

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

F. No. 01/92/171/14/AM 17/ PC-VI/313-314 Date of Order: 15 .01.2020

Date of Dispatch: 15 .01.2020

Name of the Appellant:

M/s Shekhar Impex,
Plot No. 436-438, GIDC, Phase-II,
Dared, Jamnagar- 361005

IEC Number:

2401002049

Order appealed against:

Order-in-Original No. 03/2015-16 dated
04.04.2016 passed by the Development
Commissioner, Kandla, Special Economic
Zone

Order-in-Appeal passed by:

Amit Yadav, DGFT

Order-in-Appeal

M/s Shekhar Impex, Jamnagar, Gujarat (hereinafter referred to as 'the Appellant'), an EOU unit, filed an appeal dated 27.05.2016 u/s 15 of the Foreign Trade (Development & Regulation) Act, 1992 (here-in-after referred to as "the Act") against Order-in-Original No. 03/2015-16 dated 04.04.2016 issued from File no. KASEZ/100%EOU/II/97/2001-02/24 passed by the Development Commissioner (hereinafter referred to as '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/97/2001-02/5712 dated 02.08.2001, as amended, for setting up an EOU for manufacture and export of reprocessing of Mix Ferrous and Non-ferrous scrap/waste/obsolete and unusable metals into Ingots/Billets and processed scrap, etc, as amended. The unit started commercial production on 12.11.2001. As per terms and conditions of the LoP, the unit was required to achieve positive Net Foreign Exchange (NFE) as prescribed in the Foreign Trade Policy (FTP)
- 3.2 It was observed that the Appellant failed to achieve positive NFE in the second block period during 2007-08 to 2011-12 to the tune of Rs. 515.43 lakhs as per their Annual Performance Report. Accordingly, a notice dated 14.12.2015 was issued to the Appellant by DC, KASEZ to show cause as to why action should not be taken against it under Section 9 of the Act read with Rule 10 of the Foreign Trade (Regulation) Rules, 1993 (here-in-after referred to as "the Rules") for cancellation of LoP and under Section 11 of the Act for imposition of penalty.
- 3.3 In reply to the show cause notice and during personal hearing before the DC, the Appellant stated that its cumulative NFE for the period from commencement of production i.e. 12.11.2001 to 31.03.2012 was positive by Rs. 1.40 lakhs as per the provisions of Para 6.5 of the FTP.
- 3.4. On examination of the reply to the Show Cause Notice, the DC found that the Appellant failed to fulfill the stipulated NFE for the second five year block period in contravention of the relevant provisions of FTP/HBP in force and also the conditions of LoP. Further, the Appellant was not carrying out any activities since 2009-10. Its LoP expired on 10.11.2011 and it neither applied for renewal of the LoP nor for exiting from the scheme. Hence, the DC, vide Order-in-original No. 03/2015-16 dated 04.04.2016 imposed a penalty of Rs. 20 Lakh for not achieving stipulated NFE in the second block of five year and Rs. One Lakh for not applying for renewal of LoP or completing procedure for exit from the scheme.
- 4.0 Aggrieved by the Order-in-Original dated 04.04.2016, the Appellant filed the present appeal. The appellant in its written as well as oral submissions during personal hearing held on 12.12.2019 reiterated the same/similar arguments made before the DC. It stated that:
- (i) while calculating the NFE for the second block of five year, the DC did not consider the opening stock of Rs. 842.24 Lakh as carried forward from the first block of five

year. If it is considered, it has positive NFE. The Appellant further stated that in the matter of M/s Agarwal Exports, Jamnagar, the Appellate Authority has accepted similar plea of the party.

- (ii) Imposing a penalty of Rs. One Lakh for not applying for renewal of LoP or completing procedure for exit from the scheme is against the Principles of Natural Justice as this allegation was not stated in Show Cause Notice.

5.0 Comments on appeal were also obtained from the office of the DC, KASEZ. The DC, vide letter dated 30.08.2016, stated that as per Para 6.5 of FTP, 2009-14, read with monitoring guidelines given in Appendix 14-I-G, NFE earnings shall be calculated cumulatively in each block of five years and not cumulatively in all the blocks as claimed by the Appellant.

6.0 I have considered the Adjudication Order dated 04.04.2016 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) The Appellant was required to achieve positive net foreign exchange in terms of conditions stipulated in Para 6.5 read with monitoring guidelines given in Appendix 14-I-G and conditions of LOP. As per Para 6.5 of the FTP, 2009-2014, the NFE earnings shall be calculated cumulatively in the block of five years. Moreover Appendix 14-I-G stipulates that annual monitoring in the case of old units which have completed more than five years will be undertaken only for such number of years which fall in the second block of five years. Thus NFE shall be calculated in each block of five years and not cumulatively in all the blocks, as claimed by the Appellant.

It is further observed that for the calculation of NFE, the second block period starting from 2007-2008 shall be considered. The NFE for the first block period from 2002-03 to 2006-07 shall not be considered for old units that have completed more than five years from the inception. Thus the contention of the Appellant that for calculating the NFE for second block of five year, NFE of first block shall also be considered is not tenable. Value of the opening stock for the year 2007-08 shall be taken into consideration since the closing stock for the previous year has not been taken into account for calculating NFE in the earlier block. Thus, for the second block period from 2007-08 to 2011-12 the final NFE is negative by 515.43 lakhs. As regards the contention of the Appellant regarding favourable view taken by the Appellate Authority in the case of M/s Agarwal Exports, it is observed that the Appellate Authority has not given any dispensation on this issue in that case.

- (ii) I agree with the contention of the Appellant that the Show Cause Notice dated 14.12.2015 does not mention anything about taking penal action for non-renewal of LoP or for not exiting from the scheme. Therefore, imposing penalty on this issue is against the principals of Natural Justice.


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. 01/92/171/14/AM17/PC-VI/

Dated: 15 .01. 2020

1. Partial relief is granted. Appeal against imposition of penalty of Rs 20,00,000/-for not achieving positive Net Foreign Exchange is dismissed. Appeal against imposition of penalty of Rs. 1,00,000/- for not making request for renewal of LoP or for not exiting from the scheme is admitted.
2. The Adjudicating Authority is at liberty to de-novo proceed against the appellant for taking action for not making request for renewal of LoP or for not exiting from the scheme.


15/01/2020

(Amit Yadav)

Director General of Foreign Trade

Copy To:

- ✓(1) M/s Shekhar Impex, Plot No. 436-438, GIDC, Phase-II, Dared, Jamnagar-361005.
- ✓(2) Development Commissioner, Kandla SEZ with an advice to make recoveries.
- ✓(3) DGFT's web site


15/1/2020

(Shobhit Gupta)

Dy. Director General of Foreign Trade