

Government of India  
Ministry of Commerce & Industry  
Directorate General of Foreign Trade  
UdyogBhawan, New Delhi

F. No. 18/03, 15,16/2021-22/ECA.I/

Date of Order : 09.05.2023

Date of Despatch: 10.05.2023

Name of the Petitioner(s):

- (i) Shri B.R. Shah, Ex- Director, M/s Ambalal Sarabhai Enterprises Ltd. (IEC No. 0888001177), 4, Arya(1) Apts. B/H Goyal Tower, University Road Polytechnic, Ahmedabad-380001.
- (ii) Shri Vipin Jikar, Director (erstwhile), M/s Ambalal Sarabhai Enterprises Ltd. (IEC No. 0888001177), 14/A, Haribhakti Colony, Old Parada Road, Baroda-390007(Gujarat).
- (iii) Shri K.V. Sarabhai, Director, M/s Ambalal Sarabhai Enterprises Ltd. (IEC No. 0888001177), Wadi Wadi, P.B.31, Baroda-390007 (Gujarat)

Order Reviewed against:

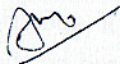
Orders-in-Appeal No. 03/16/144/00094,  
95 & 98/AM.18 all dated 20.11.2018  
passed by Addl. DGFT, Mumbai

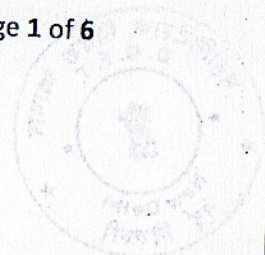
Order-in-Review passed by:

Santosh Kumar Sarangi, DGFT

**Order-in-Review**

Shri B.R. Shah, Ex- Director, Shri Vipin Jikar, Director (erstwhile) & Shri K.V. Sarabhai, Director of M/s Ambalal Sarabhai Enterprises Ltd. (here-in-after referred to as the 'Directors') of the firm M/s Ambalal Sarabhai Enterprises Ltd. having IEC No. 0888001177. (here-in-after referred to as the 'firm') filed Review Petitions dated 17.05.2021, 22.06.2021 and 22.06.2021 under Section 16 of the Foreign Trade (Development & Regulation) Act, 1992, as amended (here-in-after referred to as 'the Act') against Order-in-Appeal No. 03/16/144/00094, 95 & 98/AM.18 dated 20.11.2018 passed by Addl. DGFT, Mumbai upholding the Order-in-Original (OIO) passed by the adjudicating authority in order No. 34/36/021/00001/AM02 dt. 02.02.2018 imposing a penalty of Rs. 10 crores on the firm and its Proprietor/Partners/Directors under Section 11(2) of the Foreign Trade (Development & Regulation) Act, 1992.





### Brief Facts of the Case

2.1 The firm obtained an EPCG Authorization No. 3430000031 dt. 05.09.2001 for CIF value Rs. 9,18,52,500/- to import capital goods at 5% concessional customs duty subject to fulfilment of export obligation for FOB value Rs. 45,92,62,500/- by exporting Pharmaceuticals Bulk Drugs and Formulations within a period of 8 years from the date of issue of authorization. The firm was to maintain annual average past export performance. One of the condition of the authorization was that the firm would submit the export documents within the prescribed period after the expiry of Export Obligation Period (EOP).

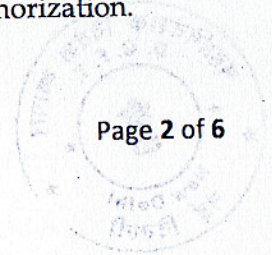
2.2 The firm did not submit the documents evidencing fulfillment of export obligation after the EOP which expired on 04.09.2009. Hence, the firm was issued a Demand Notice dt. 03.11.2009 and a personal hearing (PH) was granted was given on 25.11.2009. Shri S. Ruparel, representative of the firm appeared before the Smt. Lata Shukla, Jt. DGFT on 26.11.2009. He was given one week time to submit shipping bills as proof of export. The firm submitted partial export documents on 22.12.2009 and 19.02.2010. A letter dt. 08.07.2010 was issued with opportunity for PH on 23.07.2010 but none appeared. However, the firm submitted a letter dt.17.07.2010 stating reason for not attending the PH. Letters dt. 03.08.2010 and 24.09.2010 offering PH on 24.08.2010 and 25.10.2010 were issued but none appeared for hearing on behalf of the firm.

2.3 A Show Cause Notice (SCN) was issued with opportunity of PH on 28.09.2017 asking the firm to show cause as to why action u/s 11(2) the Act should not be taken for the failure to comply with the conditions of the authorization. The firm submitted a letter dt. 28.09.2017 but did not submit documents showing complete fulfillment of export obligation. The firm was offered another PH on 16.01.2018 vide letter dt. 08.01.2018. Shri S. Ruparel, representative of the firm appeared before the adjudicating authority on 08.01.2018. The firm was given time upto 31.01.2018 for submission of documents evidencing fulfillment of export obligation as per the conditions of the authorization. Another opportunity of PH on 31.01.2018 was offered but the firm did not appear. The Adjudicating Authority therefore, decided to finalize the case on the basis of documents and information available on records.

2.4 The firm had fulfilled total EO to the extent of Rs. 72,66,65,809/- out of 1,21,57,44,948/- imposed. The firm had failed to fulfill specific export obligation block-wise and maintain average export performance as required by the condition of the authorization. The Adjudicating Authority concluded that the firm and its Directors violated the conditions of the authorization and hence the adjudicating authority imposed a penalty of Rs.10,00,00,000/- (Ten Crore) vide Order-in-Original No. 34/36/021/00001/AM02 dt. 02.02.2018 on the firm for non fulfillment of specific export obligation block-wise and maintain average export performance as required by the condition of the authorization.



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3.1 Aggrieved by the OIO dt. 02.02.2018, the firm had filed appeals against the said OIO before the Appellate Authority (RA, Mumbai). The Appellate Authority granted PH to the firm on 01.08.2018 and firm vide its fax dt. 31.08.2018 requested to adjourn the same. A second PH was granted on 27.08.2018. Shri Ratan Jain and Shri Akhilesh Kangsia, Advocates of the firm appeared before the appellate authority. They submitted copies of Notification, Chapter 6 of HBP and copies of Judgement and requested to adjourn the PH. Third PH was granted on 02.11.2018 which was postponed to 12.11.2018. In the said PH, Shri Akhilesh Kangsia, Advocate of the firm appeared and stated that they have fulfilled the export obligation of 59.77% and Customs Authority had en-cashed Bank Guarantee of Rs. 2.24 Crores as partial duty of unfulfilled export obligation of 41%.

3.2 The appellate authority recorded the following observations :

*The Adjudicating Authority passed the order imposing fiscal penalty as the Petitioner failed to fulfil specific export obligation block-wise and maintain average export performance as required by the condition of the authorization as per Para 6.5(v) of FTP 1997-2002. The said para elaborates that "The export obligation under the scheme shall be over and above, the average level of exports achieved by him in the preceding three licensing years for same and similar products."*

*As per the condition of Annexure-A of the authorization, the Petitioner was under obligation to export items 'Manufacturing of Pharmaceuticals bulk drugs and Formulations'. As per the condition No. 3 of Annexure A, the Petitioner was also required to maintain its average of the past three years performance of the products/services mentioned in para 2 above. The annual average of the past export performance is Rs. 9,45,60,305.90/-.*

*Thus, the Petitioner was required to fulfil specific export obligation of Rs. 45,92,62,500.00 and average export obligation of Rs. 75,64,82,448.00 in 8 years. But the Petitioner had exported goods worth Rs. 72,66,65,809.00 only. Thus, there is shortfall in export obligation (Specific and Average combined) and the Petitioner was directed to regularize as per para 6.19 which reads as 'In case EPCG license holder fails to fulfil the prescribed export obligation, he shall pay duties of Customs plus 24% interest per annum to the Customs authority as per paragraph 6.11'. Thus, the appellant is liable for penal action as per Para 6.16 of Hand Book of Procedure which state that 'In case of failure to fulfil the export obligation or any other condition of the licence, the licence holder shall be liable for action under the Foreign Trade (Development & Regulation ) Act 1992, the Orders and Rules made thereunder, the Orders and Rules made thereunder, the provisions of the Policy and Customs Act, 1962.*

*Since the Petitioner had neither fulfilled export obligation as per conditions No. 2 & 3 of Annexure of the authorization nor regularized the bonafide default as per para 6.19, the Petitioner is liable to penal action as per para 6.*



3.3 The Appellate Authority dismissed the appeal filed by the firm vide O-I-A No. 03/16/144/00092/AM18 dt. 20.11.2018.

4.1 The Directors have submitted the present review petitions dated 17.05.2021, 22.06.2021 and 22.06.2021 on the following grounds :-

(a) The impugned order is non-speaking and is in violation of principles of natural justice since it has been passed without considering the submissions made by the firm,

(b) The impugned SCN, on which the OIO and the impugned order is based, is factually incorrect, and therefore, is liable to be dropped,

(c) The impugned SCN, on which the OIO and the impugned order is based, is vague, non-est and perverse, and therefore, is liable to be dropped,

(d) Penalty is not imposable under Section 11(2) of the FTDR Act, 1992,

(e) Penalty cannot be imposed jointly on the company and its Directors without specific quantification,

(f) Rule 10, 13 and 14 of FTDR Rules are not invocable,

(g) EPCG is not a licence (Prior to 19.08.2010) and the provisions of the FTDR Act, 1992 or FT(Regulation) Rules, 1993 are not applicable,

(h) The impugned SCN was issued beyond reasonable period of time and there is an inordinate delay in adjudication proceedings,

(i) Without prejudice, the unfulfilled EO is to the extent of 29.21% if the same is computed as provided in para 6.11 of HBP read with Notification Nol 49.

4.2 The independent director Shri B.R Shah in addition to the above has submitted that:

(i) He was an independent and non executive Director on the Board of Ambalal Sarabhai Enterprises (ASE) and ceased to be the Director of ASE w.e.f. 29.08.2002 by tendering his resignation while 2<sup>nd</sup> period of EO from 5.9.2003 to 4.9.2005 was running,

(ii) As an independent and non executive Director of ASE, the Director cannot be made liable for any act of commission or omission of ASE to which he was not a party much less for a period subsequent to his ceasing to be the director of ASE,

(iii) The adjudicating officers completely lost the sight of the fact that ASE was a Public Ltd. company and proceeded on a wrong assumption that ASE was a partnership firm; that its directors were like its partners and all that have resulted into miscarriage of justice. The partners were jointly and severally responsible for the acts of the firm and had a unlimited liability whereas its shareholders and non executive directors had a limited liability to the extent of their shareholding,

(iv) He was not a signatory to the application made by ASE for the grant of the Authorization for their Import, Bond executed by ASE in favour of the customs Department or application made by ASE to Punjab National Bank for furnishing a Bank Guarantee to the customs department. Every director is not liable or responsible



for the actions and conduct of a company but only those directors who are in-charge of or associated with day to day business operations and management are responsible for any action of the company.

5. The Director have prayed for :-

- (i) Setting aside the OIA dt. 20.11.2018,
- (ii) Issuing a clarification as to whether penalty so imposed by the impugned order is only on the applicant, and not on its directors and accordingly review filed by (out of an abundant caution) may be allowed,
- (iii) Granting an opportunity of personal hearing,
- (iv) Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

6.1 The Reviewing Authority had granted a PH on 17.03.2023 which was postponed due to Shri Mihir Thakore Advocate would be out of country from 29<sup>th</sup> March - 9<sup>th</sup> April 2023 and will not be able to attend the personal hearing. Another PH was granted on 2<sup>nd</sup> May, 2023. Shri Dhruv Matta, Advocate, appeared on behalf of the firm and two Directors Shri Vipin Jikar and K.V. Sarabhai alongwith Shri Sahil Jaggi, Advocate, Shri Navin Chandra Patel, Shri Chaula Shashtri, and Shri Anushree Kapadia. Shri Mihir Jakhore Sr Advocate appeared on behalf of Independent Director Shri B.R. Shah. Shri Satya Raja Shekhar G., DDG, RA, Mumbai was also present during the hearing. The advocates to the Directors claimed that the firm had fulfilled EO to the extent of 59% and the Customs authority had encashed their bank guarantee (BG) of Rs. 2.24 Crore which cover the shortfall in exports.

6.2 He further stated that the penalty contended that the shortfall in export obligation is bonafide and therefore the imposition of penalty of Rs 10.00 Crore is unjust and excessive and deserves to be set aside. The penalty has been imposed on the firm and the Director jointly and severally, which is bad in law. The SCN did not indicate the individual lapses of the Directors and therefore the conclusion and penalty is not justified. One of the Director Shri R. Shah was an Independent Director who was not involved in the day to day functions of the firm and therefore cannot be held liable.

7. I have gone through the facts and records of the case and the submission made by the Advocate to the firm, the Directors and written submissions. The Appellate Authority had provided sufficient opportunity to the firm to submit its case and the advocates of the firm duly appeared and presented their submissions before the Appellate Authority. The firm has submitted that it has partially fulfilled its export obligations and that the excess duty saved (Customs duty) has been also been paid due to the encashment of the bank guarantee (BG) of Rs 2.24 crore by the Customs authorities. However, the firm or its Directors were unable to satisfy that the interest on the Customs duty saved has also been accounted for while encashment of BG. The firm has to completely extinguish its liability towards its



*(Handwritten signature)*

unfulfilled portion of export obligation and submit documentary proof thereof to the Regional Authority. However the adjudicating authority has not issued any separate SCN to the Director including the Independent Director nor has the adjudicating authority specified the role and responsibility of the Directors in the contravention of the Act.

**ORDER**

F.No.18/14,03, 15,16/2021-22/ECA.I/ 34

Date: 07.05.2023

The three Review Petitions dated 17.05.2021, 22.06.2021 and 22.06.2021 filed by the Directors against Orders-in-Appeal No.03/16/144/00098/AM.18, No.03/16/144/00094/AM.18 & 03/16/144/00095/AM.18 all dated 20.11.2018 passed by Addl. DGFT, Mumbai is admitted. The penalty imposed against the Directors is set aside. The case is remanded to RA, Vadodara for de-novo consideration and finalize the case within three months from date of issue of order.



*(Signature)*  
9.5.2023  
(Santosh Kumar Sarangi)  
Director General of Foreign Trade

Copy to:-

- (i) Shri B.R. Shah, Ex- Director, 4, Arya (1) Apts. B/H Goyal Tower, University Road Polytechnic, Ahmedabad-380001.
- (ii) Shri Vipin Jikar, Director (erstwhile), 14/A, Haribhakti Colony, Old Parda Road, Baroda-390007 (Gujarat).
- (iii) Shri K.V. Sarabhai, Director, Wadi Wadi, P.B.31, Baroda-390007 (Gujarat).
- (iv) M/s Ambalal Sarabhai Enterprises Ltd., WadiWadi, P.B. No. 31, Baroda - 390007(Gujarat)
- (v) The Addl. Director General of Foreign Trade, Mumbai.
- (vi) The Joint Director General of Foreign Trade, Vadodara.
- (vii) Central Economic Intelligence Bureau, 1<sup>st</sup>, 6<sup>th</sup>& 8<sup>th</sup> Floor, 'B' Wing, Janpath Bhawan, Janpath, New Delhi - 110001.
- ✓(viii) DGFT Website.

*(Signature)*  
(A.S. Lungreishang)  
Dy. Director General of Foreign Trade