

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. 18/27/2018-19/ECA-I / 261

Date of Order December, 2018

Date of Dispatch 13th December, 2018

Name of Appellant : M/s McNally Bharat Engineering Co. Ltd.,
4, Mangoe Lane,
Kolkata-700001.

Order Appealed against : Order-in-Original No. 18/35/FA/CRAD/17-18/EA/CAL
dated 25.05.2017 passed by Joint DGFT, Kolkata.

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

Order-in-Review

M/s McNally Bharat Engineering Co. Ltd., Kolkata has filed Review Petition against the Order-in- Original No. 18/35/FA/CRAD/17-18/EA/CAL dated 25.05.2017 passed by Joint DGFT, Kolkata.

Facts of the case:

2. M/s McNally Bharat Engineering Co. Ltd., Kolkata obtained an Advance Authorization No. 0210156771 dated 25.03.2011 from RA, Kolkata for duty free import of items as allowed on the authorization for a CIF value of Rs. 9,20,100/- (US\$ 20492.20) with obligation for a FOB value of Rs. 5,46,33,930/- (US\$ 1216791.30) within the stipulated period as mentioned in the condition sheet of the authorization.

2.1 The export obligation period expired on 24.03.2014.

2.2 The firm neither submitted the necessary documents for redemption of export obligation nor did they submit the required Customs duty plus interest towards regularization of the case. Therefore, a Notice dated 21.01.2016 was issued to the firm under Rule 7 of the Foreign Trade (Regulation) Rules, 1993, calling upon the firm to show cause as to why they should not be put under 'Denied Entity List' for non-submission of documents towards fulfillment of export obligation and why fiscal penalty should not be imposed against them for violation of the condition of the authorization as well as for import of duty free goods, thus made in violation of Exim Policy. The firm was given 15 days time for submission of their reply and an opportunity for personal hearing was allowed.

2.3 The firm neither submitted any export documents nor availed the opportunity of personal hearing. Therefore, the firm was placed under 'Denied Entity List' on 09.05.2017.

2.4 As the firm failed to fulfill the export obligation, the Adjudicating Authority, in exercise of the powers vested upon him under Section 13 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, and under Section 11 of the said Act, passed Order-in-Original No. 18/35/FA/CRAD/17-18/EA/CAL dated 25.05.2017 imposing a fiscal penalty of Rs. 25,000/- (Rupees Twenty Five Thousand only) in addition to Customs duty and applicable interest to be paid to Customs authority for non compliance and non submission of export documents evidencing fulfillment of export obligation.

3. Due to renal cancer, the petitioner could not file appeal in time against the Order-in-Original No. 18/35/FA/CRAD/17-18/EA/CAL dated 25.05.2017 under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, before the Additional Director General of Foreign Trade (Appellate Authority), Kolkata. Hence, they have submitted Review Petition directly to the Reviewing Authority under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992 stating that:

3.1 They imported "COMPONENT FOR CARDAN SHAFT, HYDRAULIC BUFFER for value of Rs. 8,94,693.03/- (FC 19758.85) as per utilization of the Advance Authorization No. 0210156771 dated 25.03.2011 and have exported 2 NOS STACKER CUM RECLAIMER IN SKD valued at Rs. 24,27,53,472/- more than the stipulated EO of valued at Rs. 16,81,04,400/-. Realized amount is Rs. 19,24,00,001.36 (80% of supply value).

3.2 They upon fulfillment of export obligation and for claiming TED Refund submitted all statutory export documents required to be submitted as per Para 8.2C read with Para 8.3.1(ii) of HBP 2011-12 under TED file No. 02/40/083/00073/AM12 HB (RE 2001-02) of FTP / HBP vide representation dated 20.09.2011.

(i) Original Transporter Copy of Central Excise Invoice / Supply Invoice.

(ii) Original Certificate of Payment as per Appendix-22B

The only act of omission was that intimation of submission of Original Documents with TED Section was not intimated to Advance Authorizing Section ALS.

3.3 Thereafter the Zonal Joint DGFT, Kolkata issued Show Cause Notice dated 21.01.2016 under Rule 7 of the Foreign Trade (Regulation) Rules, 1993. Thereafter, without giving further notices or calling for a personal hearing, the Adjudicating Authority placed the firm under "Denied Entity List" on 09.05.2017.

3.4 Thereafter the office of Zonal Joint DGFT, Kolkata without any intimation for Show Cause Notice under Section 11(2) or any other intimation for PH issued Order-in-Original dated 25.05.2017 under Section 13 read with Section 11 of the Foreign Trade (Development and Regulation) Act, 1992.

3.5 They never received any communications for compliance of EO fulfillment or any notices to appear before the Adjudicating Authority, except the date of communication of impugned Order-in-Original dated 25.05.2017.

3.6 In view of the above, it is apparent that the purported adjudication order by reasons of being completely de hors the provisions of law laid down in the Foreign Trade (Development and Regulation) Act, 1992, and basic tenets of justice, equity and fair play stand out to be wholly bad, invalid and perverse.

3.7 The appeal under Section 15 and review under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992, could not be filed in time due to the fact that the petitioner who is the only authorized signatory for the firm had become indisposed due to his medical impairment of getting operated for Renal Cancer and was in total bed rest for more than 9 months.

3.8 The Adjudicating Authority went one step forward and issued an adverse Suspension of IEC Order vide communication dated 10.01.2018 suspending the operation of IEC No. 288021479 thus jeopardizing their entire import export activity without giving any opportunity for personal hearing or any notices under Section 14 of the Foreign Trade (Development and Regulation) Act, 1992.

3.9 On receiving the suspension order, the petitioner vide their letter dated 05.02.2018 sought personal hearing before the office of the Additional DGFT to revoke the suspension order but they were not heard.

3.10 On its own the Appellant went ahead with submission of Bank Guarantee No. 4044IPEBG180011 dated 20.04.2018 for Rs. 25,000/- seeking time to submit their submissions failing which they shall abide by the Foreign Trade (Development and Regulation) Act, 1992, their request for revoking the suspension order of IEC was not heard.

3.11 Aggrieved by the Adjudication Order / Suspension of IEC order the petitioner begs this petition on the following grounds:

- (i) Paras 8 and 9 of Order-in-Original are incorrect and misleading and without factual facts as no notice dated 21.01.2016 under Rule 7 was received by the petitioner till date until the Order-in-Original dated 25.05.2017 was served upon the petitioner. Also, no other communication was received by the petitioner to submit documents towards EO fulfillment nor any communication for appearing before the Adjudicating Authority was given prior to the issuance of Order-in-Original. Hence the contention that the firm was given 15 days' time for submission of reply and opportunity for personal hearing was allowed is without any facts as no such communication was received except the Order-in-Original dated 25.05.2017.
- (ii) The said Advance Authorization was a Deemed Export Advance Authorization issued upon surrender of Invalidation Letter No 03/96/021/00008/AM10 issued against EPCG Authorization No. 03590114029 dated 28.06.2010 to ESSAR Power M.P. Ltd., and all the export documents had been submitted under TED file No. 02/40/083/00073/AM12 HB (RE 2001-02) of FTP / HBP and TED refund was paid vide approval letter REP/02/40/00073/AM11 dated 11.11.2011 was available in the department and had skipped the attention of Adjudicating Authority which is now being produced before the Review Authority for doing the justice towards their submissions.
- (iii) On a bare perusal of the impugned Order-in-Original dated 25.05.2017 of Joint DGFT, Kolkata reveals that the order is in violation of Section 14 of the Foreign Trade (Development and Regulation) Act, 1992, as no opportunity for personal hearing was provided nor cognizance of their submissions of export documents in their TED applications was made. Hence it appears that the Order-in-Original was issued without following the principle of natural justice and thus on this ground solely the Order-in-Original requires to be set aside and dismissed out rightly.
- (iv) The impugned order passed by the Zonal Joint DGFT is bad in law since the imposition of fiscal penalty of Rs. 25,000/- is autocratic and misuse of powers under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992.
- (v) The Adjudicating Authority has erroneously stated at Para 10 in his impugned order that the petitioner has diverted the whole material imported under Advance Authorization for the purpose other than those for which it was allowed to be imported, while the fact remains that the Adjudicating Authority has failed to take cognizance of documentary evidence of submission of fulfillment of export obligation documents submitted for claiming TED Refund as per Para 8.2C read with Para 8.3.1(ii) of HBP 2011-12 under TED file No. 02/40/083/00073/AM12 (RE 2001-02) FTP / HBP vide representation dated 24.08.2011-
 - (a) Original Transporter Copy of Central Excise Invoice / Supply Invoice
 - (b) Original Certificate of Payment as per Appendix-22B.

The only act of omission was that intimation of submission of original documents with TED Section was not intimated to Advance Authorizing Section.

Therefore, the impugned order date 25.05.2017 is liable to be set aside as the same is based on errors apparent on the facts of record.

- (vi) The Adjudicating Order must be based on the evidence on record to make a speaking order, in the instant case the impugned order is not a speaking order and therefore the same is bad in law.
- (vii) The Joint DGFT being the Adjudicating Authority and a creature of statute, it was incumbent upon him to act fairly and judicially but in the instant case he has failed to do so.
- (viii) ~~The office of Zonal Joint DGFT should have ought to seek further replies in writing from the petitioner after purported Show Cause Notice dated 21.01.2016 and should have checked the correctness of all documentary evidence available in the Advance Authorization file meant to be a Deemed Export Authorization and in that context Licensee must have availed TED Refunds upon availing Invalidation of EPCG Authorization, based on which the subject Advance Authorization has been issued for availing duty free inputs required to be imported upon invalidation of EPCG Authorization.~~
- (ix) The office of the Joint DGFT was in possession of all original documents in support of their fulfillment of export obligation as prescribed under Para 4.25 and 4.26 of HBP 2011-12, can not be denied as REP Section of the office of Joint DGFT had sanctioned TED Refunds of Rs. 1,27,45,220/-, yet the Adjudicating Authority without dealing with the petitioner's contentions and without application of mind arbitrarily came to an erroneous finding that the petitioner diverted duty free imported goods for purposes other than deemed exports.
- (x) The Adjudicating Authority ought to have considered and / or examined the vital documents suo motto, had the same been examined it would have been positively evident from therein that the petitioner had fulfilled the export obligation and no material has been diverted for home consumption as assumed in the Order-in-Original, had the Adjudicating Authority done so by giving an opportunity of personal hearing before exercising the executive powers conferred upon him while signing Order-in-Original dated 25.05.2017 the correct position could have been ascertained and the petitioner would have saved from imposition of fiscal penalty.
- (xi) The Adjudicating Authority has committed a grave error in holding that the petitioner has diverted duty imported goods for purposes other than export, which is factually not correct. The fact that TED Refunds were granted by the office of Joint DGFT vide order ref. No. REP/02/40/83/00073/AM11, upon proper scrutiny of export documents of Supply Invoice / Transport Copies of Original Central Excise Invoices bearing the details of Advance Authorization File No. / Invalidation Letter reference, BRC as per Appendix-22B, statement of exports and imports duly certified by the CA has skipped the attention of Adjudicating Authority. Hence the Order-in-Original is skeptical, erroneous and liable to be set aside.
- (xii) The petitioner has acted in bonafide belief and in ignorance committed an act of omission for not submitting Certified True Copies of proof of exports in the said Advance Authorization file in spite of the fact that said provisions have amply been provided at Para 2.23 of HBP 2009-2014 to furnish Photocopies of Documents already submitted in other division / department. Once the TED is granted upon proper verification of the office of Joint DGFT against an Invalidation Letter for which Advance Authorization has been availed and TED

Refunds has also been granted, the petitioner presumed that they were free of any obligation. The petitioner should have been further granted personal hearing as per Section 14 of the Foreign Trade (Development and Regulation) Act, 1992 and the petitioner would have satisfactorily replied to the notice. Rather than acting in haste and issuing the Order-in-Original to absolve themselves from statutory monitoring of export obligation, bonafide exporter like the petitioner with unblemished track record feels aggrieved and penalizing for facing adjudication proceedings for an act of omission for not intimating the concerned Authorization Section that the export obligation is fulfilled upon submitting Certified Xerox Copies of Supply Invoices and Payment Certificates as per appendix-22B, and also act of error on the part of Adjudicating Authority not to have suo motto taken into consideration the possibilities of documents being available with the other departments of Joint DGFT.

- (xiii) It is well settled that in the matter of imposition of penalty, mens rea and / or conduct and /circumstances are material and relevant.
- (xiv) The petitioner has not acted dishonestly or contumaciously or with the deliberate or distinct object of breaching the law, which would invite deterrent punishment by way of penalty.
- (xv) The Hon'ble Supreme Court of India in Hindustan Steel Ltd. vs. State of Orissa reported in 1978(2) ELT(J159) (SC) has held inter alia as follows:
- “The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in case where the party acts deliberately in defiance of law or is guilty of contumacious, or dishonest conduct or acts in conscious disregard of its obligation; but not, in cases, where there is a technical or venial breach belief that the offender is not liable to act in the manner prescribed by the statute.”
- (xvi) In Jain Exports Private Ltd. vs. Union of India reported in 1990(47) ELT 213, the Hon'ble Supreme Court observed that while determining the question quantum of penalty, it is essential to consider the facts and circumstance relevant to the bonafide conduct of the Importer importing the goods. In the instant case the action of the petitioner was bonafide and consequently penalty imposed should be set aside.
- (xvii) The impugned adjudication order is the product of non-application of mind and is arbitrary, whimsical and without any basis.
- (xviii) There has been no violation of any of the provisions of the Foreign Trade (Development and Regulation) Act, 1992, and the Order-in-Original has been clearly issued on the basis of mere conjecture and surmise without any material on record.
- (xix) In the facts and circumstances of the instant case, the Adjudicating Authority completely misdirected itself in the manner it proceeded against the petitioner and its actions are arbitrary and biased.

3.15 In view of the aforesaid circumstances, the petitioner has requested followings:

- (i) The Order-in-Original dated 25.05.2017 be set aside.
- (ii) Waiver of fiscal penalty of Rs. 25,000/- and pre-deposit of penalty amount, on the grounds that past two years the company is undergoing financial hardship and incurred losses in Crores.

- (iii) Waiver from payment of Customs Duty plus interest as the documentary proof of fulfillment of EO is being submitted.
- (iv) De novo examination of Export Documents submitted for Redemption of Export Obligation.
- (v) Revocation of IEC Suspension Order dated 10.01.2018.

4. The applicant was granted Personal Hearing on 20.10.2018 at 5.00 PM to be heard by the Reviewing Authority. Shri Viresh L. Shah, Legal Advisor / Consultant and Shri Debasish Mukhopadhyay, Senior Manager appeared before the undersigned on the given date on behalf of the applicant. The applicant has made written submission. In the written submission, they have reiterated the same facts as in the Review Petition.

4.1. I have gone through the facts and records of the case carefully. It is observed that the Appellant was issued a notice dated 21.01.2016 under Rule 7 of Foreign Trade (Regulation) Rules 1993 calling upon the noticee firm to Show Cause as to why they should not be put under "Denied Entity List" for non-submission of documents towards fulfillment of Export Obligation. The Appellant have claimed that they did not receive this notice. The Appellant was put under DEL. The Adjudicating Authority passed Order-in-Original dated 25.05.2017 imposing a fiscal penalty of Rs. 25,000/- in addition to custom duty plus applicable interest to be paid by the Applicant. The Appellant could not file an appeal under Section 15 of the FTDR Act, 1992 within the prescribed time limit due to renal cancer. The Appellant has stated that the REP Section of office of the Addl. DGFT, Kolkata was in possession of all original documents relating to fulfillment of Export Obligation. The REP Section had sanctioned TED refund of Rs. 1,27,45,220/- . The Appellant could not inform the Advance Licence Section (ALS) about submission of EO fulfillment documents with the REP Section of the same office. This communication gap has resulted in issue of the said Order-in-Original. In these circumstances, I feel that the Appellant needs to be given one more chance to explain their case before the Adjudicating Authority.

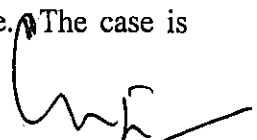
5. I, therefore, in exercise of powers vested in me under Section 16 of the FTDR Act, 1992 as amended pass the following order:

Order

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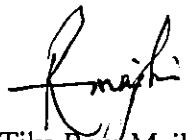
Date of Order 13th December, 2018

The Review Appeal is admitted. Order-in-Original dated 25.05.2017 is set aside. The case is remanded back to RA, Kolkata for de-novo consideration.


Alok V. Chaturvedi
Director General of Foreign Trade

To

1. M/s McNally Bharat Engineering Co. Ltd.,
4, Mangoe Lane,
Kolkata-700001.
2. The Addl. Director General of Foreign Trade,
4, Esplanade, East,
Kolkata-700069.


Tika Ram Majhi
Deputy Director General of Foreign Trade