

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

F. No. 01/92/171/04/AM21/PC-VI / 22-23

Date of Order: 26 .11.2021

Date of Dispatch: 26 .11.2021

Name of the Appellant: Anita Exports,
Plot No. 35/36, Sector-II,
Kandla Special Economic Zone,
Gandhidham – 370230, Gujarat.

IEC Number: 3704000965

Order appealed against: Order-in-Original No. KASEZ/01/2020-21 dated
20.04.2020 passed by the Development
Commissioner, Kandla Special Economic Zone,
Gandhidham

Order passed by: Amit Yadav, DGFT

Order-in-Appeal

Anita Exports, (hereinafter referred to as “the Appellant”), filed an appeal on 24.09.2020 under section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as “the Act”) against the Order-in-Original No. KASEZ/01/2020-21 dated 20.04.2020 (issued from F. No. KASEZ/IA/1628/96/Vol. I) passed by the Development Commissioner, Kandla Special Economic Zone (hereinafter referred to as “the DC”) imposing a penalty of Rs. 2,08,39,468/- (Rupees Two crores Eight lakhs Thirty Nine Thousand Four hundred and Sixty Eight Only).

2.1 Vide Notification No. 101 (RE-2013)/2009-2014 dated 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 appeal is now being heard by 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 The Appellant was issued a Letter of Approval (LoA) by the DC vide No. KASEZ/1A/1628/96/9308 dated 27.09.2001, as amended and extended from time to time, to set up a unit for reprocessing of used garments for export. After implementation of the SEZ Act in 2005, the said LoA continued under the SEZ scheme.

3.2 In terms of the para 2.54 of the Foreign Trade Policy (FTP), 2015-20, which mandates that the export proceeds if not realized within the time stipulated by RBI, all benefits and incentives availed against such exports shall be returned and action in accordance with the provisions of FT (D&R) Act, & Rules and orders made thereunder be initiated.

3.3 On scrutiny of APR for F.Y. 2015-16 filed by the Appellant, it was observed by the DC that the Appellant had unrealized export proceeds beyond the time limit stipulated by RBI to the tune of US \$450993.00 against exports made by them.

3.4 Accordingly, DC issued a notice dated 13.12.2016 to Appellant to show-cause as to why :-

- (a) Action under the Section 8 of the FT(D&R) Act, 1992 should not be initiated for contravening the provisions of para 2.54 of the FTP 2015-2020.
- (b) Importer-Exporter code Number (IEC) should not be suspended/cancelled.
- (c) The penalty under section 11(2) of the Act should not be imposed.
- (d) Appellant should not be placed on the Denied entity list (DEL) by refusal of further license, certificates, scrip or any instrument bestowing financial or fiscal benefits to the Appellant as per rule 7 of the Foreign Trade Regulation rules, 1993 as amended.

3.5 DC granted Personal hearings to the Appellant on 26.12.2016, 18.12.2018 and 15.10.2019. The Appellant in its replies dated 20.02.2017 and 15.10.2019 stated that the amount of unrealized export proceeds i.e. US\$ 455063 is equivalent to Rs. 2.13 crores if calculated @ exchange rate of relevant period and the entire disputed amount pertains to Canstar Rags (K) Ltd., Kenya and Canstar Rags (U) Ltd., Kenya. They have received almost 58% of the export proceeds and remaining amount could not be received due to financial crisis and internal dispute between the Directors. Thus, as the unrealized export proceeds were unlikely to be received, these were written off in the Books of Account during F.Y. 2012-2013. The Income Tax Department has also allowed them to write off the export proceeds. If the amount of unrealized export proceeds is deducted from the export turnover of the relevant period, they still have positive NFE earnings.

3.6 On examination of the reply dated 20.02.2017 and 15.10.2019 of the Appellant, the DC found that :-

- (i) RBI vide its Circular No. 88 dated 12.03.2013 has specified the conditions of self write-off of unrealized exports proceeds by various persons i.e. exporter, Authorised Dealer Bank etc. In the instant case, the Appellant is not a status holder exporter and as per the above circular they could only write-off 5% of the total export proceeds realized during the previous calendar year i.e. F.Y.



2011-12. Further, in case of self write off cases as per the para 4(e) of the said Circular No. 88 dated 12.03.2013 the Appellant has to submit CA certified documents related to self write-off to the concerned A.D. Bank or RBI.

- (ii) The Appellant's claim that if the amount of unrealized export proceeds is deducted from the export turnover of the relevant period, they still have positive NFE earnings is not acceptable as by taking this plea the Appellant cannot deny the fact of non-realization of export proceeds within the prescribed time limit. Further, the Appellant has neither followed any established procedure to write-off the unrealized exports proceeds i.e. write off through RBI or AD Bank nor initiated any legal action against the foreign buyer, any correspondence with the concerned foreign mission of India etc.
- (iii) The Appellant was well aware of the facts that non-realization of exports proceeds would make liable them to penalty but they tried to hush up the matter in order to mislead the Department and also withheld the key material facts and that they have contravened the para 2.54 of the FTP, 2015-2020 and conditions of the LoA & BLUT as per which they were under legal obligation to conduct their business as per the provisions of SEZ Rules. Therefore, Appellant is guilty of non-realization of export proceeds even after expiry of approximate 10 years from the date of exports.
- (iv) As regards the proposal for suspension/cancellation of IEC and keeping the Appellant in the DEL, the Appellant is a regular exporter of the SEZ and also earning NFE for the country and at present they are positive in the NFEE. The cancellation of IEC Code will stop all their business activity and such an exemplary punishment requires to be invoked only in cases of grave violation by persistent habitual offender units. Therefore, in the instant case even though violation has taken place the case is not ripe for cancellation of the IEC and proceedings initiated for cancellation/suspension of IEC are liable to be dropped.

3.7 DC after going through the contents of the SCN and all other related documents found that the Appellant had violated the provisions of para 2.54 of the FTP 2015-2020 and proceeded to adjudicate the matter. The DC vide Order-in-Original dated 20.04.2020 imposed a penalty of Rs. 2,08,39,468/- (Rupees Two crores Eight lakhs Thirty Nine Thousand Four hundred and Sixty Eight Only) on the Appellant. DC dropped the proceedings initiated for cancellation/suspension of IEC code and keeping the Appellant in the denied entity list.

4.0 Aggrieved by the Order-in-Original dated 20.04.2020, the Appellant has filed the present appeal. The personal hearings were held on 10.12.2020, 18.03.2021, 20.08.2021 and 24.09.2021. The following grounds have been raised by the Appellant in its written /additional submissions and oral submissions made by Shri A.K. Sachdeva, Advocate appearing on behalf of the Appellant :-

- (i) No penalty could be imposed for the alleged breach of paragraph 2.54 of FTP 2015-2020, as the Appellant had undeniably made exports during the financial years 2008-2009 to 2012-2013. The finding that Appellant contravened the para 2.54 of FTP, 2015-2020 or SEZ Act, 2005 or any condition of the LoA or Bond-cum-Undertaking was totally bereft of any



the Income Tax law. Even though the said dues have been written off by the Appellant under the Income Tax law, however, that does not grant immunity to the Appellant from the violation of para 2.54 of the FTP and penal provisions as applicable in consequence thereto. The Appellant has not even initiated legal claim for recovery of said huge outstanding dues of INR 2,08,39,468/- from foreign buyer, which reflects that the Appellant has not taken necessary and sufficient steps to ensure that export proceeds are recovered in terms of provisions of the FTP.

- (iii) The Appellant have contended that prior to issuance of the RBI Circular No. 108 dated 11.06.2013 there was no time constraint for export realization pertaining to units in SEZ. In this regard, it is submitted that the unrealized export proceeds pertain to relevant Period - 2008-09 to 2010-11 and more than sufficient time has lapsed, but the Appellant have failed to realize export proceeds even after expiry of more than ten years. It is additionally submitted that if there is no prescribed time limit specified at that relevant time, than it cannot be construed by them that they have never ending time to realize exports proceeds.
- (iv) The Appellant contended that they have no other option except to write off bad debts in their books of accounts as per Income Tax Act, 1961. The Appellant has written off the amount of unrealized exports in their books of accounts in F.Y. 2012-13 only and in the same financial year, the RBI vide Circular No. 88 dated 12.03.2013 prescribed the procedure for write off the unrealized export proceeds. In terms of Circular No. 88, RBI has specified the limit to write-off unrealized export proceeds by various persons i.e. exporter, AD Bank etc. As the Appellant is not a status holder exporter accordingly, it could only write-off 5% of the total export proceeds realized during the previous calendar year i.e. F.Y. 2011-12. In terms of prescribed procedure, the Appellant had to provide CA certified documents related to self- written off to the concerned A.D. Bank or RBI, however the Appellant has merely written a letter dated 03.02.2017 to ICICI Bank without providing any necessary details. Therefore the Appellant has not followed the procedure prescribed by the RBI and simply written off outstanding export proceeds in their books of accounts, which shows their non-seriousness towards the realization of unrealized export proceeds.

6.0 I have considered the Order-in-Original dated 20.04.2020 passed by the DC, KASEZ, Appeal preferred by the Appellant, oral/written submissions made by the Appellant, comments given by the DC on the appeal and all other aspects relevant to the case. It is noted that :-

- (i) The penalty has been imposed on the Appellant for non-realization of exports proceeds within the stipulated time period for the years 2008-09, 2009-10 and 2010-11. Further, the averments made in the SCN dated 13.12.2016 were upheld by the DC in the Order-in-Original dated 20.04.2020 for contravening the provisions of para 2.54 of the FTP 2015-2020.
- (ii) The period of non-realization of export proceeds is from 2008-09 to 2010-11 i.e. prior to the date of notification of FTP 2015-20. Hence, the Order-in-Original should have been passed by the DC, KASEZ keeping in view the



provisions of the para 2.41 (Realisation of Export Proceeds) of the FTP, 2009-2014 and not the para 2.54 of the FTP, 2015-2020.

- (iii) The argument made by the Appellant that the provisions of the section 11(2) of the FT(D&R) Act, 1992 will not be applicable in their case is not tenable as the para 2.41 of the FTP, 2009-2014 also stipulates for penal action in accordance with provisions of FT (D&R) Act, Rules and Orders made there under and FTP.
- (iv) The Appellant has contended that prior to issuance of RBI Circular No. 108 dated 11.06.2013 there was no time-period for realization and repatriation of the amount representing the value of goods exported by SEZ units. The relevant extract of the Circular is given below :-

"... 2. It has now been decided that the units located in SEZs shall realize and repatriate, full value of goods/software/services, to India within a period of twelve months from the date of export. Any extension of time beyond the above stipulated period may be granted by Reserve Bank of India, on case to case basis...".

There is some merit in this argument of the Appellant as the said RBI Circular does not say that the same would be applicable retrospectively and as such there is no justification for applying the said circular in the present case.

In the light of provisions of the policy/procedure noted above, it is a fit case for proper examination by the DC, KASEZ before passing orders.

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. 01/92/171/04/AM21/PC-VI

Dated: 26.11.2021

Order-in-Original No. KASEZ/01/2020-21 dated 20.04.2020 is set aside. The case is remanded back to the DC, KASEZ with the directions to examine the case de-novo and to pass an appropriate speaking order as per extant law after taking into consideration the Appellant's submissions.


(Amit Yadav)

Director General of Foreign Trade

Copy to:

- (1) M/s Anita Exports, Plot No. 35/36, Sector-II, Kandla Special Economic Zone, Gandhidham – 370230, Gujarat.
- (2) Development Commissioner, SEZ, Kandla for compliance and further necessary action.
- (3) DGFT's website.



(Randheep Thakur)
Joint Director General of Foreign Trade