

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

F.No. 01/92/171/08/AM-22/PC-VI | 42

Date of Order: 09.09.2022

Date of Dispatch: 09.09.2022

Name of the Appellant:

**Sameer Industries,
Plot No. 204-207,
Sector – IV, KASEZ,
Gandhidham**

IEC Number:

0896000681

Order appealed against:

Appeal filed against the Order-in-Original No. KASEZ/04/2021-22 dated 21.05.2021 passed by the Development Commissioner, Kandla Special Economic Zone

Order-in-Appeal passed by:

Santosh Kumar Sarangi, DGFT

Order-in-Appeal

Sameer Industries, KASEZ, Gandhidham (Kutch), Gujarat (hereinafter referred to as “the Appellant”) has filed an appeal dated 25.06.2021 under Section 15 of Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as “the Act”) against Order-in-Original No. KASEZ/04/2021-22 dated 21.05.2021 passed by the Development Commissioner (hereinafter referred to as “DC”), Kandla Special Economic Zone (KASEZ) imposing a penalty of Rs. 36,00,000/- (Rupees Thirty Six Lakhs only) on the Appellant.

2.1 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 appeal is before me.

2.2 Any person/party deeming himself/itself aggrieved by this order, may file a review petition under the provisions of Section 16 of the FT(D&R) Act, 1992 before the Appellate Committee, Department of Commerce, New Delhi.

3.0 Brief facts of the case:

3.1 Sameer Industries was issued a Letter of Approval (“LoA”) by the DC, KASEZ vide letter No. FTZ/IA/1587/95/7670 dated 23.09.1995 to set up a new manufacturing unit in KASEZ of recycled items from imported scrap such as M.S. Scrap, H.M. Scrap, C.I. Scrap, Copper, Brass, Aluminum and other Minor metal scraps, etc., subject to the conditions imposed therein.



3.2 Appellant confirmed and accepted all the terms and conditions specified in the LoA and executed a Bond-cum-Legal undertaking under Rule 22 of SEZ Rules, 2006. As per the terms and conditions of the LoA, the unit was to achieve positive Net Foreign Exchange (“NFE”) as per the Rule 53 of the SEZ Rules, 2006.

3.3 Appellant commenced commercial production in 1995. Appellant submitted Annual Performance Reports (APRs) for the period 2014-15 to 2018-19 (upto 31.03.2019). During the review of the performance, Unit Approval Committee (UAC) found that the Appellant at the end of the 5th year of the prevalent five years block had negative NFE of Rs. 355.13 lakhs. Hence, it was decided by the UAC to take necessary action against the Appellant as per the provisions of the SEZ Zone Act, 2005 and orders made thereunder.

3.4 DC issued a Show-Cause Notice (SCN) dated 27.11.2020 to the Appellant asking it to show cause as to why their LoA should not be canceled and a penalty should not be imposed under Rules 25 and 54(2) of the SEZ Rules read with provisions of FT(D&R) Act, 1992.

3.5 DC, KASEZ observed that the Appellant was guilty of non-achievement of positive NFE as required under Rule 53 of SEZ Rules, 2006 and is liable for penal action under Section 11 of the FT(D&R) Act.

3.7 DC vide Order-in-Original No. No. KASEZ/04/2021-22 dated 21.05.2021 imposed a penalty of Rs. 36,00,000/- on the Appellant under Section 11(2) of the Act for contravention of provisions of Rule 53 of SEZ Rules, 2006.

4. Aggrieved by the Order-in-Original dated 21.05.2021, the Appellant filed the present Appeal. The opportunities for personal hearing were given on 23.12.2021, 10.03.2022 and 18.05.2022. The hearing on 10.03.2021 could not take place due to administrative reasons. Nobody appeared on behalf of the Appellant in the remaining Personal hearings.

5. Appellant in its written submissions has raised the following grounds :-

- (i) Vide letter dated 28.4.2014, their LoA was renewed with retrospective effect from 03.04.2014 to 02.04.2016 for a period of two years.
- (ii) LoA was renewed vide letter dated 23.08.2016 for a period of three years w.e.f. 03.04.2016. The import consignment arrived in September, 2016 and there was break of more than five months in production.
- (iii) The unit was not permitted to undertake the manufacture of ingots out of the scrap the Appellant was exporting so that it could achieve more value addition.
- (iv) Due to the delay in renewal/extension of LoA in time they could not achieve positive NFE. It is a bona fide case of default as their LoA was not renewed in time.
- (v) As per the provisions of Rule 80 of the SEZ Rules, 2006 incorporated w.e.f. 19.09.2018, in case of bona fide default, if the unit fails to achieve NFE then

such shortfall may be regularized after the unit deposits an amount equal to one percent of the shortfall in FOB value. Accordingly the unit deposited an amount of Rs. 3.56 lakhs i.e. more than one percent of the shortfall in NFE.

6. Comments on the Appeal were obtained from the office of DC, KASEZ. The DC vide letter dated 29.09.2021 has stated as under :-

- (i) Appellant had achieved negative NFE of Rs. 355.13 lakhs for the five year block period 2014-15 to 2018-19 (upto 31.03.2019).
- (ii) Appellant had negative NFE earlier also during the block period 2006-2011 also and as such bonafide default will not be applicable in their case.
- (iii) Adjudicating Authority has rightly imposed penalty of Rs. 36.00 lakhs for not achieving of the positive NFE by the Appellant under the provisions of FT(D&R) Act, 1992 for contravention of provisions of Rule 53 of the SEZ Rules, 2006.

7.0 I have considered the Order-in-Original dated 21.05.2021 passed by DC, KASEZ, Appeal, comments of DC, KASEZ, and all other aspects relevant to the case. It is noted that the opportunities of personal hearings were granted on 23.12.2021, 10.03.2022 and 18.05.2022 but nobody appeared on behalf of the Appellant. Accordingly, the Appeal is being decided Ex-parte.

- (i) As per the Rules 25 and 54 of the SEZ Rules, 2006, if a unit in SEZ has not achieved positive NFE it shall be liable for penal action under the provisions of the FT(D&R) Act, 1992.
- (ii) DC issued a Show-cause Notice dated 27.11.2020 to the Appellant for having negative NFE of Rs. 355.13 lakhs for the block period of five years from 2014-15 to 2018-19. DC imposed a penalty of Rs. 36 lakhs on the Appellant vide Order-in-Original dated 21.05.2021.
- (iii) Rule 80 inserted w.e.f. 19.09.2018 in the SEZ Rules, states that :-

“if a Special Economic Zone Unit, in case of bona fide default, fails to achieve the minimum specified Net Foreign Exchange or specified value addition, then such shortfall may be regularized after the Unit deposits an amount equal to one per cent.”

- (iv) Rule 80 of SEZ Rules, 2006 mentions about ‘bona fide default’ i.e. SEZ unit inspite of its earnest efforts was unable to achieve minimum specified NFE earnings. In the Order-in-Original dated 21.05.2021, DC has given detailed reasons as to why the failure to achieve positive NFE is not a bonafide default and therefore provisions of Rule 80 of SEZ Rules cannot be applied in the present case.



- (v) As regards the quantum and reasonableness of penalty imposed. Adjudicating authority could not have imposed a penalty less than Rs. 10,000/- and not more than five times of the value of goods for which contravention has been made or is attempted to be made, whichever is more, as per the Section 11(2) of the FT(D&R) Act, 1992. The penalty imposed could have been upto five times i.e. Rs. 1,775.65 lakhs whereas the Adjudicating Authority imposed a penalty of Rs. 36 lakhs. By any stretch of imagination, such a penalty cannot be termed as harsh or unreasonable and is upheld.

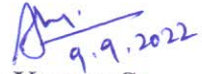
8.0 In view of the above, in exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014 dated the 5th December 2014, I pass the following order :-

Order

F.No. 01/92/171/08/AM-22/PC-VI

Dated: 09.09.2022

The Appeal is dismissed.



(Santosh Kumar Sarangi)

Director-General of Foreign Trade

Copy to:

1. Sameer Industries, Plot No. 204-207, Sector-IV, KASEZ, Gandhidham, Gujarat.
2. Development Commissioner, Kandla SEZ for information and compliance.
3. Additional Secretary (SEZ Division), DoC, New Delhi for information.
4. DGFT's website.



(Randheep Thakur)

Joint Director General of Foreign Trade