

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

F.No. 01/92/171/84/AM 16/PC-VI/113-114 Date of Order: 6.09.2018

Date of Dispatch: 7.09.2018

Name of the Appellant: M/s Harbour Petrochem Industries Pvt. Ltd., 2/27A Plot No. A9, Tuticorin Co-Operative Industrial Estate, Korampallam, Tuticorin-628101.

Order appealed against: Order-in-Original No. A/2004(016)/EOU-TN dated 25.09.2014 passed by the Development Commissioner, MEPZ.

Order-in-Appeal passed by: Shri Alok Vardhan Chaturvedi, DGFT
Shri J.V. Patil, Addl. DGFT

Order-in-Appeal

M/s Harbour Petrochem Industries Pvt. Ltd., Tuticorin (hereinafter referred to as 'the appellant'), an EOU unit, has filed an appeal dated 10.12.2014 against Order-in-Original No. A/2004(016)/EOU-TN dated 25.09.2014 passed by the Development Commissioner, MEPZ, Chennai.

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 are that:

3.1 M/s Harbour Petrochem Industries Pvt. Ltd., Tuticorin, a 100% EOU was issued the LoP vide letter no. A/2004/016/EOU/TN dated 09.06.2014 to setup an EOU unit for manufacture and export of washed pet flakes, washed HDPE flakes, washed pp flakes, washed PVC flakes, washed LIPE flakes, Chips & granuals. The unit commenced its production on 01.08.2004. As per the conditions of LOA/LOP, the appellant was required to fulfil export obligation as to achieve positive NFE, exporting the goods as per LOP.

3.2 The performance of the unit was reviewed by the DC office for the period from 1.8.2009 to 31.7.2014 (Block year 2009-10 to 2013-14.) During the period as per the APRs filed by the unit, its



performance was found to be negative NFE of Rs. 242.99 lakhs. As per the terms and conditions of the afore said LOP, the unit failed to achieve positive NFE during the period of their operation. Hence, a show cause notice was issued to the unit as to why action should not be taken under the relevant provision of FTDR Act, 1992.

3.3 In reply to the show cause notice and during personal hearing before the DC, the firm explained the reasons for negative NFE and requested for a lenient view and to condone the lapse, stating that during the 5th year of the second 5 year block period from 2009-10 they could not fulfil the export obligation cast upon them, because their import item, mixed plastic Scarp was confiscated by customs authorities on 21.7.2009 stating that the imported goods appeared to be hazardous waste restricted/prohibited under hazardous waste Rules, 2008 and imposed a redemption fine of Rs.3,00,000/- and a penalty of Rs. 2,00,000/- and ordered the goods to be re-exported. The unit appealed to the Chief Commissioner of Customs dated 18.7.2012 and no response was received. They further stated that the Customs appealed before the Hon'ble High Court, Madras and the Hon'ble Court dismissed the appeal. Meanwhile, Oriental Bank of Commerce issued a possession notice to pay an amount of Rs.503,67,435 and the matter is before the DRT and the DRT has reserved the orders. The unit requested that in view of the above circumstances and due to the global recession their unit is collapsed which was not of their fault and requested DC to extend/renew the LOP for the 3rd five year period.

3.4 After considering the reply to the SCN and the submissions made during the Personal hearing, the Adjudicating Authority vide Order-in-Original dated 25.09.2014 adjudicated the matter and imposed a penalty of Rs. 5,50,000/- on the unit for non-fulfilment of positive NFE. The DC recorded that EOU has not fulfilled their export obligation as per the provisions of the policy and the LUT executed by them. The unit has not taken adequate steps to achieve the required positive NFE in the current financial year term.

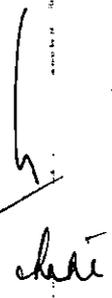
4.0 Aggrieved by the adjudication order dated 25.09.2014, the Unit has filed the present Appeal stating that: -

4.1 As per LOP, the appellants imported 72.590 MT of mixed plastic scrap containing Pet, HDPE, LDPE, PP and PVC products valued at Rs. 11, 12,532.12 under Bill of Entry No. 464784 on 21.07.09 through Tuticorin Port. However, the imported raw materials were confiscated on the premise that it contained municipal waste comprising used plastic articles and others and not of virgin plastic. Even after payment of redemption fine, goods were not allowed to be cleared but instead asked for its re-export.

4.2 An appeal before Commissioner of Customs (A) was filed which was disposed on 09.02.2010 by quashing the adjudication order.

4.3 Customs filed an appeal before CESTAT, South Zonal Bench, Madras. CESTAT concurred with the order of the Commissioner (Appeals) that the goods were not prohibited goods for import and there was no mis-declaration of goods imported by the respondents, so the question of confiscation and imposition of penalty does not arise and found no reason to interfere with the order of the Commissioner. The appeal was rejected.

4.4 Customs then filed an appeal before Hon'ble High Court of Madras. The Hon'ble High Court in its order found that there was nothing on the record to show that what was imported was in contravention of LOP. The Pollution Control Board pointed out that plastics materials which were imported were some



sort of plastic waste (mostly of oil cans, metal waste, optical fibre, cable, rubber hoses and other waste) soaked with oil dirt and other matter and need proper cleaning. The direction of PCB to re export was because they did not have proper cleaning. Also, the importer didn't have any facility of washing imported goods inside its premises. The court stated that the revenue is not justified in contending that the importer has committed violation to the LOP given. In the said circumstances, the court has no hesitation in rejecting the substantial questions of Law raised in the appeal. The appeal was dismissed.

4.5 The company approached the Commissioner of Customs with the order of Hon'ble high Court. At every stage, the Customs lost their cases and it was held that the imports were not in violation of any provision of Custom. The company approached for clearance numerous times but they are still waiting to be allowed.

4.6 Due to Global recession, situation has become bad to worse. They were compelled to close the factory due to non release of raw materials by custom authorities. Under these circumstances, the company were not able to earn Foreign Exchange which reflected into negative earnings. However, the Development Commissioner didn't appreciate the fact and imposed a penalty of Rs. 550000/- on the appellant for non fulfillment of positive net Foreign Exchange earnings.

4.7 The appellant has filed the present appeal on the following grounds while advancing those that were stated before the Adjudicating Authority:

- (i) The entire proceedings are liable to be set aside for violation of principle of natural justice.
- (ii) Waste and scrap of plastics imported by them cannot be considered as prohibited goods.
- (iii) The waste and scrap of plastics imported by them are not hazardous material.
- (iv) They have permission to wash the materials on job work basis. Hence, the reliance placed on the report of the Pollution Control Authorities is not well founded.
- (v) Waste and scrap of plastics are not liable for confiscation as they have LOP for import of Waste and Scrap of plastics.
- (vi) There is no mis-declaration in the Bill of Entry.
- (vii) No penalty is leviable on the appellants.
- (viii) It is to be appreciated that the company achieved positive NFE during the year 2004-09 block period and as such LOP got extended up to 2009-14 block period.
- (ix) It is universal fact that for 2008 onwards global recession set in and as a result number of industries were shut down.

5. Comments from the office of the Development Commissioner, MEPZ have also been obtained on the appeal filed by the Unit. Comments furnished by office of the Development Commissioner, MEPZ vide their letter dated 24.03.2016 has stated that the Adjudication Authority has considered all the facts as well as Hon'ble Madras High Court Order dated 02.02.2012 while passing the order. The Customs case for one year cannot be the cause for (-) NFE for a block of years.

6. Personal hearing was granted to the unit vide letter dated 15.3.2017 for appearance on 28.03.2017 to hear the appeal. However, no body appeared. Again, personal hearing was afforded to the unit vide letter dated 19.1.2018 for appearance on 30.01.2018 and present the case. It was specifically mentioned that in case of failure, no further opportunity of personal hearing shall be granted and a decision will be

taken by the Competent Authority ex-parte on merits of the case. However, no body appeared for PH on the scheduled date. It was decided to issue orders ex-parte.

7. The submissions of the appellants, the order of the DC MEPZ, and comments received from the DC MEPZ were considered along with policy provisions applicable for EOU Scheme. The EOU in their operations are required to achieve positive value addition in block of a five years and non achievement of the same attract the penalty under the FTDR Act, 1992. In their case, the firm's performance for the year 2009-10 to 2013-14 were considered and it was found that they were negative by 243 lakhs of rupees and hence the DC adjudicated the matter and imposed a penalty of Rs. 5.50 lakhs. The firm's contention is that they were NFE positive for 2004-2009 and were negative only for the next block 2009-10 to 2013-14. This they have mainly attributed to non release of their imported material by Customs Authorities. They have also contended that they were permitted to import plastic scrap as per LOP. Also the Oriental Bank issued possession notice. The unit which is importing plastic scrap has to be responsible. The imported plastics was not of virgin plastic and had contained all sort of wastes like oil cans, metal waste optical fibre etc. with oil and dirt and that would require proper cleaning and hence the PCB advised for re export. Non clearance of this one consignment can't be the ground for non achievement of NFE in the five year period. The Para 6.6(c) of the FTP 2009-14 provides for imposition of penalty for non achievement of positive NFE, under the provisions of FTDR Act, 1992. The DC has accordingly adjudicated the case imposing the penalty.

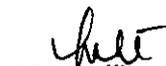
8. In view of the above, in exercise of the powers vested in us under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, we pass the following order:

Order

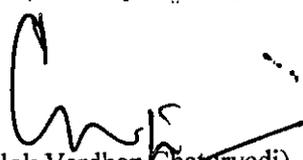
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Dated: 6.09.2018

Order-in-Original No. A/2004(016)/EOU-TN dated 25.09.2014 passed by the Development Commissioner, MEPZ, 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 Harbour Petrochem Industries Pvt. Ltd., 2/27A Plot No. A9, Tuticorin Co-Operative Industrial Estate, Korampallam, Tuticorin-628101.
- ✓ (2) Development Commissioner, MPEZ.


(Shobhit Gupta)

Dy. Director General of Foreign Trade