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

F. No. 01/92/171/02/AM-18/PC-VI/18, 19

Date of Order: 20.04.2018

**Name of the Appellant:**

M/s. Indocean Tools Pvt. Ltd.  
Plot No. 420-422, GIDC  
Industrial Estate, P.O.  
Kabilpore, Navsari- 396424,  
Gujarat.

**Order appealed against:**

Order-in-Original No. 02/2017,  
dated. 04.05.2017, passed by  
DC, KASEZ, Gujarat.

**Order-in-appeal passed by:**

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

**ORDER-IN -APPEAL**

M/s. Indocean Tools 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. 02/2017 dated 04.05.2017, passed by DC, KASEZ, Gujarat, imposing a penalty of Rs. 300 lakhs on the Appellant Company.

2. Vide Notification No.101/(RE 2013)/2009-2014 dated 5<sup>th</sup> 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. The unit has filed the appeal within the period as prescribed under section 15 (1) (b) of the Foreign Trade (Development & Regulation) Act, 1992 (amended in 2010). The Unit has further requested for waiver of pre deposit of penalty for hearing the appeal, as the appellant is a sick Company and proceedings are going on under SARFAESI Act, 2002. In view of this, we have acceded to the Unit's request for dispensing with the penalty amount.

4.0 Brief facts of the case are as under:

4.1 M/s. Indocean Tool Pvt Ltd., Plot No. 420-422, GIDC Industrial Estate, P.O. Kabilpore, Navsari- 396424, Gujarat was issued Letter of Permission (LoP) by Development Commissioner, KASEZ, Gujarat vide LoP No. KASEZ/100%EOU/24/2002-03/11249 dtd. 26.06.2002, as amended for setting up an EOU unit at Plot No. 420-422, GIDC Industrial Estate, P.O. Kabilpore, Navsari- 396424, Gujarat for manufacture and export of Handsaw machine with/without blades, carbide blades as amended. The noticee firm had commenced their commercial production under EOU scheme w.e.f. 11.10.2002.

4.2 As per the terms and conditions of the aforesaid LoP, the noticee firm, inter-alia, was required to achieve NFEP as prescribed in the Foreign Trade Policy.

4.3 Based on the Annual Performance Reports submitted by the firm for the period 2014-15, it was noticed that foreign exchange remittance amounting to Rs. 1519.47 lakhs was shown as pending for realization beyond the prescribed period. For the period 2013-14 the pending foreign exchange remittance was Rs. 1503.04 lakhs.

4.4 Para 2.54 (a) of FTP, 2015-20 prescribes that if an exporter fails to realize export proceeds within time specified by RBI, he shall, without prejudice to any liability or penalty under any law in force, be liable to return all benefits/incentives availed against such exports and action in accordance with provisions of FTDR Act, Rules and Orders made there under and FTP.

4.5 The firm had failed to realize export proceeds amounting to Rs. 1519.47 lakhs as per the Annual Performance Reports from the period 2014-15, within the time specified by the RBI, thus contravening the provisions of the Foreign Trade Policy, Handbook of Procedures in force and also the conditions of the LoP.

4.6 The DC issued a Show Cause Notice dated. 17.05.2016 to the firm to show cause as to why action should not be taken for cancellation of their LoP under section 9 of the FTDR Act, 1992 read with Rule 10 of the Foreign Trade Regulation Rules, 1993 and imposition of penalty under section 11 of the FTDR Act, as amended.

4.7 The firm did not respond to six notices and finally on 7<sup>th</sup> opportunity appeared for personal hearing. The DC noted that the non realized amount includes that starting from 2002-03 and the firm has approached to RBI seeking permission to write-off through Authorized Bank after issue of the notice. But, they have not informed about any amount foreign exchange written-off by any Competent Authority. Making efforts for realization at this stage do not have any substance as the normal time allowed to EOUs for realization of foreign exchange is 180 days. The DC passed order imposing penalty of Rs. 300 lakhs for non-realization of export proceeds amounting to Rs. 1519.45 Lakhs.

5. **The related Foreign Trade provisions:**

i) The para 2.54 of FTP 2015-20 read as under:

(a) If an exporter fails to realize export proceeds within time specified by RBI, he shall, without prejudice to any liability or penalty under any law in force, be liable to return all benefits / incentives availed against such exports and action in accordance with provisions of FT (D&R) Act, Rules and Orders made there under and FTP.

(b) In case an Exporter is unable to realise the export proceeds for reasons beyond his control (forcemajeure), he may approach RBI for writing off the unrealized amount as per procedure laid down in para 2.87 of Handbook of Procedures.

(c) The payment realized through insurance cover, would be eligible for benefits under FTP. The procedure to be followed in such cases is laid down in para 2.85 of Handbook of Procedures.

ii) Para 2.87 of Hand Book of Procedure of FTP 2015-20 read as under:

"Realization of export proceeds shall not be insisted under Foreign Trade Policy, if the Reserve Bank of India (RBI) or any "Authorized Bank" (authorized by RBI for this purpose) writes off the requirement of realization of export proceeds on merits and the exporter produces a certificate from the concerned Foreign Mission of India about the fact of non-recovery of export proceeds from the buyer. However, this would not be applicable in self - write off cases".

6. Aggrieved by the order dated 04.05.2017, the Unit has filed the present appeal. The appellant in his written submission has advanced the following grounds for approval:

a) The DC has gravely erred in passing the order. There is no force of law. The demand for penalty cannot be upheld in the instant case.

b) The period relates to Financial Year 2014-15 and respondent had referred to the provisions of FTP 2015-20 which is not relevant and appropriate. It should have been FTP of 2010-2015 and not 2015-20 and hence, SCN is bad eyes of law.

c) The appellant had applied for writing off their unrealized exports proceeds to RBI. The respondent wait till the final disposal of application for writing off by RBI to allow the writing off as per Para 2.87 of HBP.

d) In some of cases of the foreign parties to whom the appellant had made export, the amount could not be realized. There is no possibility of realization there of in future also as they had tried so many times to realize the same without any positive result.

e) They had though belatedly, but fulfilled all the procedures as mentioned in FTP and hence, now there are no procedural lapses on the part of Appellant and hence there is no violation.

f) The RBI had issued the direction vide F. No. RBI/2012-13/435 [A.P. (DIR Series) Circular No. 88] Dt. 13.03.2013 wherein they had given the procedure to be followed "Write Off" of Unrealized Exports Bills beyond the specified percentage as mentioned in the said circular and RBI will, on case to case basis will allow the exporters to allow the self write off beyond the specified percentage.

g) The appellant had already applied to RBI to allow self "Write Off" the unrealized Exports Bills beyond the specified percentage for the reasons mentioned therein

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through AD. They request to kindly wait till the final disposal of application for self write off so that there will not be any unnecessary legal harassment to the appellant.

h) The DC had proposed to impose the penalty under section 11 of the FTDR Act, 1992. However, there was no mention of any sub-clause under which it should be imposed. As per section (2) of section 11 of the Act, the penalty is leviable only if any person makes or abets or attempts to make any export or import in contravention of any provisions of this Act or rules or Orders made there under or the FTP. In the instant case, the appellant has, by applying to RBI for self "Write Off", had complied with all the provisions and procedure of the FTP and hence there is no contravention on the part of appellant and hence, there is no question of imposing penalty under this section at all.

i) The unrealized export proceeds amounting to Rs. 1519.47 lakhs is accumulated balance outstanding of past periods commenced from FY 2002-03, and it relates to more than one year. Some of the foreign parties to whom the Appellant had made exports are not realized and possibility of realization thereof is also nil. As the amount pertains to the period covering from FY 2002-03, the limitation also comes into picture and applying the provisions of "Limitation Act", the demand is time barred as pertains to period for more than 3 years and hence the SCN should be dropped on the aspect of limitation as well.

j) By stating in the APR about non realization export proceeds the Appellant had disclosed all material facts. Thus, there was no mala fide intention on the part of Appellant.

k) RBI vide A.P. (DIR Series) Circular No. 40 (December 5, 2003) provided full flexibility to all exporters and reducing the paper work associated with seeking extension of time or reduction in invoice value or write off. Thereafter RBI vides A.P. (DIR Section) Circular No. 88 dtd. 12.03.2013 had reduced the limit of self write-off from 10% to 5%. However, the limit will be related to total export proceeds realized during the previous calendar year and will be cumulatively available in a year. Further for period 2010-11 to 2014-15, the Appellant had not made any provision for doubtful debt in the books of account of debtors for the period more than one year. From the detailed calculation of export made realization of export proceeds and self write-off available for the period 2010-11 to 2014-15. It is clear that the Appellant as self-write off the amount of Rs 2, 83, 38, 903/- in the five year block period whereas he was eligible for Rs. 3, 71, 15, 679/- self write-off. Thus, the Appellant had not contravened any provisions and hence they are not liable for any penalty. Export made by the Appellant is more than import made during all the relevant year. The Appellant had achieved positive, "Net Foreign Exchange Earnings" for the period of year 2010-11 to 2014-15.

l) They were NFE positive and hence not liable to refund any export incentives.

7. The firm was given an opportunity of Personal Hearing on 21.02.2018 before the Appellate Authority. However, they did not appear for Personal hearing. On 19.02.18, an e-mail came from the firm requesting for time of two months stating that they are in the process of getting the approval of RBI for write-off and hence, the time to get the sanction from the RBI. It was decided to proceed with and pass ex-parte order based on the facts in the case.

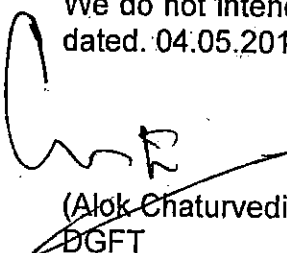
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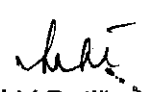
8. Discussion and findings:

The appellant's submission and the FTP provisions and provisions related to realization of export proceeds are considered. Realization of exports proceeds is important for earning of foreign exchange for the country. The export proceeds have to be realised within the prescribed time, unless there is a specific provision of any write off as per the RBI regulations/permissions. In this case, the firm has an outstanding of non realization export proceeds amounting to Rs. 1519.47 lakhs as per the APR submitted for the year 2014-15. The petitioner has neither produced the realization nor has taken any permission from RBI. The contentions that he has applied to RBI for permission and the DC should have waited till the RBI finalise on their application is not tenable. They should have obtained permission even before issuance of Show cause Notice. The realization of export proceeds is critical and has very wider implications. Moreover, the firm is operating under EOU scheme which allows duty free inputs for manufacture and also the machinery enjoyed the benefits of the scheme. The provisions of para 2.54 clearly states that non realization of exports proceeds within a time prescribed by RBI is liable for return of all the benefits/incentives availed against such exports and action under the provisions of the FTDR act, 1992. Thus the penalty imposed by the DC is in accordance with the provisions. The contention that para 2.54 of the FTP relates to 2015-20 and SCN should have been issued with reference to 2010-2015 is also not sustainable. This argument is of no consequence as even in FTP 2009-14 the para 2.41 clearly specified that non realization export proceeds within the time prescribed would invite the action under FTDR Act, 1992.

**ORDER**

We do not intend to interfere under the order of the DC passed vide order No. 02/2017 dated. 04.05.2017. The appeal stands dismissed.

  
(Alok Chaturvedi)  
DGFT

  
(J V Patil)  
Addl. DGFT

To, ✓  
M/s. Indocean Tools Pvt. Ltd.  
Plot No. 420-422, GIDC Industrial Estate,  
P.O. Kabilpore, Navsari- 396424, Gujarat.

Copy to: - ✓ Development Commissioner, KASEZ, Gujarat

  
(Shobhit Gupta)

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