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Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi- 110011

F. No. 01/92/171/29/AM-17/PC-VI / 11, 12

Date of Order: 17.04.2018

Name of the Appellant:

M/s. Indu Overseas Pvt. Ltd. Sp,
Shed No 23/1/A, GIDC, Shankar
Tekri, Udyog Nagar, Jamnagar-
361004.

Order appealed against:

Order-in-Original No. 04/2016-
17 dated 04.04.2016, passed by
DC, KASEZ, Gandhidham.

Order-in-appeal passed by:

Shri Alok Chaturvedi, DGFT
Shri J.V. Patil, Addl. DGFT

ORDER-IN -APPEAL

M/s. Indu Overseas Pvt Ltd. has filed this appeal under Section 15 of the Foreign Trade (Development & Regulation) Act 1992, as amended from time to time, against Order-in-Original No. 04/2016 dated 04.04.2016 Gandhidham, imposing a penalty of Rs. 25.00 lakhs on the Appellant Company.

2. Vide Notification No.101/(RE 2013)/2009-2014 dated 5th December 2014, the Central Government has authorised the Director General of Foreign Trade aided by one Addl. Director General of Foreign Trade to function as Appellate Authority against orders passed by the Development Commissioners as Adjudicating Authority. Hence, the appeal is before us.

3. M/s. Indu Overseas Pvt., Ltd. Sp. Shed No 23/1/A, GIDC, Shankar Tekri, Udyog Nagar, Jamnagar-361004 were issued a Letter of Permission (LoP) by the Development Commissioner, KASEZ vide LOP No. KASEZ/100%EOU/II/602003-04/11743 dated 11.02.2004, as amended, for setting up new undertaking under the EOU Scheme at Sp. Shed No 23/1/A, GIDC, Shanker Tekri, Udyog Nagar, Jamnagar- 361005 for manufacture and export of Brass Parts for Electrical and Electronic Apparatus for switching etc as amended. And whereas, as per the terms and conditions of the aforesaid LoP, the noticee firm, inter-alia, was required to achieve NFE as prescribed in the FTP.

4. It was noticed that the noticee firm had commenced their commercial production under EOU scheme w.e.f. 08.06.2004. Review of their export performance for the second five year block as on 31.03.2014 on the basis of Annual Performance Reports (APR) furnished by the noticee firm revealed that they were NFE negative as per the following details:

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	(Rs. In lakhs)
i) FOB value of Exports	:504.98
ii) Value of imported Capital Goods	:0.00
iii) Value of Imported Raw Materials	:1149.58
iv) Other outgo of Forex earnings	:0.90
NFE Achieved: (i) – [(ii) + (iii) (iv)]	:(-) 645.50

5. It was observed from the records that the noticee firm had not made any export or import activities from 2012-13 onwards. As per LoP, the noticee firm was required to achieve positive Net Foreign Exchange (NFE) as prescribed in the EOU Scheme.

6. The noticee firm had failed to achieve the stipulated NFE for the second five year block, contravening the provisions of the FTP relating to EOUs, the relevant provisions in the HBP of the FTP in force and also the conditions LoP. Further, the unit had not been carrying out business as per LoP. Thus the DC proceeded with the issuance of the Show Cause Notice.

7. The DC after issue of notice and hearing the firm, passed an O-I-O dated 04.04.2016 and imposed a penalty of Rs. 25.00 lakhs for not achieving of NFE by Rs. 645.50 lakhs during the 2nd Block period of five years. Since firms LOP expired on 06.06.2014 and the noticee firm was not carrying out any activities since 2012-13 and the unit had neither made a request for renewal of LoP nor had completed procedure for exit from the scheme, he also imposed a penalty of Rs. 1.00 lakh.

8. Against the order of the DC the firm filed an appeal. Mr. Prahalad Ray Jhanwar, Director along with CA, Subash Boardé appeared for personal hearing before the Appellate Committee on behalf of M/s. Indu Overseas Pvt. Ltd. on 30.08.2017. They stated that they are negative only by Rs. 76.37 lakhs not by Rs. 645.50 lakhs as contended by the DC. The arguments in their written submission were as below: -

- (a) The impugned O-I-O dated 04.04.2016 issued by the DC, KASEZ, imposing a heavy penalty of Rs. 25.00 lakhs for not achieving positive NFE of Rs. 645.50 lakhs and of Rs. 1.00 lakhs for Non Renewal of LOP is not correct as there is no such high NFE Negative as alleged in SCN.
- (b) The adjudicating authority has not discussed or recorded any finding on provisions of Para 6.5 which read as "NFE Earning shall be calculated CUMULATIVELY IN BLOCKS of Five Years, starting from commencement of production."
- (c) (i) It was necessary to know amendments in EXIM/FTP pertaining to calculation of NFEE. In the EXIM/FTP during 1997-2002 to 2015-2020 following amendments were made: -

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Particulars	Exim/Foreign Trade Policy	Handbook of Procedures
1997-2002	NFEP shall be calculated cumulatively for A PERIOD of FIVE YEARS from the commencement of commercial production.	Net Foreign Exchange Earning as a percentage of Export.
2004-2009	Net Foreign Exchange Earnings shall be calculated cumulatively IN BLOCKS OF FIVE YEARS starting from commencement of production.	Net Foreign Exchange Earnings shall be calculated cumulatively for A BLOCK OF FIVE YEARS from commencement of production.
2009-2014	Net Foreign Exchange Earnings shall be calculated cumulatively IN BLOCKS OF FIVE YEARS starting from commencement of production.	NFE shall be calculated cumulatively IN THE BLOCK PERIOD as per Paragraph 6.5 of FTP.
2015-2020	Net Foreign Exchange Earnings shall be calculated cumulatively IN BLOCKS OF FIVE YEARS starting from commencement of production.	NFE shall be calculated cumulatively IN THE BLOCK PERIOD as per Paragraph 6.4 of FTP.

(ii) On the basis of performance of the appellant as per the provision of para 6.5 of relevant FTP as amended from time to time calculation of NFE as under:

Particulars	Opening Stock	Import	Closing Stock	Export		NFE	Cumulative NFE
				Export	DTA Sale		
2004-05	0.00	343.68	125.43	277.06	0.00	58.81	58.81
2005-06	125.43	340.25	214.95	371.71	0.00	120.98	179.79
2006-07	214.95	857.62	339.57	767.54	0.00	32.86	212.65
2007-08	339.57	1371.34	714.83	1008.12	0.00	10.36	223.01
2008-09	714.83	691.02	644.29	1109.00	0.00	346.12	569.13
2009-10	644.29	348.79	654.64	207.57	0.00	(131.17)	437.96
2010-11	654.64	156.50	803.25	125.61	0.00	117.52	555.48
2011-12	803.25	0.00	0.00	171.80	0.00	(631.85)	(76.37)
2012-13	0.00	0.00	0.00	0.00	0.00	0.00	(76.37)
2013-14	0.00	0.00	0.00	0.00	0.00	0.00	(76.37)

(iii) From the above it could be clearly seen that there was no such a huge Negative NFE as alleged.

(d) The overall working since their commencement of production gives a very clear picture of their working which was a very favorable NFE positive till they were doing business activities were not disturbed for the reasons beyond their control. There was international recession in year 2008 and 2009. They were in

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the business of non-ferrous metal scrap and were manufacturing product out of imported scrap, they were hard hit when the prices of Brass came down to US\$ 2400 from US\$ 4300 per MT within a short period.

(e) Central Excise Authorities started to issue SCNs for the period from deletion of activities of segregation from the definition of Manufacture in Appendix 6B sector specific requirement for EOUs. In the same way Notification No. 52/2003-CUS was amended by Notification No. 84/2007 dated 06.07.2007 and Notification No. 60/2008 dated 05.05.2008 restricting generation of waste and scrap upto 2% in case SION was not approved by DGFT. These SCNs on wrong interpretation for SION resulted in a practical closure of majority Jamnagar Brass EOUs. At this high time of recession, such heavy burdened demand notices forced them to discontinue the business and stock available with them was only disposed off.

(f) As per EXIM policy for the year 1997-2002 during the relevant period NFEE was in specific percentage of Export as per HBP. In the EXIM Policy it is written that NFE shall be calculated cumulatively for a period of five years. During the relevant period NFE was to be calculated for last five years of Block as per Para 9.29 of EXIM Policy 1997-2002. For example, for calculating NFE of last five years will be 1997-98 to 2001-02 for the first block period, 2nd block is 1998-99 to 2002-03, 3rd block period if 1999-2000 to 2003-04 and so on. In the above system of calculation of NFE for first five years, NFE earned more than the prescribed percentage was automatically carried forward in the next block.

9. **Discussions and Findings:**

(a) The order of the DC, the appellant's contentions and the policy provisions were considered. The appellant contention was that they were NFE positive in the first block of 01.04.2004 to 31.03.2009 and if the positive NFE of the first block was carried to the second block of 01.04.2009 to 31.03.2014 they were NFE negative by Rs. 76.37 lakhs only and not by Rs. 645.50 lakhs.

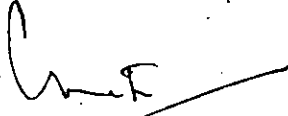
(b) As per Para 6.5 of the FTP, 2009-14, the NFE earnings shall be calculated cumulatively in blocks of five years, starting from commencement of production, and the unit should be a positive NFE earner in each of such 5 year blocks respectively. One cannot carry the positive NFE amount from one 5 year block to next 5 year block. In the firms' case, the review was for the second block of five year as on 31.03.2014. The review for NFE was to be done specifically for the second block of five year ending 31.03.2014. Accordingly it has been done and found negative by Rs. 645.50 lakhs. The contentions that the NFE was to be calculated for all the blocks and not for a particular period of five years were not tenable. The Policy 1997-2002 is not relevant to the firm. Moreover, as mentioned in DC order, the monitoring guidelines provided under Appendix 14-I-G of HBP 2009-14 clearly stipulated that annual monitoring in the cases of old units which had completed more than 5 years will be under taken for only such number of years which fall in the second block of five years. The monitoring was for second block of five years as on 31.3.2014. Accordingly it was done and was found to be negative by Rs 645 lakhs.

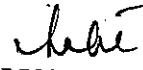
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(c) Para 6.6.1 (c) of FTP, 2009-14 prescribes that for failure to ensure positive NFE or to abide by any of the terms and conditions of LOP/LOI/IL/LUT shall render the unit liable to penal action under provisions of FTD&R Act, as amended, and Rules and orders made thereunder, without prejudice to action under any other law/rules and cancellation or revocation of LOP/LOI/IL. Since they failed to achieve the positive NFE, accordingly they were liable for penalty.

ORDER

We do not intend to interfere with the order of the DC, KASEZ passed vide Order-in-Original No. 04/2016-17 dated 4.4.2016. The Appeal stands dismissed.



(Alok Chaturvedi)
DGFT


(J V Patil)
Addl. DGFT

To:

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✓ Copy to: - Development Commissioner, KASEZ, Gandhidham.


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