

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. 18/20/2018-19/ECA-I (3)/227

Date of Order November, 2018

Date of Dispatch 14th November, 2018

Name of Appellant : M/s Shreenath Plastopack Pvt. Ltd.,
C-1/119-120, GIDC Estate,
Waghodia, Vadodara,
Gujarat-391760.

Order Appealed against : Order-in-Appeal No. 08 / 01 / 144 / 00148 / AM17 /
A'bad / 0248 dated 28.03.2018 passed by the Addl.
DGFT, Mumbai:

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

Order-in-Review

L M/s Shreenath Plastopack Pvt. Ltd., C-1/119-120, GIDC Estate, Waghodia, Vadodara,
Gujarat-391760 has filed Review Petition against Order-in-Appeal No. 08/01/144/00148/
AM17/A'bad/0248 dated 28.03.2018 passed by Additional Director General of Foreign Trade,
Mumbai.

Facts of the case:

2. M/s Shreenath Plastopack Pvt. Ltd., Vadodara obtained an Advance Authorization No. 3410022024 dated 05.08.2008 from RA, Vadodara to import LDPE Granules (Quantity 98000 kgs) for a CIF value of Rs. 94,86,400/- (US\$ 215600) subject to fulfillment of export obligation to export article made of LDPE (Quantity 93350 kgs) for FOB value of Rs. 95,48,000/- (US\$ 217000) within a period of 24 months from the date of issue of the authorization or as otherwise specified under the relevant provisions of Foreign Trade Policy and Handbook of Procedures (Vol-I) 2004-09. One of the conditions of the authorization was that the firm would submit the export documents within 2 months after the expiry of the export obligation period.

2.1 The firm requested RA on 27.02.2009 for changing of port of registration to ICD Sabarmati which subsequently was accepted by RA. The advance authorization was amended for the change of port on 04.03.2009.

2.2 The Export Obligation Period (EOP) of the Advance Authorization expired on 05.08.2010.

2.3 The firm submitted a request letter to RA on 16.09.2010 for Extension of Export Obligation Period from 24 to 36 months which was subsequently accepted by RA. Advance Authorization was amended with EOP extension from 24 months to 36 months on 27.09.2010.

2.4 The firm submitted another letter to RA on 19.10.2011 for Extension of Export Obligation Period (EOP) to 02.06.2013 stating the position of the company that it was registered as sick unit for rehabilitation of MSME sick viable enterprises with Government of Gujarat vide their Certificate No. IC/IM/Reg/Sick Unit/T-B/1474 dated 17.09.2009. Vide their letter dated 25.10.2011, RA informed the firm that their request was rejected as per Para 4.22 of HBP.

- 2.4 The firm again submitted a letter to RA on 08.11.2011 for Extension of Export Obligation Period to 5 years. Request of the firm was accepted and EOP was extended up to 10.08.2012 vide RA's letter dated 22.11.2011.
- 2.5 A Demand Notice for submission of documents evidencing fulfillment of Export Obligation was issued on 23.11.2012.
- 2.6 Show Cause Notice was issued on 28.11.2013 with direction of Personal Hearing to Joint DGFT, Vadodara on 27.12.2013. No one appeared for Personal Hearing nor submitted any document towards fulfilling Export Obligation.
- 2.7 On going through the facts and records of the case, the Adjudicating Authority noticed that RA had accepted extension to EOP two times. EOP was extended to 10.08.2012 which was originally upto 31.08.2010. As such two more years were given to the firm to fulfill the EOP.
- 2.8 Reasonable time was given to the firm and also personal hearing was granted to them. But the firm failed to submit export documents and failed to fulfill the export obligation. As no single document was submitted towards fulfillment of Export Obligation, the Adjudicating Authority was of the opinion that export was Nil.
- 2.9 In view of the above, the Adjudicating Authority held the firm responsible for violation of the provisions of Export and Import Policy and Section 11 of the Foreign Trade (Development and Regulation) Act, 1992, as amended. Hence, 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. 34/01/002/0095/AM14 dated 19.08.2014 imposing a penalty of Rs. 1,89,72,800/- (Rupees One Crore Eighty Nine Lakh Seventy Two Thousand Eight Hundred only) on the firm and its Directors / Partners / Proprietors under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, as amended.
3. Aggrieved by the Order-in-Original No. 34/01/002/0095/AM14 dated 19.08.2014, the appellant filed appeal 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.
- 3.1 An opportunity of Personal Hearing was granted on 17.01.2018 by the Appellate Authority. Shri Prakash Christian, Advocate on behalf the appellant appeared for personal hearing on the given date.
- 3.2 He reiterated the facts mentioned in their written statements. He stated that to complete 100% export, the appellant had repeatedly approached the Industries Commissionerate with a request to grant extension of validity of 5 years instead of 3 years. He further stated that they were ready to pay Custom duty for the balance obligation if waiver of interest was allowed being a sick unit.
- 3.3 The appellant stated that they had another Advance Authorization No. 3410021541 of the same product against which the appellant had not imported anything but had exported 65.74 MT. He further stated that if clubbing of Authorization No. 3410022024 dated 05.08.2008 was done with Authorization No. 3410021541 dated 05.06.2008, then the shortfall in export obligation would be 27610 only and they were ready to pay duty for balance obligation if waiving of interest was allowed being a sick unit.
- 3.4 Export obligation period was valid up to 05.08.2010. As requested by the appellant, export obligation was extended up to 10.08.2012, i.e. two more years were given to the appellant to fulfill the export obligation. The appellant failed to submit the export documents even after the extended Export Obligation Period.

3.5 After hearing the appellant and going through the Adjudication Order / oral and written submission in appeal as well as the documents available on record, the Appellate Authority found the followings:

- (i) There was no cogent reason. The appellant had failed and neglected to submit the export documents during the initial / extended export obligation period of 2 years i.e. up to 10.08.2012. This Act of failure on the part of the appellant attracts provisions of Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, as amended.
- (ii) The appellant's request for waiver of payment from interest on Imports made could not be acceded to.
- (iii) The Adjudicating Authority followed the due process and appropriate course of action followed on principle of natural justice by giving the appellant reasonable time and sufficient opportunity for submitting the export documents or to get the case regularized by paying Custom Duty plus Interest on imports made.
- (iv) No sufficient documentary evidence furnished to suggest that export obligation would be met in full.

3.6 The Appellate Authority found that there was absolutely no justification to interfere with the Order-in-Original passed by the Adjudicating Authority. Hence, , 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. 08/01/144/00148/AM 17/A'bad/0248 dated 28.03.2018.

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

4.1 They had imported 98 MT of HDPE however could not export since the validity of the authorization expired.

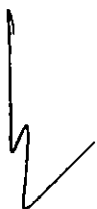
4.2 Show Cause Notice dated 28.11.2013 came to be issued to the applicant, for initiating action under Section 11(4) of the Foreign Trade (Development and Regulation) Act, 1992, imposing a penalty on the ground that the applicant had failed to fulfill the conditions of export obligation within the stipulated period,

4.3 The applicant appeared for personal hearing against the Show Cause Notice dated 28.11.2013 before Joint DGFT and verbally explained in detail why they could not submit the export documents and fulfill the export obligation within time limit because the appellant firm was under BIFR and registered under sick unit. The applicant also discussed the company's various problems and requested for extension of validity of the authorization for further two years.

4.4 The Order-in-Original dated 19.08.2014 came to be passed holding the applicant guilty for non-submission of required export documents towards fulfillment of export obligation.

4.5 Being dissatisfied and aggrieved with the Order-in-Original dated 19.08.2014, the applicant preferred an appeal before the Appellate Authority praying for grant of extension of 2 years to complete export obligation, waiver of pre-deposit, staying recovery of penalty etc.

4.6 Despite the above factual position the impugned order came to be passed rejecting the appeal of the applicant.



4.7 The impugned order is ex-facie bad in law as the same has been passed contrary to the provisions of the law and contrary to the principles of natural justice. On this ground alone the impugned order deserves to be quashed and set aside.

4.8 The applicant is a sick unit and facing lot of financial problems due to which the bank facilities were retrenched by the banker and also put up at DRT and started recovery under SARFAESI Act.

4.9 The applicant was also facing stiff competition in export business as also other problems due to global market slash down during material time.

4.10 The Order-in-Original was passed ex-parte without hearing the applicant.

4.11 The applicant should have been allowed to club the export obligation under Authorization No. 3410021541 with the obligation under the Authorization No. 3410022024 which is the subject matter of the petition. Under the Authorization No. 3410021541 the applicant had exported 65.74 MT of finished products valued at 54,45,249/- (US\$ 130578). As against this export the applicant has not imported any quantity under the Authorization, the Foreign Trade Policy permits clubbing of one or more authorizations for the purpose of export obligation fulfillment.

4.12 It is not the case of the Department that the applicant had not followed the provisions of the law for import of goods and export of goods. There has been no mis-declaration of facts or suppression of facts on the part of the applicant. Non-fulfillment of export obligations for reasons beyond the control of the applicant can not invite such a disproportionate penalty.


4.13 The impugned order and the Order-in-Original seek to impose penalty jointly on the applicant company as well as its Director which is not permissible in law. The proceedings against the applicant have been vitiated by an error of law in as much as no separate penalties have been quantified against the applicant company and against its Director. Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 does not provide for imposition of penalty jointly on the applicant as well as Director. On this ground alone the impugned order deserves to be quashed and set aside.

4.14 It is not the case of the Department that the goods imported under the advance authorization were not utilized for the purpose for which they were imported. In the absence of any such finding, the impugned order can not be sustained. The applicant craves leave to refer to and rely upon the judgment of the Hon'ble High Court of Delhi in the case of Optima Impex Pvt. Ltd. vs. UOI 2003 (151) ELT 493.

4.15 Mere non-fulfillment of export obligation can not result into imposition of penalty. Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 is not invocable when there is a failure to export goods which is beyond the control of a person. This is the legal position laid down by the Hon'ble High Court of Delhi in the case of Dencap Electronics vs. ADGFT reported in 2006 (194) ELT 389. This judgment of the Hon'ble High applies on all fours to the case of the applicant in as much as the non-fulfillment of export obligation was beyond the control of the applicant in as much as due to global slump in the economy at material time. The applicant's unit could not export the products nor could sell the same in the local market resulting into applicant's unit certified as a sick unit.

4.16 For the reasons stated above, no penalty can be imposed on the applicant company.

4.17 In view of the factual and legal position, the applicant has requested to quash and set aside the impugned order.



5. The applicant was granted Personal Hearing on 09.08.2018 at 3.00 PM to be heard by the Reviewing Authority. Shri Siddharth Chaturvedi, Director and Shri J.K. Chaturvedi appeared before the undersigned on the given date on behalf of the applicant and explained their case.

5.1 I have gone through the facts and records of the case carefully. It is observed that the applicant was given EOP extension of two years and thereafter the applicant was given ample opportunity to submit the export documents or get their case regularized by payment of duty plus interest. The applicant did not submit export documents showing fulfillment of EO/payment of duty plus interest even before the Appellate Authority. Even at this stage, the applicant is not saying anything about submission of relevant documents. They are arguing about technical and legal points so that they can avoid penalty and interest on duty which has not been paid for a long time. The Appellate Order seems to be in order. Therefore, I find no reason to interfere with the Appellate Order.

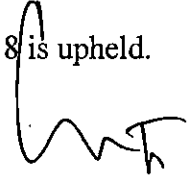
6. I, therefore, in exercise of powers vested in me under Section 16 of FTDR Act, 1992, as amended, pass the following order:

Order

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Date of Order 14th November, 2018

The Review Appeal is dismissed. Order in Appeal dated 28.03.2018 is upheld.



Alok V. Chaturvedi
Director General of Foreign Trade

To

1. M/s Shreenath Plastopack Pvt. Ltd.,
C-1/119-120, GIDC Estate,
Waghodia, Vadodara,
Gujarat-391760.
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