

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

F.No. 18/58/2018-19/ECA-I/116

Date of Order: 9.04.2019

Date of Dispatch: 9.04.2019

Name of the Appellants:

Shri SevantiLal J. Parekh, former Director of KDL Ltd.

Shri Chhaganlal M Jain, former Director of KDL Ltd.

Shri Surendra S Somani, former Director of KDL Ltd.

IEC Number

0399006931

Order reviewed against:

Orders-in-AppealNo. 03/16/144/00024/AM18, 03/16/144/00025/AM18, 03/16/144/00026/AM18 all dated 28.03.2018 passed by the Adl. DGFT, Mumbai.

Order-in-Review passed by:

Shri Alok Vardhan Chaturvedi, DGFT

Order in Review

Messers SevantiLal J. Parekh, Chhaganlal M Jain, & Surendra S Somani, all three Directors of KDL Ltd. have filed these reviews under section 16 of the Foreign Trade (Development & Regulation) Act 1992, as amended against the 03 Orders-in-Appeal No. 03/16/144/00024/AM18, 03/16/144/00025/AM18, 03/16/144/00026/AM18 all dated 28.03.2018 passed by Addl. DGFT, Mumbai.

FACTS OF THE CASE:

2. KDL Biotech Ltd., Raigard, Maharashtra applied and obtained Advance Autbhorization No. 0310119704 dated 16.01.2002 with an obligation to export 2000 kgs of Amoxycillin Trihydrate BP/USP Micronised/ Compacted Power for FOB value of Rs. 20,96,000/- which was later amended to Rs. 30,96,000/-. The company was allowed to import the raw material as per SION for CIF value of Rs.30,60,821/-. One of the condition was that the company would submit original export documents towards discharge of export obligation within the stipulated time.

2.1 The company submitted documents towards fulfilment of export obligation. On scrutiny, it was found by licensing authority that full payment against invoice No. 9069 had not been realised. There was negative value addition. Vide RA, Mumbai's office letter dated 01.01.2008, the noticee company was requested to submit BRC against the said invoice No. 9069.

2.2 The company submitted the reply vide letter dated 08.04.2014. On examination of the documents, it was revealed that the company had achieved negative value Addition. Therefore, the company was directed to regularize the case in terms of Para 4.28(i) of the



Hand Book of Procedure 1997-02. It failed to get the case regularized in terms of para 4.28 of relevant HBP. Therefore, adjudicating authority passed the Order-in-original No. 03/01/002/00331/AM09 dated 05.09.2017 imposing a fiscal penalty of Rs.30,000/- (Rupees Thirty Thousand only) and directing the company and individual Directors jointly to pay penalty.

2.3 Aggrieved by the order dated 05.09.2017 passed by the Adjudicating Authority, Shri Seventilal J. Parekh, Shri Chhaganlala M. Jain and Shri Surendera S. Somani all three Directors of KDL Biotech Ltd. filed appeals in their individual capacities against the Order-in-Original No. 03/01/0002/00331/AM09 dated 05.09.2017 under section 15 of Foreign Trade (Development and Regularization) Act, 1992, as amended before the Appellate Authority. All of three Directors of the company prayed to (i) set aside the impugned order (ii) dispensing with the pre-deposit of fiscal penalty amount of Rs. 30000/- imposed on the Directors (iii) grant interim relief by staying the operation of the impugned order (iv) pass such orders as it may deem fit in the facts and circumstances of the case (v) grant personal hearing.

3. The Appellate Authority found no justification to interfere with the Order-in-Original dated 05.09.2017 passed by Adjudicating Authority and therefore, in exercise of the powers under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992, as amended, rejected the appeal.

4. The Appellants submitted three review petitions all dated 05.11.2018 under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992, as amended, before the DGFT, praying to quash the Order-in-original dated 05.09.2017 and the three Orders-in-Appeal dated 28.03.2018.

4.1 The Appellants have filed the review petitions on the following grounds that :

- (i) the licence holder did not get good price for the export goods, even after exporting full quantity. The FOB value realised was only Rs. 23,94,000/- much below the prescribed value addition and much below the export FOB value of Rs. 30,96,000/- indicated in the Advance Authorisation. The matter was simply of bonafide default in value. This is clearly a case which was required to be regularised in terms of para 4.28 of the Handbook of Procedure (2002-2007).
- (ii) the licence holder submitted all the documents in its possession vide its letter dated 08.04.2014 requesting the jurisdictional licensing authority to redeem the authorisation and thereafter if any amount was to be paid since value addition being negative, that would have been paid as and when informed by the licensing authority to the licence holder. The jurisdictional licensing authority, instead of calculating the amount to be paid by the licence holder under para 4.28 of the relevant HBP, proceeded to adjudicate the matter by invoking totally wrong provisions of law, which were not applicable at all.
- (iii) the case has been adjudicated under Section 13 of Foreign Trade (Development and Regulation) Act, 1992 for contravention of the provisions of Section 11(2) of the Act, and for contravention of the provisions of Rules 10, 13, 14 of the Foreign Trade (Regulation) Rules, 1993. Applying these provisions, which are not applicable to this case, the Adjudicating Authority imposed a fiscal penalty of Rs 30,000/- on the licence holder KDL Biotech Ltd and its Directors jointly.



(iv) the shortfall in FOB value in this case was Rs.7,02,000/- [Rs.30,96,000 – Rs.23,94,000/-]. 1% of this amount which was required to be deposited comes to Rs.7020/-. The authorisation holder was only required to deposit Rs.7020/- in terms of para 4.28 of the HBP of the relevant period. No penalty was to be imposed on the Authorisation holder. The question of imposing any penalty on the Directors, jointly or severally or alongwith the authorisation holder also did not arise.

(v) any fiscal penalty can only be imposed on the authorisation holder. The Directors can be penalised if their connivance is established and not otherwise. In any case, when penalty is imposed on the authorisation holder, imposition of penalty on the Directors has to be independent depending on the part played by each one of them. Imposition of fiscal penalty of Rs.30,000/- in the present proceedings jointly on KDL Biotech Ltd., the authorisation holder and its Directors is, therefore totally illegal and unsustainable.

(vi) as per Para 4.28(ii), when export obligation is fulfilled in terms of quantity but there is shortfall in terms of value and there is also negative value addition, only 1% of shortfall in the FOB value is required to be paid. There is no reference to payment of any customs duty so far as regularisation of bona fide default under Para 4.28(ii) of HBP of the relevant period is concerned. Therefore, the direction to the company and its Directors to pay customs duty plus interest, as applicable to customs authorities by the Adjudicating Authority and upheld by the Appellate Authority is totally misconceived and untenable.

(vii) the Appellants resigned from the company w.e.f 13.10.2003. Whereas, the company responded to the letters of the licencing authority in 2014 for the reasons best known to the company or its then directors. Since the appellants resigned as directors on 13.10.2003, they could not have done anything related to the noticee company. Therefore, it was the company or the existing directors, who could have been possibly penalized under Foreign Trade (Development and Regulation) Act for not regularising the Advance Authorisation.

(viii) the term 'person' under Para 9.38 of FTP means both natural and legal and includes an individual, firm, society, company, corporation or any other legal person including the DGFT officials. Since in the present case, the Advance Authorisation has been taken by the company, the 'person' in the present case for the purposes of the FT(D&R) Act, means company and not the individual Directors and therefore if the company has failed to fulfil export obligation, it is the company which is liable and not the individual Directors, unless the circumstances as described in the Appellate order under Para 2 of the findings are fulfilled and brought on record.

(ix) the appellants were Non-executive Independent Directors and were never responsible for any part of the business, nor were involved in any way in day-to-day activity of the company, nor had any knowledge of the non fulfilment of any export obligation against Advance Authorisation taken by the company. In the circumstances, being non-executive independent Directors, the Applicant Directors cannot be held responsible for non-fulfilment of alleged export obligation in the present case.



5. I have gone through the facts and records carefully. It is observed that the License holder in this case is a public Ltd. Company. For imposition of penalty on any Director of the public Ltd. Company, his role in the contravention has to be looked into. This has not been examined by the Appellate Authority.

6. I, therefore, in exercise of powers vested in me under Section 16 of Foreign Trade (Development & Regulation) Act, 1992, as amended, pass the following order:

Order

F.No. 18/58/2018-19/ECA-I

Dated: 04.2019

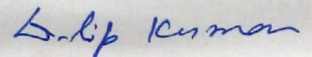
Three impugned orders dated 28.03.2018 passed by Addl. DGFT are set aside and referred back to the Appellate Authority for de-novo consideration taking into account the findings as mentioned in para 5 supra.



(Alok Vardhan Chaturvedi)
Director General of Foreign Trade

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- (3) Shri SeventiLal J. Parekh, Appellant Director
- (4) Shri Chhaganlal M. Jain, Appellant Director
- (5) Shri Surendera S. Somani, Appellant Director
- (6) Addl. DGFT, Mumbai.
- (7) DGFT Website



(Dilip Kumar)

Deputy Director General of Foreign Trade