

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

F. No. 01/92/171/04/AM-22/PC-VI/3-4

Date of Order: 07.04.2022
Date of Dispatch: 07.04.2022

Name of the Appellant: **Consolidated Cobalt Chemicals Limited,
Plot No. 356, Sector- I,
Kandla Special Economic Zone,
Gandhidham-370230.**

IEC Number: **3792000024**

Order appealed against: **Appeal filed against Order No. KASEZ/148/2020-21
dated 15.03.2021 passed by the Development
Commissioner, Kandla Special Economic Zone**

Order passed by: **Santosh Kumar Sarangi, DGFT**

Order-in-Appeal

Consolidated Cobalt Chemicals Limited, (hereinafter referred to as "the Appellant") filed an appeal on 08.04.2021 (received on 02.06.2021) under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order No. KASEZ/148/2020-21 dated 15.03.2021 (issued from F.No. KASEZ/IA/1443/92/8210) passed by the Development Commissioner, Kandla Special Economic Zone (hereinafter referred to as "the DC") imposing a penalty of Rs. 20,00,000/- (Rupees Twenty Lakh 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 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 Consolidated Cobalt Chemicals Limited (hereinafter referred to as "the Appellant"), was issued a Letter of Approval (LoA)/ Permission by the DC, KASEZ vide letter No FTZ/1A/1443/92/311(KASEZ/1A/1443/92) dated 09.04.1992, as amended/extended from time to time to set up a manufacturing unit in KASEZ, subject to conditions imposed therein.

3.2 Appellant accepted all the terms and conditions specified in the said LoA and executed a Bond-cum-LUT under Rule 22 of the Special Economic Zone Rules, 2006 (hereinafter referred to as "the SEZ Rules").

3.3 As per the aforesaid LoA, the Appellant was required to intimate the date of commencement of production, achieve positive Net Foreign Exchange (NFE) as prescribed in the SEZ Scheme for the period it operated as a unit in the SEZ from the commencement of production/activity, as required under Rule 53 of the SEZ Rules and in case of failure to comply with any conditions of the said LoA, it's LoA was liable to be cancelled as per the provisions of the SEZ Act, 2005 and the Rules & orders made there under.

3.4 Appellant completed its fifth year for prevalent five years block period on 31.03.2016 and submitted its Annual Performance Report (APR) for 2015-16 under Rule 22(3) of SEZ Rules.

3.5 The performance of the unit of Appellant was reviewed by the Unit Approval Committee (UAC) of the DC and it was observed that the NFE of the unit at the end of 5 years of the prevailing five year block period was negative to the tune of Rs. 156.44 Lakhs. UAC decided to take necessary action against the Appellant, as per the provisions of the SEZ Act and the Rules and orders made thereunder.

3.6 DC observed that the Appellant did not fulfill the conditions of the LOA and Bond-cum-LUT and did not achieve positive NFE after completion of 5th year of the third five years' block and had a shortfall of NFE to an amount of Rs. 156.44 lakhs.

3.7 DC imposed a penalty of Rs. 20,00,000/- (Rupees Twenty Lakhs) vide Order-in-Original dated 15.03.2021 on the Appellant under Section 11(2) of the FT(D&R) Act read with Rules 25 and 54(2) of the SEZ Rules, 2006 for non-achievement of cumulative positive NFE and contravening the provisions of Rule 53 of the SEZ Rules, 2006 and condition No. 8 of Bond-cum-LUT executed by the Appellant.

4.0 Aggrieved by the Order-in-Original dated 15.03.2021, the Appellant has filed the present Appeal. Shri Anshumaan Sahni, Advocate appeared on behalf of the Appellant in the hearing held on 25.03.2022. Shri Satyadeep Mohapatra, Joint DC appeared on behalf of the DC, KASEZ. The Appellant in its written and oral submissions has raised the following grounds :-

- (i) Appellant commenced business in the KASEZ in 1992. There was a severe cyclone in the year 1998 which damaged their manufacturing facilities. The operations were restarted in January, 2001 but due to a severe earthquake on

26.10.2001, the Appellant's plant and building collapsed, due to which they were out of business with overseas buyers.

- (ii) Appellant is manufacturing Borax Decahydrate from Imported raw material Borax Penta Hydrate. Borax Pentahydrate is not produced in India. The main source of raw material Borax Pentahydrate is the USA and Turkey. They decide the market and price volatility affects all other importers / manufacturers.
- (iii) The prices of Borax (raw material) were highly volatile in the 2011-16 and thus exports by Appellant were not competitive.
- (iv) This is the first lapse on part of default on part of Appellant during the last 28 years. Appellant has paid Customs Duty amounting to Rs. 3.30 crores against the shortfall in NFE earnings of Rs. 156.44 lakhs during 2011-16.
- (v) DC issued SCN dated 12.09.2017 and 11.12.2015 to the Appellant. Reply was filed by the Appellant on 11.01.2021 and Personal hearing was held on 10.02.2021. Appellant requested DC to condone the lapses and grant them one more opportunity, to commence their operations from the Zone, in the coming months and also to grant benefit of Rule 80 of SEZ Act, to deposit an amount equal to 1% of shortfall in FOB Value, as the Business Conditions, were adverse and therefore, the Appellants, could not achieve positive NFE.
- (vi) For the period 2016-2021, the Appellant was in positive NFE. It is only in the period 2011-2016 from 1991 to 2022, that the Appellant has once had negative NFE. The Order-in-Original by DC, KASEZ imposing a penalty of Rs. 20 lakhs is incorrect, excessive and harsh and should be set aside. There has been no loss to exchequer as Duty has been paid to Customs to cover shortfall of foreign exchange.

5.0 Comments on the Appeal were obtained from the office of the DC, KASEZ. The DC vide letter dated 28.10.2021 stated as under: -

- (i) Appellant was issued a LoA by the DC vide letter dated 09.04.1992, as amended/extended from time to time to set up a manufacturing unit in KASEZ, subject to conditions imposed therein.
- (ii) Appellant completed their fifth year for prevalent five years block period on 31.03.2016. In year 2015-16, unit had achieved negative NFE of Rs. 156.44 lakhs.
- (iii) Appellant is stating that there was cyclone in 1998 and earthquake in 2001, which destroyed their business infrastructure. The SCN pertains to the period 2011 to 2016, thus, the calamities referred by Appellant occurred long before the period during which it failed to achieve positive NFE. Even during the intervening block period 2006-2011, they have achieved positive NFE.

- (iv) Non-achievement of positive NFE to the tune of Rs. 156.44 lakhs attracts the provisions of the Rule 25 of SEZ Rules, 2006 which makes the unit liable for penal action for not fulfilling the statutory obligation of achieving positive NFE.
- (v) It is basic principle of business that before starting any new business, all pros and cons and viability of the business are studied by the businessman and in this case also, the Appellant before getting approval for manufacturing of Borax must have studied all related aspects viz. availability of raw material, sale of finished goods, future of the business in the international market etc. In addition to Borax, the Appellant was also having approval of other manufacturing and trading items in their authorized operations. Hence, if there was no good response in Borax, they could have concentrated on other items of their LoA.

6.0. I have considered the Order-in-Original dated 15.03.2021 passed by DC, KASEZ, Appeal and oral/written submissions preferred by the Appellant, comments given by the DC and all other aspects relevant to the case. It is noted that :-

- (i) Appellant achieved positive NFE earnings since commencement of operation except for the period from 2011 to 2016.
- (ii) It has been contended by Appellant that the penalty of Rs. 20 lakhs imposed by DC is excessive as DC has not taken into account the circumstances which led to non-achievement of NFE. Appellant has paid Rs. 3.30 crores as Customs Duty against the shortfall in NFE earnings of Rs. 156.44 lakhs during 2011-16.
- (iii) DC, KASEZ has confirmed that except for the period from 2011 to 2016, Appellant has been able to maintain positive NFE for all other relevant block periods.
- (iv) As per the policy/procedure, the NFE is calculated cumulatively for a period of five years and the Appellant was found to have negative NFE for the five year block period from 2011 to 2016. Hence, the action taken by the DC, KASEZ for imposition of penalty for contravening the provisions of the SEZ Act and conditions of the LoA is in accordance with the Act.
- (v) As regards the quantum 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.
- (vi) Since the Appellant is not a habitual offender and it could not maintain positive NFE during the period from 2011 to 2016 due to the international business conditions, I am inclined to take a lenient view for deciding the quantum of penalty.



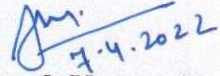
7.0. In view of the above, in the exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014 dated the 5th December 2014, I pass the following order :-

Order

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


Dated: 07.04.2022

Partial relief is granted. Amount of penalty imposed vide Order-in-Original No. KASEZ/148/2020-21 dated 15.03.2021 by DC, KASEZ is reduced from Rs. 20,00,000 to Rs. 10,000 (Rupees Ten Thousand Only).


(Santosh Kumar Sarangi)
Director General of Foreign Trade

Copy to:

1. Consolidated Cobalt Chemicals Limited, Plot No. 356, Sector-1, Kandla Special Economic Zone, Gandhidham- 370230.
2. Development Commissioner, KASEZ for information and 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

