Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi -110011
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F.No. 01/92/171/08/AM-19/PC-VI/11, 12-, TP.No. 10 Date of Order: 30.06.2021
Date of Dispatch: 30.06.2021

Name of the Appellant:	**Harish Processors Pvt. Ltd., Shed No. 304-305, Marshalling Yard, KASEZ Gandhidham, Gujarat.**
IEC No. :	**3795000076**
Order appealed against:	**Order-in-Original No. KASEZ/108/2017-18 dated 18.01.2018 passed by the Development Commissioner, Kandla Special Economic Zone**
Order-in-Appeal passed by:	**Amit Yadav, DGFT**

Order-in-Appeal

Harish Processors Private Limited (hereinafter referred to as "the Appellant") filed an Appeal dated 08.03.2018 (received on 16.03.2018) under section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order-in-Original dated 18.01.2018 (issued from F.No. KASEZ /IA/1671/96/Vol.I/10951) passed by the Development Commissioner (hereinafter referred to as "DC"), Kandla Special Economic Zone (KASEZ).

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 the 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. Appellant was issued a Letter of Approval (LoA) by the DC, KASEZ vide F.No. KFTZ/IA/1666/96/2316 dated 04.06.1997, as amended/extended from time to time, to set up a unit in KASEZ for manufacturing of the following items:-

S. No.	Items allowed for manufacturing	Annual Capacity as given in LoA
1	Recycled Plastic Granules, Flakes, Agglomerates, Pellets Bars, Lumps and Powder etc.	2000 MTs
2	HDPE woven sacks, sheets and carry bags with flexo printing made from raw materials products from (1) above	--
3	Filled compound, Master batch and polymer compound made from raw materials products from (1) above.	--

After implementation of the SEZ Act in 2005, the said LoA continued under the SEZ scheme.

3.2. Rule 18(4)(b) of SEZ Rules, 2006 states that *'No proposal shall be considered for ... (b) enhancement of the approved import quantum of plastic waste and scrap beyond the average annual import quantum of the unit since its commencement of operation to the existing units....'*. Further, as per Rule 53 of the SEZ Rules and terms & conditions of the renewal letter dated 12.12.2013, if a unit fails to abide by any of the terms and conditions of the LoA or Bond-cum-Legal Undertaking, penal action can be taken against it under the provisions of the FT(D&R) Act, 1992 and its LoA can be cancelled as per provisions of the SEZ Act.

3.3. It was noticed by the DC that the Appellant exceeded the annual approved quantum of import of plastic waste and scrap by 1214.51 Mts. in 2006-07, 2350.30 Mts. in 2007-08, 1212.63 Mts. in 2008-09, 508.247 Mts. in 2010-11, 1005.651 Mts. in 2011-12, 1200.301 Mts. in 2012-13, 2366.699 Mts. in 2013-14, 2832.268 Mts. in 2014-15 and 2146.626 Mts. in 2015-16 against the annual approved capacity of 2000 Mts. This was a violation of the Rule 18(4) of SEZ Rules, 2006, as the excess import was in contravention of the limits fixed in LoA.

3.4. DC in his findings observed that the Appellant exceeded annual import quantum in three consecutive years i.e. 2006-07, 2007-08, 2008-09 and after a gap of one year in six consecutive years i.e. 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 also again exceeded the said quantum. Therefore, the Appellant had excess import in nine financial years out of ten years under review.

3.5. Accordingly, a Show cause notice (SCN) bearing No. KASEZ /IA/1671/96/Vol.I/11212 dated 24.11.2016 was issued to the Appellant by the DC as why their authorized operations should not be cancelled under Section 16 of the SEZ Act, 2005 and penalty should not be imposed on it under Section 11 of the FT(D&R) Act, 1992, as amended, (as made applicable under Rule 54(2) of SEZ Rules, 2006) for the above said violation. Previously a SCN bearing No. KASEZ /IA/1671/96/Vol.I/5237 dated 14.03.2011 was issued to the Appellant for exceeding average quantity of permissible annual import quantum for the period 2006-07 to 2010-11 (upto 31.12 2010). However, it was withdrawn as a revised SCN was issued on 24.11.2016.

3.6. The Appellant in its written submissions and Personal Hearing held before the DC on 20.12.2016 stated that :-

(i) On initial commencement of production in 1998, it was allowed licensed capacity of 2000 MT annually. After consideration of the request of the Appellant vide letter dated 02.07.1998, it was entitled for a capacity of 6500 Mts. annually.

(ii) Since there was no restriction on operational capacity during the period 1998-2006, it operated at the level of 3500-4000 MT annually.

(iii) After SEZ Act and Rules were framed in 2006, restrictions were placed in force to restrict the new licensing. The existing units however, were allowed to operate at the production based on average annual import quantum, to be computed at actual production/ import starting from the date of commencement of production till 2006, when the SEZ rules were enforced. The Appellant thus continued to operate at 3500-4000 MT annually even under SEZ policy.

(iv) The average annual import quantum for the period 1998-2006 from the start of the operation of the unit as per the Rule 18(4)(b) of SEZ Rules was computed as 3664 Mts. and DC admitted vide letter dated 16.03.2011.

3.7 DC after going through the contents of the SCN and all other related documents, proceeded to adjudicate the matter and imposed a penalty of Rs. 75,00,000/- (Rupees Seventy Five Lakh only) on the Appellant for making excess import vide Order-in-Original dated 18.01.2018 for violation of provisions of the FT(D&R) Act, 1992 as made applicable vide Rule 54 (2) of the SEZ Rules, 2006 with the following observations :-

(i) The SCN dated 14.03.2011 was required to be dropped as fresh proceedings have been already initiated vide SCN dated 24.11.2016.

(ii) As per Rule 18(4)(b) of SEZ Rules, 2006, it is clear that no existing plastic reprocessing unit is allowed to enhance its approved annual import quantum more than average approved annual quantum since its commencement of operation till the SEZ Rules came into force i.e. 10.02.2006. No correspondence, order or decision exists on records to indicate whether any such quantum has been fixed. However, a co-relation can be found out between annual import quantity and annual production capacity.

(iii) The appellant did not give any specific data to justify that in order to utilize their maximum permissible annual capacity, how much raw materials, in the form of plastic waste & scrap are required to be imported. Its main product is Plastic Agglomerates wherein the main process of production involves conversion of segregated plastic waste and scrap into plastic agglomerates. The material on record does not indicate any specific loss during manufacturing process. The percentage loss is also not specified in the Standard Input Output Norms (SION) as published by the DGFT. Hence, by taking 2% production loss, the annual quantum of import should be 2040 MT against the annual production capacity of 2000 MT.

(iv) Taking into consideration the actual imports and 2% production loss, the excess quantity of import is as under :-

S. No.	Year	Annual import quantum arrived after 2% of loss (In Mts.)	Quantity excess/less (In Mts.)
1	2006-07	2040	+ 1174.51
2	2007-08	2040	+ 2310.30
3	2008-09	2040	+ 1172.63
4	2009-10	2040	- 310.167
5	2010-11	2040	+ 468.247
6	2011-12	2040	+ 965.551
7	2012-13	2040	+ 1259.301
8	2013-14	2040	+ 2326.699
9	2014-15	2040	+ 2792.268
10	2015-16	2040	+ 2106.266

The Appellant exceeded the annual import quantum in 9 years on an annual basis.

3.5. Accordingly, a Show cause notice (SCN) bearing No. KASEZ /IA/1671/96/Vol.I/11212 dated 24.11.2016 was issued to the Appellant by the DC as why their authorized operations should not be cancelled under Section 16 of the SEZ Act, 2005 and penalty should not be imposed on it under Section 11 of the FT(D&R) Act, 1992, as amended, (as made applicable under Rule 54(2) of SEZ Rules, 2006) for the above said violation. Previously a SCN bearing No. KASEZ /IA/1671/96/Vol.I/5237 dated 14.03.2011 was issued to the Appellant for exceeding average quantity of permissible annual import quantum for the period 2006-07 to 2010-11 (upto 31.12 2010). However, it was withdrawn as a revised SCN was issued on 24.11.2016.

3.6. The Appellant in its written submissions and Personal Hearing held before the DC on 20.12.2016 stated that :-

(i) On initial commencement of production in 1998, it was allowed licensed capacity of 2000 MT annually. After consideration of the request of the Appellant vide letter dated 02.07.1998, it was entitled for a capacity of 6500 Mts. annually.

(ii) Since there was no restriction on operational capacity during the period 1998-2006, it operated at the level of 3500-4000 MT annually.

(iii) After SEZ Act and Rules were framed in 2006, restrictions were placed in force to restrict the new licensing. The existing units however, were allowed to operate at the production based on average annual import quantum, to be computed at actual production/ import starting from the date of commencement of production till 2006, when the SEZ rules were enforced. The Appellant thus continued to operate at 3500-4000 MT annually even under SEZ policy.

(iv) The average annual import quantum for the period 1998-2006 from the start of the operation of the unit as per the Rule 18(4)(b) of SEZ Rules was computed as 3664 Mts. and DC admitted vide letter dated 16.03.2011.

3.7 DC after going through the contents of the SCN and all other related documents, proceeded to adjudicate the matter and imposed a penalty of Rs. 75,00,000/- (Rupees Seventy Five Lakh only) on the Appellant for making excess import vide Order-in-Original dated 18.01.2018 for violation of provisions of the FT(D&R) Act, 1992 as made applicable vide Rule 54 (2) of the SEZ Rules, 2006 with the following observations :-

(i) The SCN dated 14.03.2011 was required to be dropped as fresh proceedings have been already initiated vide SCN dated 24.11.2016.

4.0. Aggrieved by the Order-in-Original dated 18.01.2018, the Appellant has filed the present Appeal. The Appellant in its written submissions and oral submissions in the Personal hearing on 09.04.2021 has raised the following grounds :-

(i) DC has issued the SCNs dated 14.03.2011 and 24.11.2016 for violating Rule 18 (4)(b) of the SEZ Rules, 2006 but the SEZ Act, 2005 does not have any explicit provisions for imposition of penalty for violation of Rules.

(ii) SEZ Act, 2005 does not confer power to make rules to empower the DC to impose penalty under FTDR Act, 1992. Therefore, Rule 54 of the Rules does not flow from any authority of the Act.

(iii) SEZ Act has an overriding effect over other Acts. The section 52 of the SEZ Act, 2005 makes it clear that Chapter X A of the Customs Act, 1962 and SEZ Rules, 2003 etc. are not applicable after the SEZ Act and Rules come into force w.e.f. 10.02.2006.

(iv) DC does not have the jurisdiction to issue SCN or impose penalty under Rule 54(2) of the SEZ Rules as this relates to the "Monitoring of Performance" and any action in this regard can be taken by the Unit Approval Committee alone.

(v) DC has erroneously taken 2% production loss without any authority despite its own findings that no percentage loss is specified in SION.

(vi) On calculating the average annual import from the year 2006-07 till 2015-16 (after including intrazone purchase from 2006-07 to 2015-16), the average import quantum comes out to be 3003.104 Mts.

5.0. Comments on the Appeal were obtained from the office of the DC, KASEZ. The DC vide letter dated 09.04.2019, inter alia, stated as under : -

(i) Rules 25 and 54 of the SEZ Rules, 2006 provide that if a Unit has not achieved positive Net Foreign Exchange Earning or failed to abide by any of the terms & conditions of the LoA/Bond-cum-LUT, the unit shall be liable for penal action under the provisions of the FT(D&R) Act, 1992.

(ii) No approved import quantum/SION has been specified in the instant matter. Since SION was not fixed, percentage loss was taken to be 2%.

(iii) Since the appellant violated the conditions of Rule 18(4)(b) of the SEZ Rules, 2006 by exceeding the annual approved capacity, the DC imposed penalty on it under the provisions of Rule 54 of the SEZ Rules, 2006 read with provisions of FT(D&R) Act, 1992.

6.0. I have considered the Order-in-Original dated 18.01.2018 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) Penalty has been imposed on the Appellant for exceeding the permissible annual import quantum in violation of the conditions of Rule 18(4)(b) of the SEZ Rules, 2006 read with condition No. 22 of the LoA and condition No. 8 of the undertaking. However, it is noted that in the O-in-O dated 18.01.2018, it has been mentioned that any approved import quantum was not specifically mentioned in the LoA instead only its annual production capacity was mentioned. Further no correspondence, order or decision exists on records to indicate whether any such quantum has been fixed for the unit. Hence, annual import quantum of the unit was not fixed in the LoA or its subsequent renewals.

(ii) In the O-in-O dated 18.01.2018, it is mentioned that percentage loss is not specified in the SION for the manufacturing process adopted by the Appellant. Hence, it is not clear as to under which Rule, 2% production loss has been arrived at while determining the annual import quantum in the absence of any SION or ad-hoc norms for the process. It is also not specified as to under which Rule, SION notified by DGFT is applicable on units in SEZ under SEZ Act/Rules or orders made thereunder.

(iii) As per Rule 18(4)(b) of SEZ Rules 2006, as amended, the average annual import quantum should have been determined by taking the import figures since commencement of operation and fixed accordingly. However, the same has not been done by the office of DC, KASEZ.

(iv) It is also not explained as to why "intra zone sales" have not been excluded when the 'intra-zone purchases' have been included.

Hence, it would not be justifiable to penalize the Appellant if the grounds having legal bearing on the case are not considered in the light of applicable policy/procedure provisions.

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

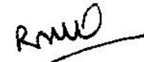
F.No. 01/92/171/08/AM-19/PC-VI Dated: 30.06.2021

Order-in-Original No. KASEZ/108/2017-18 dated 18.01.2018 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. Harish Processors Pvt. Ltd., Shed No. 304-305, Marshalling Yard, KASEZ Gandhidham, Gujarat.
2. Development Commissioner, KASEZ with an advance to make recoveries.
3. Additional Secretary (SEZ Division), DoC, New Delhi for information.
4. DGFT's website.



(Randheep Thakur)
Joint Director General of Foreign Trade