 dated 11.09.2009, wherein it has been provided in Para 1(iv) –

> "that in respect of imports made before the discharge of export obligation, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with."

4.7 They agree that due to a sudden technological advancement their proposed export item has become obsolete and has no international market and therefore, they are stuck with material. They fully agree that this situation is in the nature of business risk for which they are bound to pay duty on the excess imports in terms of the bond filed with the Customs Department at the time of imports. Levy of penalty for no malafide action on their part is not applicable for excess imports. More so, as they have already requested the Department to issue a letter for payment of Customs duty before any show cause notice was issued and thus their bonafides are proven. They rely on the case reported in 2015 (327) E.L.T 305 (Tri. Mum.) –

IN THE CESTAT, WEST ZONAL BENCH, MUMBAI

KDL. BIOTECH LTD. Versus COMMR. OF CUS. (EXPORT PROMOTION), MUMBAI

Wherein it has been held that-

Demand and penalty - EXIM - Import - Advance - license - Excess import of duty free raw materials - Duty Penalty not imposable - Sections 28 and 112 of Customs Act, 1962.
(Paras 20, 21)

4.8 In view of the facts cited above, they have requested to drop the Order-in-Original dated 29.09.2017 for the following reasons-

> There has been no malafide intention on their part in obtaining the authorization and failing to export the resultant product due to change in technology and upgrading of products in international markets. By the time they could import the electronic items, manufacture and market, newer advanced products hit the markets and they were left with outdated obsolete products which could not attract dynamic pricing. They agree that they are responsible for exporting the resultant product, but penalizing them for bonafide transaction is not justified. Moreover, it has been provided for in Notification No. 96/2009-Cus dated 10.09.2009 Para 2 that in respect of imports made

before the discharge of export obligation, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this Notification are not complied with.

4.9 Imposition of penalty of Rs. 5,00,000/- for the above minor lapses which are not deliberate without any malafide intention is very harsh and unjustified. The Adjudicating Authority has failed to appreciate the amount of penalty was disproportionately harsh merely on the technical lapse cited above which was unintentional and was curable defect. In this regard, they rely on the following judgment-

HINDUSTAN STEEL LTD. Versus STATE OF ORISSA 1978 (2) E.L.T. (J 159) (S.C.)

No penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner prescribed by the statute. Even otherwise, they submit that no provisions of the Foreign Trade (Development and Regulation) Act and Rules made there under are violated which justify imposition of penalty as there is no deliberate contravention for any material benefit. They further submit that there are no grounds stated in the impugned order, except the grounds of non submission of documents, which would justify the imposition of penalty. Hence, they submit that the impugned order is even otherwise without jurisdiction. Moreover, the Appellate Authority has not considered, discussed or commented on the legality of the case laws submitted with the appeal, therefore no natural justice has been extended to them.

4.10 In the light of the aforesaid facts, they have requested to quash and set aside the penalty imposed as per impugned order and to allow this appeal.

5. The appellant was granted Personal Hearing on 25.07.2018 at 3.15 PM to be heard by the Reviewing Authority. Shri Roy Lowrence, Exim Manager appeared before the undersigned on the given date on behalf of the appellant. The appellant has made written submission stating that:

5.1 Even though they are undergoing severe financial constraints and loss of business, they are managing to make the payment against the unperformed obligations against the advance authorization. They have furnished a copy of the statement for payment cum outstanding along with copies of the challans towards customs duties paid till date. They have also furnished the copy of the Balance sheet and Net Worth Certificate.

5.2 Due to speedy advancement in technology and sudden availability of cheap alternative products in the market they could not match the competition eventually leading to heavy loss in business.

5.3 They have no malafide intention and they are trying their best to arrange the payment and resolve the matter, even though they are a sick unit.

5.4 They have requested to allow them a period at least six months to clear the dues and also requested not to levy / waive penalty and interest as they are unable to bear the brunt of it.

6. I have gone through the facts and records of the case carefully. It is observed that the Advance Authorisation had expired on 25.05.2012 but the firm has not paid the duty plus interest against unperformed obligation so far. Ample opportunity was given to the Appellant but they could not get the case regularized even after six years. Therefore, the case laws and provisions quoted by the Appellant are not applicable to them due to willful default on their part to pay the custom duty plus interest for regularization of their case for such a long time.

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

Order

F. No. 18/18/2018-19/ECA-I /222 **Date of Order** 14th **November, 2018**

The Review Appeal is dismissed. Order-in-Original dated 29.09.2017 and Order-in-Appeal dated 29.03.2018 are upheld.

Alok V. Chaturvedi
Director General of Foreign Trade

To

1. M/s Mahabali Innovative Technologies Pvt. Ltd.,
   Monarch House, Master Royal Palms,
   Aarey Milk Colony, Goregaon (East),
   Mumbai-400065.

2. The Addl. Director General of Foreign Trade,
   CGO Complex, Nishtha Bhawan,
   New Marine Lines, Churchgate,
   Mumbai-400020.

Tika Ram Majhi
Deputy Director General of Foreign Trade