Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi -110011
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F.No. 01/92/171/60/AM 16/ PC-VI/167, 168 Date of Order: 06.12.2018

Date of Dispatch: 06.12.2018

Name of the Appellant: M/s Packwell Packaging, B-28, Phase-II, Noida.

Order appealed against: Order-in-Original No. 14-19/2003-100%EOU/6856 dated 02.07.2013 passed by the Development Commissioner, Noida SEZ.

Order-in-Appeal passed by: Shri Alok Vardhan Chaturvedi, DGFT
Shri R.P. Goyal, Addl.. DGFT

Order-in-Appeal

M/s Packwell Packaging, Noida (hereinafter referred to as 'the appellant'), a 100% EOU unit, has filed an appeal dated 16.04.2014 u/s 16 of FT (D&R) Act, 1992 against Order-in-Original No. 14-19/2003-100%EOU/6856 dated 02.07.2013 passed by the Development Commissioner, Noida SEZ.

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 the appeal is before us.

3.0 Brief facts of the case :

3.1 The appellant was granted LOP No. 14-19/2003-100%EOU dated 19/22.09.2003 for manufacture & export of corrugated boxes/ boards & Wooden Pallet Boxes. The Appellant executed a legal undertaking (LUT) on 05.12.2003 for abiding by the terms and conditions of the LOP and also to observe and comply with provisions of the FTP issued from time to time in this regard. The Appellant unit commenced its production w.e.f. 11.11.2003 and continued its operation as an EOU in the 2nd block of five years.

3.2 It was found from the APRs of the Appellant unit that the unit has supplied goods only to EOUs and SEZs, except physical exports of Rs. 12.22 lakhs in November, 2009. Simultaneously, the unit has also sold its goods in Domestic tariff Area (DTA) amounting to Rs.

453.61 Lakh from June 2007 to March 2011 besides sale of scrap of Rs. 49.61 Lakh on payment of Central Excise duty. However, no permission was ever taken for supplying goods to the EOUs/ SEZ and for sale of goods in DTA on payment of concessional Central Excise duty in terms of the prescribed guidelines and the provisions under FTP.

3.3 It was observed by DC that :

(a) the unit contravened the conditions of legal agreement dated 05.12.2003 executed by it and provisions of FTP in as much as it has sold its goods in an unauthorized manner in the DTA on payment of concessional duty, without earning any entitlement for such DTA sale;

(b) it contravened the provisions of para 6.17 of HBP and guidelines of Appendix 14-I-H of HBP in as much as it did not submit any application to the Development Commissioner to determine the extent of the DTA sale it is entitled to, with an intent to evade payment of duty in contravention of proviso to section 3(1) of Customs Excise Act 1994 read with notification issued in this behalf

Hence the unit was asked to show cause to the Development Commissioner, NSEZ as to why:

(i) the goods of Rs. 4,53,60,612.40 and scrap of Rs. 49,61,802.75 sold in DTA on payment of duty should not be held unauthorized and without any entitlement under para 6.8(a) & (e) of the FTP;

(ii) penalty should not be imposed on it under the provisions of FT(D&R) Act, 1992 read with para 6.6(c) of FTP for the above mentioned contraventions of the provisions and procedures;

(iii) the Importer Exporter Code number granted to the unit should not be cancelled in terms of Section 8 of the FT(D&R) Act, 1992.

3.4 The unit was granted personal hearings on 28.06.2012, 30.10.2012, 14.12.2012 and 09.01.2013 by the DC. In its defence, the unit, orally and vide letter dated 21.02.2012, stated that:

(i) the allegation regarding the goods sold in an unauthorized manner in DTA on payment of concessional duty, without earning any entitlement for such DTA sale, was not true because it had never imported any inputs for use in its 100%EOU. The goods cleared in the DTA were produced and manufactured, wholly from the raw material produced or manufactured in India and hence it was entitled for exemption of duty in DTA in excess of an amount equal to the aggregate of duties of excise leviable u/s 3 of the Central Excise Act, 1944 on like goods produced or manufactured in India, other than in an EOU, if sold in India in terms of Exemption Notification No. 23/2003-CE, as amended;

(ii) the allegation that deemed exports to EOU/SEZ is not eligible for DTA sale entitlement and only physical exports are relevant under para 6.8 (a) of the FTP, is not correct

because such eligibility under para 6.8 (a) of the FTP is based on FOB value of exports and the word Physical Exports has not been used in the said para;

(iii) it had undertaken Inter Unit Transfer to 100% EOU/SEZ Units under para 6.13 of FTP where the recipients EOU/SEZ units have used the same as their inputs/raw material packaging material for use in the manufacture of goods which is ultimately exported. The value of such Inter Unit Transfer to 100% EOU/SEZ Units should be included while determining the FOB value of exports in EOU Scheme;

(iv) the unit was under bonafide belief that there was no requirement of permission of DTA entitlement, because the unit had neither availed any benefit of duty on import of any inputs/ capital goods for use in its 100% EOU nor it availed the benefit of deemed export on inputs received by them from Domestic market as DTA sale was made on payment of applicable Central Excise Duty. Further, there is no loss of Government revenue in the case as EOU/SEZ to whom the goods were supplied by the appellant unit could either use such goods for manufacture of goods for export or sell in DTA on payment of applicable duty.

3.5 The DC examined the contents of the SCN vis-a-vis the defence submissions of the appellate unit. The case laws as referred to by the unit were not found applicable in the facts and circumstances of the present case. The findings of the DC are as under:

(i) Para 6.13 of FTP lays down the provision for transferring manufactured goods from EOU to another EOU, under intimation to the Development Commissioner. The unit failed to intimate such transfer of the goods to another EOU/SEZ unit.

(ii) In terms of para 6.8(a) of FTP, the value of export in FOB and such value of supplies to SEZ against which payment are made from Foreign Exchange Account are only considered for arriving at the admissibility for 'DTA sale on payment of concessional rate of duty'. The FOB value of deemed exports under para 6.9 of FTP are not eligible to be counted to arrive at the DTA sale entitlement.

(iii) The DTA sale as made by the appellant unit was not authorized in the absence of any application for such entitlement in terms of Appendix 14-I-H of HBP and not admissible/entitled in terms of para 6.8(a) of the FTP.

(iv) The contention of the unit being eligible for concessional rate of duty equivalent to Central Excise duty paid on these DTA sales for the reason of use of only indigenous inputs cannot be accepted as the exemption from payment of Customs duties is applicable to the entitled and authorized DTA sale only, which is not a case of the unit.

(v) The Department of Commerce vide letter No. 1/9/2008-EOU clarified that supplies made under para 6.9 of the FTP should not be considered for calculating DTA entitlement.

(vi) In view of the above, the DC concluded that:

- The unit neither submitted the prescribed application for arriving at the admissibility and entitlement of the DTA sales nor obtained prior authorization from the Development Commissioner for the DTA sales undertaken by it;
- The unit had not earned entitlement for DTA sales, on concessional rate of duty, against the physical exports;
- The supplies to another EOU/ SEZ unit are only eligible for considering the computation of NFE and not for inclusion of such clearances for calculating DTA entitlement;
- No foreign exchange was earned as payments against the supplies to EOU/SEZ unit were not received in Foreign Exchange account;
- The DTA sale of goods being non-entitled and unauthorized, was not eligible for clearance on concessional rate of duty.
- The unit has contravened the substantive provisions of the FTP and the clause (4) of the LUT executed by them.

3.6 On conclusion of the adjudication proceedings, the Development Commissioner, Noida SEZ vide Order-in-original No. 14-19/2003-100%EOU/6856 dated 02.07.2013 held the goods of Rs. 4,53,60,612.40 and scrap of Rs. 49,61,802.75 sold in the DTA on payment of concessional duty unauthorized, inadmissible and without any entitlement under para 6.8(a) & (e) of the FTP and imposed a penalty of Rs. 10 Lakh under the provisions of section 11 of the FT(D&R) Act, 1992 read with para 6.6.1(c) of FTP.

4. Aggrieved by the adjudication order dated 24.07.2017, the appellant firm filed the present appeal. The Appellant has made the following additional submissions:

(i) The DC Noida has granted the extension for LOP on two occasions after examining all the facts given in the quarterly and yearly progress report. The extensions in the LoP were given on the basis of projected turnover that were mentioned in terms of rupees by making the supply to other EOU and other SEZ units. The DC has never raised any objection regarding the alleged irregularity against the Appellant.

(ii) The appellant has partially converted into an EOU unit from DTA to meet the demand of his main buyer i.e. M/s Moserbaer who has procured the packaging material (corrugated box) from the appellant for the purpose of physical export.

(iii) The unit is not required to take any prior permission for movement of goods from EOU to another EOU. The goods can be moved on the basis of prior intimated to the Development Commissioner and customs/central excise authorizes following the procedure for inbound movement of goods. In the present case, the goods were moved under the procedure of ARE-3.

5. Comments from the office of the Development Commissioner, NSEZ have also been obtained on the appeal filed by the Unit. The Development Commissioner, NSEZ vide its letter dated 03/04.11.2015 has submitted that:

(i) An EOU can sell in DTA upto 50% of its physical exports. Since the petitioner had not made any physical export, the appellant unit was not entitled to sell in the DTA.

(ii) Since the FTP does not differentiate between goods manufactured out of domestically procured input and goods manufactured out of imported input, the word FOB value of export means the seller is required to deliver goods when the good is loaded onto the carrier at the named port of exportation, including the cost of the goods and all the costs necessary to bring the goods onto the carrier.

(iii) Granting of LOP extension does not mean that the unit cannot be proceeded against for any violation detected after granting extension.

(iv) Submission of projection in rupee does not imply that the projections are for deemed exports.

(v) For the calculation of DTA entitlement, only the value of physical exports is to be taken into account, the definition of "exports" under Customs Act 1962 and under the FT (D&R) Act, 1992 are similar and both mean taking goods out of India. Hence the expression of "50% of FOB value of exports" appearing in EXIM Policy and Notification No.2/95-CE is to be taken as referring to physical exports outside India.

(vi) DoC vide letter NO.01/9/2008-EOU has clarified that supplies made under para 6.9 of FTP should not be considered for calculating DTA entitlement.

(vii) Deemed exports are counted for NFE calculation but if the unit has not made any physical exports, then the unit is not allowed to make DTA sale.

(viii) The supplies made under para 6.9 of the FTP should not be considered for calculating DTA entitlement.

(ix) The unit has contravened substantive provisions of the FTP that it will not dispose of its production in the domestic market except as per the terms & provisions of EOU scheme unless specifically allowed by the competent authority.

(x) Exports mean physical exports. Certain categories of supplies listed in para 6.9 of FTP are 'Other supplies in DTA'. They are not even called deemed export in Chapter 6. These supplies are counted towards fulfillment of NFE of the unit. No other entitlement is attributed for such supplies.

(xi) The unit has neither taken permission nor intimated regarding the DTA sale except reporting in APRs

(xii) The unit has undertaken deemed exports by clearing goods to SEZ and EOU without payment of duty.

(xiii) Total DTA sale was found to be Rs. 4.53 crore besides scrap sale of Rs.49.61 lakhs which is unauthorized and non-entitled.

6. An opportunity of personal hearing was granted to the appellant firm for appearance on 23.03.2016, 29.03.2016 and 03.06.2018. Finally, Shri Rahul Ranjan, Counsel appeared before the appellate authority on behalf of the appellant unit and sought some time to submit the written arguments. The appellate authority granted one week time for submission of the written arguments. However no response was received in this regard despite reminder on 31.08.2016. As a last resort, final opportunity of personal hearing was granted to the appellant unit for appearance on 09.08.2018 vide letter dated 24.07.2018. It was clearly mentioned in the said letter that in case the appellant unit fails to appear for PH no further opportunity of personal hearing shall be granted and a decision will be taken on merits of the case ex- parte. Since no response was received from the unit despite sufficient opportunities given to it, the Appellate

Authority decided to finalise the appeal based on the submissions made in the appeal and on merits of the case.

7. We have considered the order-in-original dated 02.07.2013 passed by the DC NSEZ, appeal preferred by the appellant, report/comments received from the office of DC, NSEZ and all other aspects relevant to the case. It is noted that the unit sold its goods in an unauthorized manner in DTA on payment of concessional duty without earning any entitlement for such DTA sale. No intimation was given to the DC for transfer of such goods to another EOU/SEZ unit, even the unit did not submit the prescribed application for arriving at the admissibility and entitlement of DTA sale. This has been done in violation of the established procedure with the intention of duty evasion. Since, the unit has contravened the substantive provisions of the FTP and the legal agreement executed by them, the DC has proceeded to adjudicate the matter in accordance with relevant provisions and held the sale in DTA unauthorized and inadmissible and imposed with a penalty of Rs 10, 00,000.

8. 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

F.No. 01/92/171/60/AM16/ PC-VI/ Dated: 06.12. 2018

We do not intend to interfere with the order of the DC passed vide Order-in-Original No. 14-19/2003-100%EOU/6856 dated 02.07.2013. The appeal stands dismissed.

(R.P. Goyal)
Addl. Director General of Foreign Trade

(Alok Vardhan Chaturvedi)
Director General of Foreign Trade

Copy to:

(1) M/s Packwell Packaging, B-28, Phase-II, Noida.
(2) Development Commissioner, SEZ, Noida.

(Shobhit Gupta)
Dy. Director General of Foreign Trade