

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

F. No. 01/92/171/22/AM-17/ PC-VI/

Date of Order: 05.05.2020

Date of Dispatch: 05.05.2020

Name of the Appellant:

Transatlantic Packaging Pvt. Ltd.,
Survey No. 263, Golana Road,
Lunej, Khambhat – 388620 (Gujarat)

IEC Number:

3499004151

Order appealed against:

Order-in-Original No. 20/2015-16 dated
17.09.2015 passed by the Development
Commissioner, Kandla, Special
Economic Zone

Order-in-Appeal passed by:

Amit Yadav, DGFT

Order-in-Appeal

Transatlantic Packaging Pvt. Ltd., Khambhat (hereinafter referred to as 'the Appellant'), an EOU unit, filed an appeal on 26.07.2016 u/s 15 of Foreign Trade (Development & Regulation) Act, 1992 (here-in-after referred to as "the Act") against 20/2015-16 dated 17.09.2015 (issued from File No. KASEZ/100%EOU/III/147/04-05/Vol.II/7191) passed by the Development Commissioner (hereinafter referred to as 'the DC'), Kandla, Special Economic Zone (KASEZ).

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 me.

3. Brief facts of the case:
- 3.1 The Appellant was granted a Letter of Permission (LOP) by DC, KASEZ vide LOP No. KASEZ/100%EOU/II/147/04-05/2916 dated 17.03.2005, as amended, for setting up an EOU for manufacture and export of Thermoformed Plastic Packaging Articles with or without multi-colored printing, as amended. The unit started commercial production on 12.05.2005. As per the terms and conditions of the LoP, the unit was required to achieve Positive Net Foreign Exchange as prescribed in the Foreign Trade Policy (FTP).
- 3.2 On the basis of Annual Performance Report (APR) submitted by the appellant, it was noticed that the appellant failed to achieve positive NFE in the first five year block period as on 31.03.2010 to the tune of Rs. 264.78 lakhs. After issuing a show cause notice (SCN) dated 18.05.2010 to the Appellant, the DC, KASEZ dropped the proceedings and extended the LOP for next five year block period on submission of undertaking dated 03.06.2010 that the appellant shall meet the LOP condition of NFE within the extended period of five years.
- 3.3 The performance of the appellant was again reviewed on the basis of its APR, it was noticed that the appellant again failed to achieve positive NFE in the second five year block period as on 31.03.2015 to the tune of Rs. 126.31 lakhs. Hence, a notice dated 15.05.2015 was issued to the Appellant by DC, KASEZ to show cause why action should not be taken against it for cancellation of LOP in terms of section 9 of the Act read with Rule 10 of the Foreign Trade (Regulation) Rules, 1993 (here-in-after referred to as "the Rules") and for imposition of penalty under Section 11 of the Act, as amended.
- 3.4 In oral and written submissions before the DC, KASEZ, the Appellant stated accepted that it could not achieve positive NFE during first and second blocks of five years due to import of very expensive machinery, recession, stiff competition and sluggish market conditions.
- 3.5. On examination, the Appellant's submissions were not found convincing. Hence, the DC, KASEZ proceeded to adjudicate the matter by upholding the averments made in the SCN and imposed a penalty of Rs. One crore vide Order-in-original dated 07.09.2015 on the appellant.
- 4.0 Aggrieved by the Order-in-Original dated 17.09.2015, the Appellant filed the present appeal. The appellant in its written as well as oral submissions during personal hearing held on 06.02.2020 reiterated the same/similar arguments made before the DC,

KASEZ. In addition, the appellant stated that it was again given an opportunity to make good the deficiency by granting extension in LOP for another five year period by the DC, KASEZ. During the Financial Year 2016-17 of the extended period, it has achieved export obligation of Rs. 22,52,35,626/- Hence, the penalty imposed on it should be set aside or may be reduced to nominal.

5.0 The DC, KASEZ vide letter dated 26.12.2016 furnished comments on the appeal. He has inter-alia informed that the LOP has been extended upto 12.05.2020 keeping in mind the market scenario. However, the penalty has been imposed to act as deterrent for not achieving positive NFE and to recover the import duty saved while being negative NFE.

6.0 I have considered the Adjudication Order dated 17.09.2015 passed by DC, KASEZ, oral/written submissions made by the appellant, comments of office of the DC, KASEZ and all other aspects relevant to the case. It is noted that:

- (i) For opting and taking tax benefits under the EOU scheme, it was first and foremost condition that the appellant would achieve positive NFE in terms of para 6.5 of FTP. The condition was also specifically stated in the LOP issued to the appellant. However, the appellant failed to achieve positive NFE in two consecutive blocks of five years.
- (ii) Even after failure to achieve positive NFE in the first block of five year, a lenient view was taken by the DC, KASEZ and no penalty was imposed on the appellant. An opportunity was also granted to the appellant by the DC, KASEZ to achieve NFE in the second block period by extending the LOP. The appellant also furnished an undertaking dated 03.06.2010 in this regard. However, no concrete efforts have been shown by the appellant to achieve the stipulated export obligation and again failed.
- (iii) The contention of the appellant that as its LOP has again been extended for another five year block, no penalty should have been imposed. In this regard, it is noted that disposal of adjudication proceedings and extension of LOP period are two separate things. As per policy/procedure, the NFE is calculated cumulatively for blocks of five year period and the appellant was found NFE negative for the block. Hence, the action taken by the DC, KASEZ for imposition of penalty for contravening the relevant provisions FTP and conditions of LOP is in accordance with the Act.
- (iv) As regards the quantum of penalty imposed, it is noted that the adjudicating authority has discretionary power to impose a penalty upto five times of the value of negative NFE. In the present case, the DC, KASEZ has already taken a lenient view by not imposing any penalty during first block of five year period, in which

NFE was negative for an amount of Rs. 264.78 Crore. Further, he was lenient even while imposing penalty of one crore for second block of five year period, in which NFE was negative for an amount of Rs. 126.31 Lakhs. Hence, the appeal does not merit consideration.


7.0 In view of the above, in exercise of the powers vested in me 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, I pass the following order:

Order

F.No. 01/92/171/22/AM-17/ PC-VI /

Dated: 05.05.2020

The appeal is dismissed.


5/5/2020

(AmitYadav)

Director General of Foreign Trade

Copy To:

- (1) Transatlantic Packaging Pvt. Ltd., Survey No. 263, Golana Road, Lunej, Khambhat – 388620 (Gujarat)
- (2) Development Commissioner, Kandla SEZ with an advice to make recoveries.
- (3) DGFT's web site


5/5/2020

Dy. Director General of Foreign Trade