

Government of India (भारत सरकार)
Department of Commerce (वाणिज्य विभाग)
Directorate General of Foreign Trade (विदेश व्यापार महानिदेशालय)
Vanijya Bhawan, New Delhi-110011
वाणिज्यभवन, नई दिल्ली

F. No. 01/92/171/17/AM-23/PC-VI/ 13

Date of Order: 12.02.2024

Date of Dispatch: 20.02.2024

Name of the Appellant:

M/s. Windlass Steelcrafts LLP registered office
at P.O. Box-52, 11-A, Rajpur Road, Dehradun-
248001

IEC No. of the Applicant:

2988000433

Order Appealed against:

Appeal filed against Impugned order F.No.
12-388/2007-100%EOU/988
dated 24.01.2018

Order passed by:

Shri Santosh Kumar Sarangi
Director General of Foreign Trade

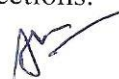
Order-in-Appeal

1. The Appellant herein, M/s. Windlass Steelcrafts LLP having registered office at P.O. Box-52, 11-A, Rajpur Road, Dehradun-248001, has filed an appeal against Impugned order F.No.12-388/2007-100%EOU/988 dated 24.01.2018 passed by DC, NSEZ. (hereinafter referred to as the impugned order)
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 Director General of Foreign Trade to function as Appellate Authority against the orders passed by the Development Commissioner, Special Economic Zones as Adjudicating Authority, Hence, the present appeal is before me.
3. Any person/party feeling aggrieved by this order is entitled to 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.



4. Brief History of the Case:

- 4.01 The Appellant had converted its existing DTA unit into 100% Export Oriented (EOU) at V.P.O Balawala, Haridwar Road, Dehradun (Uttarakhand) vide Letter of Permission (LOP) No. 12-388/2007-100%EOU/3452 dated 21.06.2007 for manufacture and export of Handicrafts made out of Steel, Brass, Leather, Wood & Miscellaneous items. On examination of balance sheets, form 56G and enquiries from Income Tax Department, it was noticed that the Appellant had claimed deductions under Section 10B of the Income Tax Act, 1961, and simultaneously availed duty drawbacks from Customs Authorities, which was allegedly prohibited. DC, NSEZ initiated proceedings against the Appellant, alleging violations of the terms and conditions of the LOP. Show Cause Notice dated 28.06.2013 was issued to the applicant for misuse of the status of an EOU. In response, the appellant firm replied that they had validly claimed benefit under section 10B of Income Tax Act, 1961. They also pointed out that they were eligible to claim drawback under section 75 of the Customs Act since they haven't availed CENVAT credit and were thus eligible for availing the drawback benefit. After personal hearing, examination of reply furnished by the firm on SCN, the DC, NSEZ vide order dated 24.01.2018, imposed a penalty of Rs.75/- lakhs (Rupees seventy five lakhs only) upon the Appellant in terms of Section 11(2) of the FT(D&R) Act, 1992 with the Directors jointly and severally liable to pay and the IEC No. 2988000433 was suspended in terms of Section 11(7) of FT(D&R) Act.
- 4.02 Against the said order, the Appellant filed two Writ Petitions before Hon'ble High Court of Delhi i.e. W.P.(C) 2300/2018 and W.P.(C) 2465/2018 challenging action of DGFT in delegating the power of adjudicating authority under Section 13 of FT(D&R) Act 1992, vide Notification No. 20 (RE-2013) 2009-14 dated 13.06.2013 to DC NSEZ and challenging the finding in impugned order passed by DC, NSEZ.
- 4.03 Hon'ble High Court of Delhi, vide Order dated 24.11.2022 in respect of both the above WPs, stated that the principal challenge laid by the Petitioner questioning the jurisdiction of DC to pass orders was not well founded and thus WP does not survive in view of the notification dated 24.03.1993 (related to WP No. 2300/2018); and directed the Petitioner to file an appeal in terms of Section 15 of FT(D&R) Act, 1992 within two weeks of the Order dated 24.11.2022. The Hon'ble High Court also stated in its order that if no such appeal is filed within a period of two weeks from date of passing of order, the IEC Code shall stand suspended and the respondents are at liberty to take such actions as available in Law. Further, the Hon'ble High Court has mentioned that the present petition is dismissed as withdrawn, albeit with the aforesaid directions.



4.04 As per Order of the Hon'ble High Court Delhi in W.P.(C) 2465/2018, the suspension of IEC was revoked by the Joint DGFT and the Appellant also deposited 50% of penalty amount Rs.37.50 lakhs in favour of DC, NSEZ, which has been converted in the form of FDR.

5.0 In compliance of above Order dated 24.11.2022, the said appeal has been filed by M/s Windlass Steelcrafts LLP on 06.12.2022 (i.e. within a period of two weeks of the Order dated 24.11.2022) before the Appellate Authority i.e. Directorate General of Foreign Trade.

6.0 In its appeal dated 06.12.2022 before the DGFT the appellant maintained that there has not been any gross violations to attract Section 11(2) of the FT(D&R) Act. It also maintained that the claim of Duty drawback did not violate any of the conditions of the LOP/LUT/FTP. It further stated in its appeal that the drawback claimed was in accordance with law and that failure to get bonded is not a mandatory requirement if no import of raw material has been done. Also, income tax deduction claimed under Section 10B of the Income Tax Act was lawful.

6.01 That the matter of benefits as claimed by the applicant is between the Custom Authorities and the Income Tax Authorities and therefore on this ground the applicant raise that the Development Commissioner has no jurisdiction to issue the impugned order.

6.01 That the Karnataka and Madras High court have held that a 100% EOU is entitled to claim duty drawbacks and therefore the learned counsel for applicants has relied on those two judgments to buttress its claims that the order issued by the Development Commissioner is illegal. In addition to these two judgments of the Karnataka and Madras High Court the applicant has relied on an order passed by Custom Excise and Service Tax Appellate Tribunal (CESTAT).

7.0 The DC, NSEZ in the impugned order has held that the Appellant has claimed benefits from the Income Tax Authorities by declaring their status as an EOU to them whereas concealed the same from the Custom and Central Excise Authorities. This claim can be substantiated from the fact that the Appellant did not gets its manufacturing premises bonded and did not obtain its warehousing licenses u/s 58 and 65 of the Customs Act.1962 respectively. The appellant has grossly violated the terms and conditions of LOP by not informing the DC of the commencement of its manufacturing process and by not getting its premises bonded. Additionally, there also has been failure in periodic submission of Quarterly (QPR) and Annual Performance Report (APR). The Appellant has also wrongfully claimed Duty Drawback from Customs Authorities as it was prohibited to do so vide notification No. 68/2007 – Cus (NT) dated 16.07.2007 as superseded vide notification No. 103/2008 – Cus (NT) dated 29.08.2008, vide notification No. 84/2010-Cus (NT) dated 17.09.2010, vide notification No. 68/2011-Cus (NT) dated 22.09.2011 and further vide notification No. 92/2012-Cus (NT) dated 05.10.2012. The ill motive behind claiming duty



drawback from customs authorities was also highlighted by citing that there are specific provisions which states that no duty is levied on the import of the goods for an EOU, yet the Appellant chose not to avail the benefit of upfront duty exemption available to the EOU's and chose to pay the duty and claimed duty drawback which was prohibited. There has been misrepresentation by the Appellant as it simultaneously acted as an EOU and non-EOU and thus got doubly enriched once from Custom Authorities and later from Income Tax Authorities.

Observations

8. On going through the facts of the case it is observed that:

8.01 Para 6.6 (c) of LOP/LUT states that “.....*failure to ensure positive NFE or to abide by any of the terms and conditions of the LOP/LOI/IL/LUT shall render the appellant liable to penal action under the provisions of the Foreign Trade (Development & Regulation) Act, 1992 and the Rules and Orders made thereunder without prejudice to action under any other law/rules and cancellation or revocation of LOP/LOI/IL.* The Appellant had failed to fulfill Clause No. v and vi of the LOP i.e. it failed to get its premises custom bonded and obtain warehouse license under section 58 and section 65 of the Custom Act, 1962 respectively. Furthermore, it also failed to intimate its commencement of production to DC, NSEZ. Also there has been a failure to file Annual and Quarterly Performance Report (APR and QPR) all of which form part of compliance of Foreign Trade Policy.

8.02 The Appellant has utilized its status of an EOU before Income Tax Authorities and thus claimed benefit under Section 10B of Income Tax Act, 1961 which they were granted.

8.03 The Appellant has also claimed Duty Drawback from Custom Authorities under Section 75 of the Customs Act, 1962.

9. Also it prima facie appears that there has been misrepresentation/fraud by the Appellant regarding utilization of its EOU status to one authority i.e. Income Tax Authority and hiding the same from the other authority i.e. Customs Authority. On the material placed on record, the Income Tax Authorities have specifically recorded that the applicant was an EOU and income from operations as an EOU has also been quantified for the purpose of Section 10B of the Income Tax Act, 1961. Thus, there is positive averment before the Income Tax authorities that the applicant was not only an EOU but they were also obtaining income from operations as an EOU. Despite this fact appellant didn't inform the Development Commissioner of commencement of production which it was duty bound to do by way of clause vi of the LOP/LUT.

10. The appellant placing reliance on Judgments "*Commissioner of Customs, Tuticorin vs. L.T. Karle: (2007) 207 ELT 358: Mad HC, Karle International vs. Commissioner of Customs, Bengaluru: (2012) 281 ELT 486: KA HC DB, Fancy Images [Final Order No. 50003-05 of 2017]: CESTAT*" to buttress their claim that even an EOU is entitled to duty drawback by Customs Authorities is misplaced. The ratio laid down in the above stated judgments is clearly distinguishable on facts. In both the judgments, it was a case where duty drawbacks were denied to a DTA unit on the ground that its products were manufactured by an EOU. The authorities in both these cases had relied on the Notification No. 68/2007-CUSTOMS (N.T) claiming goods manufactured by an EOU are not entitled to duty drawbacks. However, the DTA unit before the court placed reliance on the Circular No.32 of 2000 dated 20-04-2000 wherein it was clarified that DTA units were entitled to outsource their production to EOU appellants. The courts held that a cumulative reading of both the notification and the circulars (the notification barring duty drawbacks to EOUs and the circular allowing DTA units entitled to outsource their production to EOU units) made it clear that merely because the DTA appellants have outsourced their manufacturing to EOU will not disentitled them from claiming duty drawbacks. It was in this context that the Karnataka and Madras HCs have held that goods manufactured by EOUs are entitled to duty drawbacks. The same is evident from paras 44 & 45 of the Madras HC judgment and paras 15 &16 of the Karnataka HC judgment.
11. In the case before us the ratio of these judgments will not apply since it is not a case where duty drawbacks were refused on the ground that a DTA appellant has outsourced manufacturing to EOU appellant. In the instant case the EOU itself has manufactured and exported goods thus making it disentitled to duty drawback at All Industry Rate in view of clear mandate of Notification No. 68/2007-CUSTOMS (N.T).
12. The Appellant argued that the order issued by the learned Commissioner is wrong as the claims of the appellant have been allowed both by the Income tax as well as Customs Authorities therefore the Development Commissioner has no jurisdiction to issue the said order. However, the argument is felicitous in as much as the applicant was granted an LOP by the Commissioner, therefore the Development Commissioner being the supervisory authority under the Foreign Trade (Development and Regulation) Act, 1992 has the right to ensure that the obligations and rights under the LOP granted by him are not violated. The acts of the appellant as alleged by the Development Commissioner are in violation of the LOP thereby invoking the jurisdiction of the Development commissioner who is right in imposing the penalty.
13. From the facts mentioned in the Impugned order dated 24.01.2018 and counter reply furnished by NSEZ, it is clear that the appellant has grossly violated the terms and conditions of LOP by not informing the DC of the commencement of its manufacturing process and by not getting its premises bonded. Additionally, there also has been failure



in periodic submission of Quarterly (QPR) and Annual Performance Report (APR). Being an EOU the appellant firm was exempted from paying any Customs Duty, but it preferred to pay Customs Duty and got Duty Drawback from Custom's Authority. However, it is not clear, whether the appellant firm had intimated Custom's Authority that it was an EOU while claiming Duty Drawback.


14. In view of the above and 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. 01/92/171/17/AM-23/PC-VI

Dated: 12.02.2024

Order-in-Original No. 12-388/2007-100%EOU/988 dated 24.01.2018 passed by Development Commissioner, NSEZ is set aside. The order of the DC is mainly based on the assumption that the appellant has not disclosed their status as an EOU to the Custom Authorities to avoid the implication of the Customs Notification No. 68/2007-CUSTOMS (N.T) dated 16.07.2007 on them. However, there is no documentary evidence or proof to support the assumption. The case is accordingly remanded back to DC, NSEZ with a direction to examine the case de-novo and pass appropriate order as per the extant rules after taking into account the appellant's eligibility for the duty drawback benefit and also verifying the authenticity of the fact about the appellant's intimation to the Customs Authority regarding its status of being an EOU while claiming Duty Drawback under Section 75 of the Customs Act.


12.2.2024

(Santosh Kumar Sarangi)
Director-General of Foreign Trade

Copy To:

- 1) M/s. Windlass Steelcrafts LLP having registered office at P.O. Box-52, 11-A, Rajpur Road, Dehradun-248001
- 2) Development Commissioner, NSEZ for taking necessary action.
- 3) DGFT's website.



(Nirmal Kumar)
Joint Director General of Foreign Trade