

**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. 18/22/2018-19/ECA-I/239

Date of Order November , 2018

Date of Dispatch 14th November , 2018

Name of Appellant : M/s A.D. Textiles,
Post Box No. 63, 1/104,
Sanjay Nagar, Erode Road,
Authur Road, Karur,
Tamil Nadu-639002.

Order Appealed against : Order-in-Original No. 32/21/039/00002/AM.12 dated
20.10.2017 passed by the Deputy DGFT, Coimbatore.

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

Order-in-Review

M/s A.D. Textiles, Post Box No. 63, 1/104, Sanjay Nagar, Erode Road, Authur Road, Karur, Tamil Nadu – 639002 has filed Review Petition against the Order-in- Original No. 32/21/039/00002/AM.12 dated 20.10.2017 passed by the Deputy DGFT, Coimbatore.

Facts of the case:

2. M/s A.D. Textiles, Karur (Tamil Nadu) obtained an Advance Authorization No. 3210048570 dated 24.06.2011 from RA, Coimbatore for Annual Requirements for import of relevant fabrics for a CIF value of Rs. 50,00,000/- subject to fulfillment of export obligation to export of textile products for FOB value of Rs. 1,00,00,000/- 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 2 months after the expiry of the export obligation period.

2.1 The firm failed to fulfill the export obligation and also did not submit any original documents as per Para 4.28 of Handbook of Procedures, 1997-2002 / 2002-2007. The firm also failed to regularize the case by payment of customs duty plus interest as directed by RA vide letter dated 08.03.2017. Therefore, a Demand-cum-Show Cause Notice dated 21.04.2017 under Section 14 for action under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992 was issued.

2.2 Under the circumstances, the Adjudicating Authority was fully convinced that the firm and its Proprietor / Partners / Directors had violated the conditions of the Authorization and thereby were liable to a penalty under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992.



2.3 In consideration of above facts, the Adjudicating Authority, in exercise of powers conferred upon him under Section 13 read with Section 11 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, passed Order-in-Original No. 32/21/039/00002/AM.12 dated 20.10.2017 imposing a penalty of Rs. 50,00,000/- on the firm and its Partners as no reply to the Show Cause Notice was received and also there was no appearance on personal hearing granted to them.

2.4 The Adjudicating Authority further ordered that no further Authorization would be issued to the firm or any other firm in which the Proprietor / Partners / Directors of the firm were directly involved in the day-to-day activities of that firm as per Para 2.10 of Foreign Trade Policy and Para 4.24.1 of Handbook of Procedures, 2004-2009 read with Section 7(1)(a) and (k) of the Foreign Trade (Development and Regulation) Act, 1992.

3. Due to inadvertent delay, the firm did not prefer an appeal under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992 against the Order-in-Original No. 32/21/039/00002/AM.12 dated 20.10.2017. Hence, the firm has filed Review Petition directly to the second Appellate Authority, the DGFT under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992, as amended.

3.1 They have stated that the goods were imported for a total CIF of Rs. 8,44,543.58/-.

3.2 Due to adverse and non-competitive market conditions in the overseas countries, they could not export the resultant product manufactured by them.

3.3 They had voluntarily paid the Custom duty plus interest for a total value of Rs. 19,95,485/-

3.4 Evidence to the fact of payment of Custom duty plus interest have been confirmed by the Customs, Chennai vide their letter No. S405/111/2018-DEEC / EODC dated 03.04.2018.

3.5 Similarly, the Customs, Tuticorin have also confirmed the payment of Custom duty plus interest for Rs. 94,483/- for the imports affected through their Port vide letter No. VIII/06/07/2016-ICD dated 01.08.2016.

3.6 The payment details of Custom duty plus interest are mentioned as below:

Chennai Customs	Amount	Tuticorin Customs	Amount
Payment through MEIS Debit	8,55,858.00	SC-34 No. 74030	56,041.00
T.R. Challan	1,53,255.00	SC-34 No. 74195	38,442.00
MC/OTH 00004 through SBI	13,895.00		
MCM through Indian Bank	8,77,994.00		
Total	19,01,002.00		94,483.00
Grand Total	19,95,485.00		

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3.7 The above payment of Custom duty plus interest paid by them and confirmed by the Customs absolves of responsibility cast on them for fulfilling the conditions of the export obligations under the Advance Authorization for Annual Requirements (AAAR).

3.8 The payment of Custom duty and interest due to bonafide default in EO has been permitted under Para 4.28 of HBP, 2009-14 and thus, the voluntary payment of the custom dues under 'AAAR' may be treated as full settlement of the Government Revenues to the Department.

3.9 It has been the constant mandate of the Government not to impose penalty in case of EO short fall on bonafide grounds which can be regularized by paying the admissible custom duty plus interest foregone under the 'AAAR' as per Para 4.28 of HBP, 2009-2014. This mandate is squarely applicable in their case and therefore, they have requested to review the impugned Order-in-Original of the Dy. DGFT under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992.

3.10 When they have settled the entire custom duty along with the interest which is permitted under the mandate of the Hand Book of Procedures 2009-2014 vide Para 4.28 thereof, then there is no ground to sustain the impugned order by which the huge penalty was fastened on their shoulders and as such the impugned Order-in-Original would not survive in the eyes of law and deserves to be reviewed for setting aside the same in the interest of justice.

3.11 The impugned Order-in-Original dated 20.10.2017 of the Dy. DGFT, Coimbatore imposing a penalty under Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 is arbitrary and not sustainable and run contrary to the mandate of the HBP governing bonafide default in the fulfillment of export obligation under the 'AAAR' Scheme.

3.12 The Dy. DGFT, Coimbatore had wrongly penalized their company under the heading 'CONTRAVENTION OF THIS ACT, RULES, ORDERS AND FOREIGN TRADE POLICY' under Section 11 of the Act as if they had contravened the Act and Rules and the Foreign Trade Policy which is totally erroneous. On the contrary, their case is fully covered under the definition of Bonafide Default in EO as per Para 4.28 of HBP, 2009-14. Therefore, in the absence of any conclusive findings of contravention or even violation on their part, the impugned order imposing penalty can not be sustained in the eyes of law and therefore, it needs to be reviewed to the restore the sanctity of the mandate of HBP in the interest of justice.

3.13 Regularization of Bonafide Default in EO has been an established procedure constantly maintained by the Government in the Foreign Trade Policy and Procedures. The current Para 4.50 of HBP covers the Bonafide Default under Chapter IV – Advance Authorization Scheme which is similar to the Para 5.14 of HBP for Regularizing the Bonafide Default under EPCG Scheme. Therefore, when their EO has been regularized as per Para 4.28 of HBP relevant, the penalty imposed on the same ground can not be sustained under the mandate of Policy and Procedures.

3.14 It is well settled principles of law as held in the cases of Phillips (India) Ltd. v. Commissioner of Customs, Mumbai 2001 (137) E.L.T. 697 (Tri-Mumbai) that penalty can not be imposed for non fulfillment of EO under EPCG especially when the failure had no willful intent on the part of the Authorization holder. The same principles have also been held



in the cases of Meirs Pharma (India) Pvt. Ltd. v. Commissioner of Customs, Chennai, M/s Steel Authority of India Ltd. v. Commissioner of Customs, Visakhapatnam and M/s Sun Knitwear Pvt. Ltd. v. commissioner of Customs, Bangalore.

3.15 In the case of Shuchitha Mills Ltd. and P. vs. Commissioner of Customs – 2007 (Appeal No. C/200/2004), the CESTAT, Chennai has held that once the duty liability has been settled and paid back by the Authorization holder, the penalty imposed can not be sustained and the import under the 'AAAR' will have to be treated as normal import outside the purview of the Chapter-IV, duty free Scheme. Therefore, the question of the violation of the conditions of the EPCG Scheme does not arise at all and consequently no penalty whatsoever could be imposed. The ratio of this case law is squarely applicable to facts and circumstance of the case and as such when the authorization holder had paid the entire duty availed under the subject 'AAAR' Authorization, the penalty imposed by the Dy. DGFT, Coimbatore in the impugned order deserves to be set aside.

3.16 It is well settled that once the duty plus interest had been fully paid and thus the Authorisation holder had proved their honesty in dealing with the statutory authorities, no penalty can be imposed as held by the Hon'ble Supreme Court in the case of Jaswal Neco Ltd. vs. CC, Visakhapatnam reported in 2015 (322) ELT 561 (SC) which is squarely applicable to the facts and circumstances of their case and hence, penalty imposed in the impugned Order-in-Original dated 20.10.2017 is not sustainable and therefore, they have requested that the entire penalty may be deleted in the interest of justice.

3.17 On similar issue, the CESTAT, New Delhi in the case of Hotel Surya International vs. CC (ICD) New Delhi has held that no penalty can be imposable on the sole ground that export obligation has not been fulfilled. This settled law is applicable to their case and therefore, they have requested to delete the penalty and set aside the impugned order in the interest of justice.

3.18 It is settled law that an order imposing a penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. A penalty will not also be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed, the authority competent to impose the penalty may refuse to impose the penalty if the breach complained was a technical or venial breach, flew from a Bonafide through mistaken belief. Therefore, the penalty imposed in the impugned order is not sustainable in as much as the EO default is the bonafide one and certainly can not be treated as willful default.

3.19 Under fiscal laws, penalty can only be imposed on the conclusive finding of mensrea on the part of the assessee and in the absence of willful intent to evade duty; no penalty whatsoever could be imposed. In their case, the EO default is a bonafide one and not classifiable as a willful default at all. The Hon'ble Supreme Court, in the matter of Union of India v. Rajasthan Spinning and Weaving Mills – (2009) 13 SCC 448 = 2009 (238) ELT 3(SC) relying upon its earlier decision in the matter of Cosmic Dye Chemical v. CCE – (1995) 6 SCC 117 = 1995 (75) ELT 721 (SC) has held that suppression or mis-statement or suppression of facts must be willful and the condition precedent for imposition of penalty is that the authority would have to be satisfied that non-payment or short payment of duty was deliberate with intent to avoid payment of duty. In the judgment, it has finally been observed

by the Supreme Court that penalty under Section 11AC is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section. This Judgment is squarely applicable to the fact of their case in as much as the EO default is nothing but a bonafide default not intended to evade custom duty at all. And when the entire custom duty has been paid and fully settled Customs, they had proved their bonafide conduct in dealing with the statutory authorities and therefore, no mensrea of willful intent could be established on their part. Under these circumstances, the penalty imposed in the impugned order may be set aside by deleting the entire penalty as devoid of merits and not sustainable in law more specifically as per Para 4.28 of HBP, 2009-14.

3.20 Further in the case of HOTEL SURYA INTERNATION Vs CC (ICD) New Delhi (reported in 2014 (314) ELT 564 – (Tri-Del) the Hon'ble Tribunal has held that:

“There was no deliberate attempt to avail benefits of deferred payment of duty. It would not proper to apply the provisions of confiscation or of penalty and on the sole ground that the export obligations are not fulfilled.”

3.21 In view of the above, the applicant has requested to review the impugned order by condoning the delay in filing the appeal and pass orders by setting aside the impugned order in as much as the entire custom dues plus interest have been voluntarily settled by the petitioner for its bonafide default in EO as per Para 4.28 of HBP, 2009-14 and thus render justice.

4. The applicant was granted Personal Hearing on 25.07.2018 at 3.30 PM to be heard by the Reviewing Authority. Shri Pulkrit Tare, Advocate appeared before the undersigned on the given date on behalf of the applicant and explained their case.

4.1 I have gone through the facts and records of the case carefully. It is observed that the Appellant has paid custom duty plus interest and the customs have confirmed the same. The Appellant have also stated that due to adverse and non-competitive market conditions in the overseas countries, they could not export the resultant product manufactured by them and their case can be regularized under Para 4.28 of HBP 2009-14 as non-fulfillment of EO by them for a bonafide default. In view of the circumstances, the Appellant needs to be given one more opportunity.

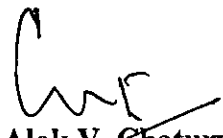
5. I, therefore, in exercise of powers vested in me under Section 16 of the FTDR Act 1992, as amended, pass the following order:

Order

F. No. 18/22/2018-19/ECA-I/240

Date of Order ^{14th} November, 2018

The Review Appeal is admitted. Order-in-Original dated 20.10.2017 is set aside. The case is remanded back to RA, Coimbatore for de-novo consideration.


Alok V. Chaturvedi
Director General of Foreign Trade

To

1. M/s A.D. Textiles,
Post Box No. 63, 1/104,
Sanjay Nagar, Erode Road,
Authur Road, Karur,
Tamil Nadu-639002.
2. The Joint Director General of Foreign Trade,
Coimbatore.



Tika Ram Majhi
Deputy Director General of Foreign Trade