

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

F.No. 01/92/171/116/AM 16/ PC-VI/21-122 Date of Order: 07.09.2018

Date of Dispatch: 12.09.2018

Name of the Appellant:

M/s Star Brilliant Private Limited, Unit No.
001 Block II, SEEPZ++, SEEPZ-SEZ,
Andheri East, Mumbai-400096.

Order appealed against:

Order-in-Original No. SEEPZ-SEZ/NUS/
APL/GJ/280/02-03/16213 dated 06.10.2015
passed by the Development Commissioner,
SEEPZ, Mumbai.

Order-in-Appeal passed by:

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

Order-in-Appeal

M/s Star Brilliant Private Limited, Mumbai (hereinafter referred to as 'the appellant'), a SEZ unit, has filed an appeal dated 04.11.2015 u/s 15 of FT(DR) Act, 1992 against Order-in-Original No. SEEPZ-SEZ/NUS/APL/GJ/280/02-03/16213 dated 06.10.2015 passed by the Development Commissioner, SEEPZ, Mumbai.

2. Vide Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, the Central Government has authorized the Director General of Foreign Trade aided by one Addl. DGFT in the Directorate General of Foreign Trade to function as Appellate Authority against the orders passed by the Development Commissioner, Special Economic Zones as Adjudicating Authorities. Hence, the present appeal is before us.

3.0 Brief facts of the case are that:

3.1 M/s Star Brilliant Private Limited, a SEZ unit situated at Unit No. 001, Block II, SEEPZ++, SEEPZ-SEZ, Andheri East, Mumbai-400096, was issued a Letter of Permission bearing No. SEEPZ-SEZ/1A-1/NUS/APL/GJ-280/02-03/2066 dated 13.02.2003 for manufacture and export of studded Gold Jewellery. The appellant was

granted subsequent approval for continuation of their unit up to 31.03.2019. Further, the unit submitted a bond cum Legal Undertaking binding them to the President of India to abide by the conditions of import and export and operation of the unit in terms of Special Economic Zone Rules, 2006 and orders made there under.

3.2 Discreet enquiry made by the officers of the DC office, it was observed that there was less activity in the unit and there was no export in the last six months and hence it was decided to verify whether the unit was properly utilising the raw material, imported or procured from DTA, on which they were availing benefits.

3.3 During the course of inquiry conducted by DC, SEEPZ, SEZ against the appellant unit, the following discrepancies were noticed:

- (i) APR for the year 2009-10 reveals that the unit had purchased 5000 gms of gold valued at Rs. 77,89,337/- and had exported Jewellery worth Rs. 2,60,08,935/- and was NFE positive of Rs. 166.68 Lakhs in the year.
- (ii) As per the APR for the year 2010-11, the unit made IUT purchase of Jewellery from Sidd's Jewels Pvt. Ltd for Rs. 18,63,73,974/- and exported the same for Rs. 18,87,93,643/- on the same day. Shipping Bill reflects the name of manufacturer as Sidd's Jewels. Further, the appellant purchased 5000 gms of gold from Union Bank of India and sold the same to another Unit (Mohit Diamonds Pvt. Ltd.) on the same day for a profit. The appellant has not carried out any authorized operation (manufacturing) and shown NFE of Rs. 28.73 Lakhs in the year which was only notional.
- (iii) As per the APR for the year 2011-12, the unit made IUT purchase of Jewellery from Sidd's Jewels Pvt. Ltd for Rs. 7,45,17,384/- and exported the same for Rs. 7,65,20,989/- on the same day. Shipping Bill reflects the name of manufacturer as Sidd's Jewels. Further, the appellant purchased 9000 gms of gold from a unit named Kiara Jewellery Pvt. Ltd and sold the same to another Unit Shrenuj & co.) on the same day for a profit. The appellant has not carried out any authorized operation (manufacturing) and shown NFE of Rs. 8.20 Lakhs in the year.
- (iv) ~~As per the APR for the year 2012-13, the unit made IUT purchase of Jewellery from Sidd's Jewels Pvt. Ltd for Rs. 8,16,58,894/- and exported the same for Rs. 8,27,20,826/- on the same day. Shipping Bill reflects the name of manufacturer as Sidd's Jewels. The appellant has not carried out any authorized operation (manufacturing) in the year. Further, the appellant in their APR for 2012-13 had submitted the value of imported raw materials/capital goods as nil. However, online information obtained from NSDL reveals that the unit had imported jewellery making machine/spares of Rs. 2,41,150/- (CIF) vide B/E No. 22802 dated 12.11.2012. Thus, the appellant unit has mis-declared in the APR to show~~

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positive NFE of Rs. 5.01 Lakhs for the year. Therefore the unit has not carried out any authorized operation in the year and the NFE shown is incorrect.

- (v) Scrutiny of year 2013-14 reveals that the unit has not carried out any export in the year 2013-14 but made IUT purchase for Rs. 1,29,243/- as per their declaration. Hence NFE for the year is Negative.

3.4 The unit had projected Net Foreign Exchange Earnings of US\$ 22,18,000/- for the block 2009-2014. However, Scrutiny of the APR reveals that the unit has actually not achieved any NFE except for the year 2009-10 and total NFE achieved is only a fraction of the Foreign Exchange Earning. The unit was not carrying out any authorized operation (manufacturing of jewellery) during four years 2010-2014.

3.5 It was found by DC that the unit had committed the following violations:

- a) Not carried out authorized operation as approved.
- b) Not fulfilled the obligation of export turn over and NFE as promised.
- c) Submitted APR giving incorrect information.

3.6 The above violations were discussed in the approval committee meeting held on 26.09.2014 which recommended for issue of show cause notice against the unit for violation of different provisions of SEZ Rules. A show cause notice was issued to the unit on 19.11.2014 to show-cause as to why penal action should not be taken against them under the provisions of Section 11(2) of Foreign Trade (Development & Regulation Act, 1992) for violation of SEZ Act and Rules, 2006.

3.7 The unit was given personal hearing by DC which was attended by the unit on 18.12.2014. The unit also submitted written submissions dated 14.12.2014 and 30.12.2014. The unit contended before the DC that they entered into third party export transactions for export of studded Gold jewellery through Sidd's Jewels as one of the clients had approved a sample design of jewellery of Sidd's Jewels Pvt. Ltd. They further submitted that due to some reasons, they were unable to manufacture the said jewellery and thus put up an order for the required design to M/s Sidd's Jewels, that they purchased the said jewellery manufactured by the said party and exported to same to the client. The unit further contended that such transaction is allowed as per para 6.13 of FTP. They submitted that they continued same mode of export for the year 2011-2012 and 2012-2013 and they have done job work on behalf of other units in SEEPZ. As regards the non declaration of import of jewellery making machine/spares in the APR for the year 2012-13, they submitted that it was a mistake on their part for not declaring the value of the import in their APR.

3.8 On consideration of the facts of the case and oral/written submissions made by the firm, the Development Commissioner, adjudicated the matter and imposed a penalty of Rs. 500000/- on the unit and directed them to file a fresh APR for the year 2012-13.

4. Aggrieved by the adjudication order dated 06.10.2015, the appellant firm has filed the present appeal. Personal hearing was also granted to the unit on 09.08.2018 in which Shri A.N. Sharma, IRS, Principal Commissioner (Retd.), Customs, Central Excise & Service Tax, Mumbai appeared and represented the Unit before us. In their oral and written submission, the appellant has stated the following:

- (i) The impugned Show Cause Notice and its consequence adjudication vide the impugned O-I-O are devoid of merit and are legally unsustainable.
- (ii) A study of the SEZ Act, 2005 reveals that such procurements of manufactured goods by one SEZ unit from another SEZ unit is legally permitted.
- (iii) Settled Principle of Law states that mere wrong citation of Para 6.13 in our reply to the adjudicating authority would not debar us from availing the facilities and benefits as provided under FTP.
- (iv) Done all imports & exports strictly as per the provisions of SEZ Act & Rules read with FTP. Imports and Exports are not in contravention of any of the said provisions.
- (v) Achieved the positive NFE in all the five years of the block. During 2013-14, but forgot to mention the import of machine/spares of Rs. 2,41,150/- in APR due to inadvertence. Even taking this import into account, still have a positive NFE of Rs. 2.60 Lacs for 2013-14.
- (vi) They were doing manufacturing on job-work for other SEZ units.
- (vii) It is true that they could not achieve the level of manufacturing activities and NFE as per the projections. This is due to slump in global markets.

5. Comments from the office of the Development Commissioner, SEEPZ have also been obtained on the appeal filed by the Unit. The Development Commissioner, SEEPZ vide their letter dated 30.09.2016 and 16.06.2017 has, in addition to what is stated in the Order-in-Original, has stated that:

- (i) The NFE of Rs. 28.73 lakhs and Rs. 8.20 lakhs shown in the APRs for 2010-11 and 2011-12 respectively are notional because these are calculated on the basis of FOB values of the products of export of Rs. 1887.94 lakhs and Rs. 765.21 lakhs in the respective years by the appellant, which are not manufactured by the unit rather purchased under IUT.
- (ii) Though the Third Party export is allowed under SEZ Rule 46(10), such export shall be counted towards the fulfillment of the obligations of the manufacturing

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unit only, in which the goods or services were manufactured or developed and not of the appellant unit.

- (iii) Under self-declaration based regime, it is incumbent upon the unit to exercise utmost care and precaution to ensure that their declarations are true and correct. The unit can not take refuge under inadvertence for their failure to declare the import of machines/spares in the APRs.
- (iv) Notwithstanding the job-work done by the unit to other units in SEEPZ, the fundamental route for achieving NFE is by carrying out exports which the unit has failed to do thereby contravening the terms and conditions of the LOA & BG/LUT.
- (v) The reason like non-achievement of level of manufacturing activities and NFE due to slump in global markets is not acceptable as other unit in SEEPZ which are in the same business have not faced any such problem.

6. We have considered the adjudication order dated 06.10.2015 passed by DC, SEEPZ, appeal preferred by the Unit and oral as well as written submissions made by its representatives, report/comments of office of the DC, SEEPZ and all other aspects relevant to the case. On examination of the present case it is noted that

- (i) In the order, the DC has observed that in terms of Rule 22(3) of SEZ Rules, 2006, each unit is required to submit Annual Performance Report to the Development Commissioner and as per Rule 54(1) of the SEZ Rules, the performance of Unit shall be monitored by the Approval Committee. As per the guidelines given in Annexure appended to these rules in case the Approval Committee come to the conclusion that a unit has not achieved positive Net Foreign Exchange Earning or failed to abide by any of the terms and conditions of the Letter of Approval or Bond-cum-Legal undertaking, without prejudice to the action that may be taken under any other law, for the time being in force, the said Unit shall be liable for penal action under the provisions of the Foreign Trade (Development and regulation) Act, 1992.
- (ii) Further, DC in its order has recorded that "as per Annexure-I of the SEZ Rules, "Annual monitoring in the cases of old units which have completed more than five years will be undertaken for only such number of years which fall in the subsequent block/s of five years." As such, Cumulative Net Foreign Earning of earlier block cannot be carried forward for calculation of Cumulative NFE of subsequent block. However, the Unit has been wrongly carrying forward the cumulative NFE of the earlier block in the APR of the current block to show inflated Cumulative NFE. Thus the unit had wrongly projected Net Foreign Exchange Earning of US\$ 22,18,000/- for the block 2009-14 however they

have not achieved any NFE except for the year 2009-10 and total NFE achieved is only a fraction of the Foreign Exchange Earning as promised. I have also gone through the APR filed by the unit. APR for the year 2012-13 reveals that M/s Star Brilliant Pvt. Ltd. had submitted the value of imported raw materials/ capital goods as nil. However, online information obtained from NSDL reveals that they have imported jewellery making machine/ spares of Rs. 2,41,150/- (CIF) vide B/E No. 22802 dated 12.11.12. Thus, M/s Star Brilliant Pvt. Ltd. has deliberately mis-declared in the APR to show positive NFE of Rs. 5.01 lakhs for the year. Thus, the unit has submitted wrong and misleading information to show positive NFE. The Units working in SEZ, are effecting clearance on self declaration and hence they are expected to comply with the rules and regulation of SEZ. The management of M/s Star Brilliant Pvt. Ltd. should not have submitted such misleading/wrong information as these violation has rendered the unit liable for penal action. Such violation needs to be prevented in self assessed regime which unit has failed to do. The unit is also bound by the conditions of import and export under SEZ Act for its authorized operations for which it had executed a Bond and Legal undertaking. But as the unit failed to abide by terms and conditions of the letter of approval of Bond cum legal Undertaking as described earlier, thus in my considerate view, for these various act of omission and commission, submitting, wrong and misleading information as mentioned above the unit is liable to penalty under Section 11 of Foreign Trade (Development and Regulation) Act, 1992".

- (iii) The violations of the unit were discussed in the UAC held on 26.09.14 which recommended issuance of SCN. No manufacturing activity was carried out in the unit. It's IUT and export can't be counted for NFE. The unit had projected an NFE of US\$ 22,18,000 for the block 2009-14. The APR reveals the unit has not achieved any NFE except for the year 2009-10 and the total NFE achieved is only a fraction of NFE earning promised. The various violation of the SEZ unit has been recorded in the DC's order and also is mentioned above.
- (iv) The inter unit transfer is under para 6.13 of FTP 2009-14 is for EOUs not applicable for SEZ which are which are governed by the SEZ Rules, 2006. In the order is observed that the unit has not carried out any manufacturing activity in the last four years for which it was granted LOP and thus the unit has failed to abide by the terms and conditions of Rule 22 SEZ Rules, 2006.
- (v) The unit working in SEZ are effecting clearance on self declaration basis and hence are expected to comply with rules and regulation of SEZ. The unit is also bound by the conditions of import and export in the SEZ Act for its authorized operation for which executed bond/legal undertaking. The DC has

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accordingly proceeded imposition of penalty for omissions and commissions, submitting wrong and misleading information and unit was liable for penalty under FTDR Act, 1992. The penalty imposed however shall be without prejudice to any liability on the firm in terms of recovery of any duties etc under the relevant provisions as applicable and also any other action that may be taken under any other law as applicable.

7. In view of the above, in exercise of the powers vested in us under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, we pass the following order:

Order

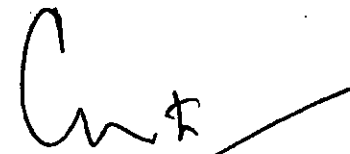
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Dated: 07.09.2018

The Order-in-Original No. SEEPZ-SEZ/NUS/APL/GJ/280/02-03/16213 dated 06.10.2015 passed by the Development Commissioner, SEEPZ Mumbai is upheld and the appeal stands rejected.



(J.V. Patil)

Addl. Director General of Foreign Trade


(Alok Vardhan Chaturvedi)
Director General of Foreign Trade

Copy To:

- ✓ (1) M/s Star Brillian Private Limited, Unit No. 001, Block II, SEEPZ++, SEEPZ-SEZ, Andheri East, Mumbai-400096.
- ✓ (2) Development Commissioner, SEEPZ, Mumbai.


(Shobhit Gupta)

Dy. Director General of Foreign Trade