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

F. No. 01/92/171/35/AM-17/PC-VI / 16, 17

Date of Order: 20.04.2018

Name of the Appellant:

M/s. Tolaram Electronics Pvt.
Ltd. B/15-17/P, GIDC
Electronic Estate, Sector-25,
Gandhinagar, Gujarat.

Order appealed against:

Order-in-Original No. 24/2010-
11, dated 27.08.2010, passed
by DC, KASEZ, Kutch.

Order-in-appeal passed by:

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

ORDER-IN -APPEAL

M/s. Tolaram Electronics 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.24/2010-11 dated 27.08.2010, passed by DC, KASEZ, Kutch, imposing a penalty of Rs. 50.00 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. The appeal should be filed within a period of 45 days from date of receipt of the order as stipulated in under section 15 (1) (b) of the Foreign Trade (Development & Regulation) Act, 1992 (amended in 2010). Further, second proviso to section 15 (1) (b) of the Act stipulates that in the case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of the penalty or redemption charges has been deposited. Further, it has also been provided that where the Appellate Authority is of the opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose. Although, the unit has filed the appeal beyond the period as prescribed under section 15 (1) (b) of the Foreign Trade (Development & Regulation) Act, 1992 (amended in 2010), we decided to condone the delay in filing the appeal and to hear the appeal. The Unit has further requested for waiver of pre deposit of penalty for hearing the appeal. We have acceded to the Unit's request for dispensing with the penalty amount.

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4.0 Brief facts of the case are as under:

4.1 M/s. Tolaram Electronics Pvt Ltd. B/15-17/P, GIDC Electronic Estate, Sector-25, Gandhinagar, Gujarat was issued Letter of Permission (LoP) bearing No. PER:11(92)/EO320(91)/IL dated 15.01.1992, as amended, to set up a 100% EOU at B-15/16/17/P, GIDC, Electronic Estate, Gandhinagar, Gujarat for manufacture of color, black and white T.V. sets.

4.2 As per the terms and conditions of the LoP the notice firm, inter-alia, was required to fulfill the export obligation by exporting the entire resultant products, except as permitted to sell in Domestic Tariff Area (DTA) and at the same time (ii) to achieve a minimum value addition of 24.88% as prescribed in the LoP. The noticee firm executed Legal Undertaking (LUT) dated 28.05.1992 to fulfill the terms and condition of LoP.

4.3 The firm commenced commercial production under EOU scheme w.e.f. 01.08.1992, and made duty free imports and utilized the same. The export performance of the firm as on 31.03.96 and 31.03.98 was reviewed for the period from 01.08.92 to 31.03.96 and 01.04.93 to 31.03.98 respectively on the basis of the performance reports.

4.4 As the firm failed to fulfill the stipulated export obligation and NFEP norms, show cause notices dated 23.03.98 and dated 23.03.05 were issued to the firm to show cause as to why action should not be taken for imposition of penalty under section 4-1 of the Import and Export (Control) Act, 1947 read with Section 20(2) and FTDR Act, 1992 and for debarring them from importing any goods, receiving import licenses, Customs clearance permits and allotment of imported goods through STC/MMTC of India or any other similar agency.

4.5 Personal hearing was held before the DC on 02.06.2005. They informed the DC that due to change in technology and competition with other countries they had to shut down their operations in 1993-94, thereby could not achieve the stipulated export obligation. Capital goods imported have been installed and majority of the raw materials are also put to use into production. It was pleaded for allowing depreciation on the capital goods imported by them and requested for smooth exit without imposition of penalty since the company was already going through financial hardship. The details of indigenous procurements and the quantum of goods converted into exportable products were called for. But the firm did not submit the data. Having followed the principles of natural justice, before taking up the case for adjudication, it was decided by the DC to adjudicate the SCN ex-parte based on the evidence available on record.

4.6 The cumulative performance of the unit as per the records available and SCN issued to the notice firm as recorded in the DC order was as under:

1.	Import of capital goods	Rs. 345.90 lakhs
2.	Value of raw materials, etc. consumed	Rs. 16.18 lakhs
3.	Other outflow of foreign exchange	Rs. 1.52 lakhs
4.	Value of exports	Rs. 63.11 lakhs

4.7 The firm had sought in 1999, in principal for de-bonding. But were unable to do the final exit for want of permission from the Central Excise Department. The firm had export of Rs. 63.11 lakhs as against foreign exchange outflow of Rs. 363.60 lakhs resulting in negative foreign exchange earning to the extent of Rs. 300.49 lakhs and violation of conditions of LoP by way of not meeting the stipulated level of foreign exchange earnings.

4.8 On conclusion of the adjudication proceedings, The DC vide order-in-original No. 24/2010-11 dated 27.08.2010 imposed a penalty of Rs. 50 lakhs in terms of section 4-I of the Import and Exports Control Act, 1947 read with Section 20(2) of FTDR Act, 1992.

5. Aggrieved by the adjudication order dated 22.12.2016, the Unit has filed the present appeal on 22.02.2013 with request for condonation of delay. The firm was given an opportunity for Personal Hearing on 30.1.2018 and 21.02.2018. However, nobody appeared for personal hearing.

6. The grounds of appeal as per written submission are as under:

a) They were granted of LoP No. Per: 11(92)/E.O 320(91) I.L dated 15.01.1992 for manufacture of 1, 56, 000- TV Division they have achieved Positive NFE. They also had LOP dated 23.11.1990 for the division for manufacture of blank cassettes.

b). In the Order-In-Original No. 21/2010-11 dated 27.08.2010 passed by the Development Commissioner in appellant in respect of LOP No. Per: 82(90)/E.O 299(90) Misc dated 23.11.1990 for manufacture of Blank Video Cassettes Division, the Development Commissioner had set aside the proceedings. In the said order the DC observed as below:

"As seen from records available, the SCN was served on account of shortfall in exports with reference to minimum threshold level fixed i.e Rs. 4500/- lakhs in the 5 year block period. The noticee firm have actually achieved the NFE of Rs 215.80 lakhs, which is definitely more than the value of imports during the said period i.e. Rs. 157.66 Lakhs. In view of the above factual figures, I find there is no negative NFE achievement and also no mis-utilization of benefits extended to the notice firm. Further the current Foreign Trade Policy says that a EOU shall be only a positive net foreign exchange earner to operate in the 100% EOU scheme. In the instant case, the noticee firm achieved positive NFE of 23.20%".

c) Ratio of the Judgment of Development Commissioner in the matter of LoP for manufacture of Blank Video Cassettes shall squarely apply here in case of LoP for manufacture of TVs.

d) As per present law 100% EOU units shall be only a positive net foreign exchange earner to operate in the 100% EOU Scheme and the same law is also relied by the Development Commissioner in appellant's case in the matter of LoP for manufacture of blank video cassettes.

e) Appellant submits that conclusion drawn by the Honorable Development Commissioner that appellant is Negative Net Foreign Exchange Earner in the present case (i.e TV Division) is baseless and erroneous and hence the demand under impugned Order-In-Original deserves to be dropped.

date

f) Appellants are not Negative Net Foreign Exchange Earner because they have not made any payment in foreign currency while importing capital goods thus there is no out flow of foreign exchange to that extent.

g) They have not made any payment to foreign supplier in foreign currency except payment of Rs. 20, 18, 257/- (Rs. 10, 68, 236/- towards Capital goods for BVC Division and Rs. 9, 50, 021 CG for TV Division) out of the total import value of Capital goods of Rs. 3, 60, 04, 557/- (which includes Rs. 3, 49, 36, 321 for TV division). The payment for such imports was not made in foreign currency to foreign supplier. Instead, the payments to such foreign capital goods suppliers were made by way of issue of shares in lieu of payment in foreign currency obtaining the prior permission from Reserve Bank of India. The appellant had issued 3, 39, 863 equity share having face value Rs. 100/- of appellants company to the foreign suppliers as a consideration for purchase of imported capital goods. The appellants took prior permission of the RBI for issuance of shares to the foreign supplier against the purchase of the capital goods. The shares were issued to overseas corporate body vis. M/s. Galt Investment Ltd. Hongkong.

h) The import on account TV Division was Rs. 3, 64, 34, 775/- (Capital goods Rs. 3, 49, 36, 321/- and other raw material Rs. 14, 98, 454) and their export for the TV Division was Rs. 63, 11, 700/-. No payment in foreign currency made to the foreign currency. Thus, against export of Rs. 63, 11, 700/- their import is Rs. 9, 50, 021/- for capital goods and Rs. 14, 98, 454/- for raw materials and thus their NFE is Rs. 38, 60, 235/- and NFE 61.21%.

i) The SCN does not specify the export obligation and value addition norms which Appellant allegedly failed to fulfill. Appellants have positive Net Foreign earning in the present case.

j) Appellants could have saved or earned foreign exchange by the re-exporting the capital goods to the foreign supplier however, permission for re-export was not granted to the appellant.

k) There was any intention to evade duty or defraud the revenue. The intentions were always genuine. However, nobody could foresee that Video Cassettes and Black & White TV sets would become outdated so fast. Cassettes were replaced by Compact Disc and Digital Video Discs. Black & White TVs were replaced by color TV, flat TV, LCD and Plasma TV. The equipments imported by the Appellants were rendered useless as a result of the changes.

7. Discussion and findings:

The review of the performance of the EOU was (LOP covering manufacture of TVs) for the five year period ending on 31.03.1996 and 31.03.1998 and was done by the DC. On review, the DC found that the firm was negative NFE to the extent of Rs. 300 lakhs resulting in violation of the conditions of LOP. Accordingly, the DC has imposed the penalty of Rs. 50 lakhs. As part of the scheme, the unit imported the raw materials and the capital goods without payment of any duty. The government revenue is involved. The contention of the appellant that there was no outflow of foreign exchange as shares in lieu of foreign exchange was issued with the approval of RBI against these capital goods imported and hence they are NFE positive. This is not sustainable. As per the EOU scheme the firm has to achieve the NFE positive covering the value of the capital goods also. On the assessed value of the capital goods, the customs would have

collected the duty but for the exemption. Thus, the firm is negative in NFE as recorded by the DC and is liable for penalty for the negative NFE. The DC has accordingly passed the order.

ORDER

We do not intend to interfere with the Order passed by the DC KASEZ vide Order NO 24 /2010-11.dated 27.8.2010. The appeal stands dismissed.



(Alok Chaturvedi)
DGFT

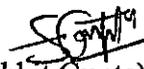


(J V Patil)
Addl. DGFT

To,

M/s. Tolaram Electronics Pvt. Ltd.
B/15-17/P, GIDC Electronic Estate,
Sector-25, Gandhinagar, Gujarat.

Copy to: - Development Commissioner, KASEZ, Gandhinagar, Gujarat.



(Shobhit Gupta)

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