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**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. 18/24/2017-18/ECA-I/310

Date of Order January, 2019

Date of Dispatch 17<sup>th</sup> January, 2019

Name of Appellant : M/s Chemical De Universe Pvt. Ltd.,  
Plot No. 3/409, 9A Ground Floor,  
Opp. Heera Panna, Tardeo,  
Mumbai-400034.

Order-in-Appeal No. 03/16/144/00087/AM.17/207 dated 31.07.2017 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 Chemical De Universe Pvt. Ltd., Mumbai has filed Review Petition against Order-in-Appeal No. 03/16/144/00087/AM.17/207 dated 31.07.2017 passed by Additional Director General of Foreign Trade, Mumbai.

**Facts of the case:**

2. M/s Chemical De Universe Pvt. Ltd., Mumbai obtained an Advance Authorization No. P/L/3112847 dated 05.05.1986 from RA, Mumbai for a CIF value of Rs. 52,81,200/- with export obligation for FOB value of Rs. 79,75,000/-.

2.1 The firm completed the exports worth Rs. 96,78,260/- against fixed FOB value of Rs. 79,75,000/- as imposed and were issued an excess entitlement certificate for the FOB value of Rs. 17,03,260/- by the RA.

2.2 However, they had imported banned/canalized/restricted item to the extent of Rs. 46,70,544/- while the firm's entitlement on FOB value of exports worked out to Rs. 24,19,565/- as pointed out by the Audit Authorities.

2.3 The firm was, therefore, advised to surrender the excess benefit of Rs. 17,03,260/- granted to them. A Show Cause Notice dated 09.06.2003 under Section 14 of the Foreign Trade (Development and Regulation) Act, 1992 was issued to the firm as to why action should not be taken against them under Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 to recover excess entitlement worth Rs. 17,03,260/- against advance authorization No. P/L/3112847 dated 05.05.1986 on completion of export obligation imposed in the said authorization.

2.4 The firm did not reply to the Show Cause Notice even after expiry of the stipulated time as given in the notice.

2.5 In accordance with the principle of natural justice and in order to enable the firm to place evidence, if any, on record contravening the allegation leveled against them in the show cause

notice, they were advised to appear for personal hearing on 20.06.2003. Nobody appeared for the same.

2.6 Hence, the Adjudicating Authority, in exercise of powers conferred upon him under Section 13 of the Foreign Trade (Development and Regulation) Act, 1992, passed Order-in-Original No. JDGFT/ALS-III/ECA ADJ/1731 dated 23.07.2003 imposing a penalty of Rs. 17,03,260/- (Rupees Seventeen Lakh Three Thousand Two Hundred Sixty only) on the firm and its Partners / Proprietors under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992.

3. Aggrieved by the Order-in-Original No. JDGFT/ALS-III/ECA ADJ/1731 dated 23.07.2003, 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 05.10.2016 by the Appellate Authority. Shri Kailashchandra Gupta, authorized representative of the appellant appeared before the Appellate Authority on 06.10.2016 and requested to grant another date to enable them to present their case accordingly as they had stated to have lost documents, i.e. copy of Order-in-Original and their appeal papers. Copies of the required documents were made available to them by RA.

3.2 A fresh date of personal hearing was granted on 19.10.2016 but nobody turned up for the same.

3.3 The appellant vide their letter dated 20.10.2016 requested RA office to provide sufficient time to make suitable representation after obtaining copies of records and proceedings.

3.4 With a view to maintain principle of natural justice, a fresh date of personal hearing was granted to them on 11.07.2017, when Shri Manoj Agiwal, Advocate, appeared on behalf of the appellant and presented the points made in their representation dated 18.09.2003. He had not submitted any additional documents over and above the documents which were already submitted.

3.5 After going through the adjudication order as well as the documents available on record, the Appellate Authority found that it was a clear case to stand with the decision taken by the Adjudicating Authority as the firm had imported banned / canalized / restricted items to the extent of Rs. 46,70,544/- while their entitlement on FOB value of export worked out to Rs. 24,19,565/- as pointed out by the Audit Authorities. The appellant was requested to surrender the excess benefit granted to them as pointed out by the Audit Team. The appellant failed and neglected to comply with the Audit Objection. No efforts to surrender the benefit had been made by the appellant.

3.6 The Appellate Authority did not find any justification to interfere with the Order-in-Original passed by the Adjudicating Authority. Hence, in exercise of the powers vested in her under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, dismissed the appeal vide Order-in-Appeal No. 03/16/144/00087/AM.17/207 dated 31.07.2017.

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 The correctness of the order is challenged as the Applicant had submitted additional documents to plead its case which has been ignored by the Appellate Authority. On 07.10.2017, the day and date on which the applicants were called for hearing, as the Appellate Authority was not available, the applicant submitted additional documents which comprised of the additional written submissions and authority letter in favour of Advocate.

4.2 The additional written submissions have direct bearing on the jurisdiction of the Adjudicating / Appellate Authority and its omission while considering the case of the applicant is a glaring mistake and an error on the part of Appellate Authority.

4.3 On the next day of the hearing i.e. on 11.07.2017, the applicant again submitted a photocopy of the additional documents, the authority letter and a protest letter to the Appellate Authority.

4.4 The applicant also submits that there is nothing on record placed by the Department in evidence that the applicant has imported banned/canalized/restricted items to the extent of Rs. 46,70,544/- FOB. The applicant had informed the Adjudicating Authority / Appellate Authority that the applicant does not have any documents relating to transactions 15 years old.

4.5 The impugned order is illegal as the proceedings imposing penalty have been taken under Section 11 r/w Section 14 of the Foreign Trade (Development and Regulation) Act, 1992 whereas the cause of action relates to an Advance License No. P/L/3112847 dated 05.05.1986 and DEEC Book No. 015505 dated 05.05.1986 under the repealed Act viz. Imports and Exports (Control) Act, 1947.

4.6 There was no order issued under the repealed Act viz. Imports and Exports (Control) Act, 1947 in force as on the date and thus no proceedings under Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 including imposition of penalty could have been adopted against the applicant.

4.7 It is a settled position in law that any proceedings without jurisdiction are null and void ab initio.

4.8 The proceedings even otherwise are barred by time. It has been settled through a number of judgments that even the Government is required to act in a reasonable time. The advance license is of May 1986 and the applicant would have performed its export obligation latest by December 1988, thus more than 14 years had lapsed when the letter dated 20.12.2002 was issued or when the alleged show cause notice dated 09.06.2002 was issued. The applicant had immediately by its letter dated 31.01.2003 informed the Authority that the applicant did not have any record of the transaction which had taken place about 14 years ago.

4.9 The impugned order also suffers from propriety. The Appellate Authority by impugned order has over written the order of the Adjudicating Authority which was under appeal. As the order which was appealed against was passed ex-parte, the Appellate Authority ought to have remanded the matters back to the Adjudicating Authority to have the issue adjudicated on evidence.

4.10 The Appellate Authority and before it the Adjudicating Authority having the power to decide can not lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case. In this case the Appellate Authority turned a nelson's eye to the additional submissions of the applicant and the Adjudicating Authority proceeded ex-parte.

4.11 When there is a right vested in an authority created by statute to hear appeals it becomes the duty of such authority to hear judicially.

4.12 The general principle is that an adjudicatory body can not base its decision on any material unless the person against whom it is sought to be utilized has been apprised of it and given an opportunity to rebut, comment, criticize or explain the same.

4.13 It is evident that the impugned order is incorrect, illegal and ultra vires the Foreign Trade (Development and Regulation) Act, 1992 and requires to be set aside.

4.14 It is necessary that the papers and proceedings be called by this Hon'ble Court and the correctness, legality and propriety of the impugned order be examined.

4.15 It has received the impugned order on 04.08.2017 and thus this Review Application is filed within the limitation period.

4.16 In view of the above, the applicant has requested to call for the papers and proceedings and after examining the correctness, legality and propriety of the impugned order and to quash and set aside the impugned order.

5. The applicant was granted Personal Hearing on 21.08.2018 at 3.00 PM to be heard by the Reviewing Authority. Shri Manoj Agiwal, Advocate appeared before the undersigned on the given date on behalf of the applicant. The appellant has made written submission stating that:

5.1 The bond / legal agreement in respect of the subject advance authorization was discharged upon completion of the export obligation and it would be appropriate to consider the year 1987 as the year of discharge of the bond / legal agreement.

5.2 It is assumed the Export Entitlement Certificate would have been issued to the applicant.

5.3 The Authorities have not placed on record the details of, if any, the REP License. The applicant has already informed in 2003 that it does not have the relevant records relating to a transaction concluded 15 years ago.

5.4 There is no ground to apply Section 11 of the Foreign Trade (Development and Regulation) Act, 1992.

5.5 The audit observation was made in 1991. The applicant was put to notice in December, 2002 i.e. after a lapse of 11 years. Such delay has been held to be arbitrary and unreasonable. [2007 (210) ELT 658 (P&H) and 1995 (80) ELT 781 (Bom) relied upon]

5.6 There is no contravention of the Imports and Exports (Control) Act, 1947 by the applicant.

5.7 Whether the audit findings is in accordance with the Scheme of Advance License under Chapter XVI r/w Appendix 19 of the Imports and Exports Policy 1985-1988 and issue of REP License under Chapter XIV read with Appendix 17 r/w Para 28 of Appendix 19. – This aspect requires adjudication.

5.8 Whether the resolution of the irregularity provided by the Licensing Authority in 1991 is in conformity with the last sentence of Para 28 of the Appendix 19 of the Imports and Exports Policy 1985-1988. – This aspect requires adjudication.

5.9 Whether the audit observation is correct.

5.10 In consideration of undertaking an export obligation of FOB Rs. 79,75,000/- being approximately 51% of value addition of application to import banned / canalized / restricted items of CIF value of Rs. 52,81,000/-, the applicant was granted Advance License in terms of Chapter XVI r/w Appendix XIX of the Imports and Exports Policy 1985-1988. The form of application is given in Appendix XVI-A of the Imports and Exports Procedure 1985-1988.

5.11 The Advance License Committee whilst processing the request is guided by Para 3 of Appendix 19 of the Imports and Exports Policy 1985-1988.

5.12 The applicant fulfilled export obligation of FOB Rs. 96,78,260/-. Thus in accordance with Para 28 of the Appendix 19 of the Imports and Exports Policy 1985-1988 was entitled to be issued Excess Entitlement Certificate (EEC) of Rs. 17,03,260/-.

5.13 It is further provided that under the provisions of Chapter XIV r/w Appendix 17, the applicant would be entitled to a REP license equivalent to 25% of the EEC. It is further provided that the EEC would be valid for 3 months.

5.14 Para 219 and 225 of Chapter XIV provide for the terms and conditions for transfer of REP License and the benefits to a transferee. The application for issue of REP license is in Form B under Appendix XVI-J of the Imports and Exports Procedure 1985-1988. Under this Form there is a provision for adjusting erroneously issued license against future license. It is emphasized the value of the license under consideration would be the permissible value being 25% of the EEC.

6. I have gone through the facts and records of the case carefully. It is observed that despite being informed, the party was not coming forward to settle a long pending audit objection. On receiving the Demand Notice dated 20.12.2002, the Appellant was required to prove his case immediately before the Adjudicating Authority that the Audit objection was not correct or they should have surrendered the excess benefit but they failed to do so. Therefore, a Show Cause Notice dated 09.06.2003 was issued to the firm as to why action should not be taken against them to recover excess entitlement. The firm did not reply to the Show Cause Notice. Even then, the party was advised to appear for personal hearing on 20.06.2003. Nobody appeared for the same. Therefore, it is quite evident that ample opportunity was given to the Appellant by the Adjudicating Authority. Hence, the Adjudicating Authority passed Order-in-Original No. dated 23.07.2003 imposing a penalty. The Appellant filed an appeal before Addl. DG, Mumbai. The Appellant could not prove even before the Appellate Authority that the audit objection was not in order. Actually the Appellant had no documents to prove the same. Therefore, the Appellate Authority after going through the facts and circumstances of the case rightly rejected the Appeal vide Order-in-Appeal No. 03/16/144/00087/AM17/207 dated 31.07.2017. I find no reason to interfere with the Appellate Order.

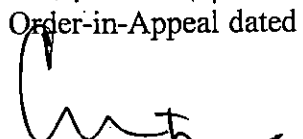
6.1 I, therefore, in exercise of powers vested in me under Section 16 of FTDR Act, 1992, as amended, pass the following order:

Order

F. No. 18/24/2017-18/ECA-I/311

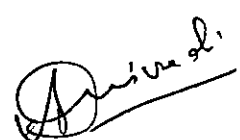
Date of Order January, 2019  
17.01.2019

The Review Appeal is dismissed. Order-in-Original dated 23.07.2003 and Order-in-Appeal dated 31.07.2017 are upheld.

  
Alok V. Chaturvedi  
Director General of Foreign Trade

To

1. M/s Chemical De Universe Pvt. Ltd.,  
Plot No. 3/409, 9A Ground Floor,  
Opp. Heera Panna, Tardeo,  
Mumbai-400034.
2. The Addl. Director General of Foreign Trade,  
CGO Complex, Nishtha Bhawan,  
New Marine Lines, Churchgate,  
Mumbai-400020.

  
Alok Dwivedi  
Deputy Director General of Foreign Trade