

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

F. No.01/92/171/10/AM-19/PC-VI

Date of Order: 21.01.2021

Date of Dispatch: 21.01.2021

Name of the Appellant: /67-68/TP.No. 71
M/s. Oswal Polymers,
Plot No. 4 and 11, Sector-2,
KASEZ Gandhidham-Kutch,
Gujarat.

IEC No.: 2406003531

Order appealed against: Order-in-Original No. KASEZ/111/2017-18 passed by
the Development Commissioner, Kandla Special
Economic Zone, Gandhidham

Order-in-Appeal passed
by: AmitYadav, DGFT

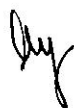
Order-in-Appeal

M/s Oswal Polymers, (hereinafter referred to as "the Appellant"), an SEZ unit, filed an Appeal on 19.03.2018 against Order-in-Original No. KASEZ/111/2017-18 (issued from F.No. KASEZ/IA/1704/97/10960 dated 18.01.2018) passed by the Development Commissioner, Kandla Special Economic Zone (hereinafter referred to as "the DC") imposing a penalty of Rs. 50,00,000/-on the Appellant.

2.0. Vide Notification No. 101 (RE-2013)/2009-2014, dated the 5 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.

3.0. **Brief facts of the case:**

3.1. The Appellant was issued a Letter of Approval (LoA) vide File No. KFTZ/IA/1704(A)/97/10736 dated 06.02.1998, as amended and extended from time to time, to set up a Unit in Kandla SEZ recycling of plastic scrap/ waste into plastic Granules, Agglomerates, Flakes, Pallets Bars, Powder and other plastic items, with an



annual capacity of 4000 Mts. After implementation of the SEZ Act in 2005, the said LoA continued to be valid under the SEZ scheme. The Appellant executed a Bond undertaking to fulfill conditions of the LoA and other related acts/rules.

3.2 Rule 18(4)(b) of SEZ Rules, 2006 states that '*No proposal shall be considered for 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 had exceeded the annual import quantum of plastic waste and scrap by 1111.745 Mts. in 2007-08, 3161.265 Mts. in 2008-09, 222.12 Mts. in 2009-10, 2010.824 Mts. in 2010-11, 423.809 Mts. in 2011-12, 1794.849 Mts. in 2012-13, 2200.034 Mts. in 2013-14 and 1059.555 Mts. in 2014-15 against the annual capacity approved as per its LoA i.e. 4000 Mts. in contravention of Rule 18(4) of SEZ Rules, 2006.

3.4. Accordingly, DC issued a Show-cause Notice (SCN) notice dated 11.04.2016 to the Appellant to show cause as to why its authorized operations should not be cancelled under the Section 16 of the SEZ Act, 2005 and penalty should not be imposed on it under Section 11 of 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 F. No. KASEZ/IA/1704/97/5235 dated 16.03.2011 was also issued to the Appellant for exceeding average quantity of permissible annual import quantum for the financial years 2006-07 to 2010-11 (up to 31.12.2010).

3.5. The Appellant in its Personal Hearing held before DC on 27.06.2017 and in its written submissions stated that there was no fixed import quota of plastic scrap for its unit in the LoA. Further, the Rule 18(4)(b) of SEZ Rules says that the proposal for enhancement of import quantum will not be considered and this is not the case for any enhancement of import quantum.

3.6. The DC after going through the contents of the SCN and all other related documents available on record made the following observations:

- (i) An SCN was issued for imposition of penalty under the Rule 54(2) of the SEZ Rules, 2006 read with the provisions of the FT (D&R) Act, 1992. The SCN dated 16.03.2011 was required to be dropped as fresh proceedings were already initiated vide SCN dated 11.04.2016.



- (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 10.02.2006 i.e. date w.e.f. SEZ Rules came into force.
- (iii) From the records and LoA, there is no specific mention of any approved import quantum instead only their annual production capacity was mentioned. Further, no correspondence, order or decision exists on records to indicate whether any such quantum has been fixed. However, a co-relation can be established between annual import quantity and annual production capacity.
- (iv) 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 Standard Input Output Norms (SION) as published by the DGFT. Hence, by taking 2% production loss, the annual quantum of import should be 4080 MT against the annual production capacity of 4000 MT.
- (v) Taking into consideration the actual imports and 2% production loss, the excess quantity of import comes out to 669.162 Mts. in 2006-07, 1031.745 Mts. in 2007-08, 3081.265 Mts. in 2008-09, 142.12 Mts. in 2009-10, 1930.824 Mts. in 2010-11, 343.809 Mts. in 2011-12, 1714.849 Mts. in 2012-13, 2120.034 Mts. in 2013-14 and 979.555 Mts. in 2014-15.

3.7. The DC found the Appellant guilty of making excess import in contravention of the provisions of Rule 18(4)(b) and proceeded to adjudicate the matter. The DC vide Order-in-Original dated 18.01.2018 imposed a penalty of Rs.50,00,000/- on the Appellant.

4.0. Aggrieved by the Order-in-Original dated 18.01.2018, the Appellant has filed the present appeal. The Appellant was granted an opportunity of Personal hearing on 18.12.2020. The Appellant, in its written and oral submissions, submitted that: -

- (i) The DC erred in issuing the SCNs dated 16.03.2011 and 11.04.2016 for violating Rule 18 (4)(b) of the SEZ Rules, 2006 as the SEZ Act, 2005 does not have any explicit provisions for imposition of penalty for violation of Rules.
- (ii) The 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) The SEZ Act, 2005 in terms of vide section 52 has an overriding effect over other Acts. This section 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) The 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) The 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 2014-15, the average import quantum comes out to be 5184.56 MT.

5.0. Comments on the Appeal were obtained from the office of the DC, KASEZ. The DC, vide letter dated 11.04.2019 inter alia, stated as under: -

- (i) As per Rule 54(2) of the SEZ Rules, 2006, if a unit fails to abide by any of the terms & conditions of LOA/Bond-cum-Legal Undertaking, the unit shall be liable for penal action under the provisions of FT(D&R) Act, 1992. These Rules have been framed on the basis of power vested by the Government u/s 55 of the SEZ Act. Further, DGFT notification No. 20 dated 13.06.2013 empowers the DC for exercising powers u/s 13 read with section 11 of the Act.
- (ii) Annual capacity for manufacturing of specified items as indicated in LoA was taken to determine permissible annual import quantum which was implicit in the LOA itself. Since, the SEZ Rules, 2006 came into effect from 10.02.2006, the period from 2006-07 was only taken for determination of exceeding annual capacity.
- (iii) No approved import quantum/SION has been specified in the instant matter. Since, SION was not fixed, percentage loss was taken to be 2% which is well settled of law.
- (iv) 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 under the provisions of Rule 54 of the SEZ Rules, 2006 read with provisions of FT (D&R) Act, 1992.

6.0. A Personal Hearing was granted to the Appellant on 17.12.2020 when Mr. Amal Dave, Consultant, appeared before the undersigned. He stated that the subject matter is similar to that decided in case of M/S Luckystar International and pleaded to decide this matter on the similar lines. I have considered the Order-in-Original dated 18.01.2018 passed by the DC, KASEZ, appeal preferred by the Unit, 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 contention of the Appellant that penalty cannot be imposed under FT(D&R) Act, 1992 as the SEZ Act, 2005 does not confer power to make rules to empower the DC to impose penalty under FTDR Act, 1992. It is observed that Rule 54(2) of the SEZ Rules, 2006 empowers the DC to take for penal action under the provisions of FT(D&R) Act, 1992 against an SEZ unit, if it fails to abide by any of the terms & conditions of LOA/Bond-cum-Legal Undertaking. These Rules have been framed on the basis of power vested by the Government u/s 55 of the SEZ Act. Further, DGFT notification No. 20 dated 13.06.2013 empowers the DC for exercising powers u/s 13 read with section 11 of the Act.
- (ii) 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.
- (iii) In the O-in-O, 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 processes.
- (iv) 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.
- (v) 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 Development Commissioner, KASEZ.

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. 01/92/171/10/AM 19/ PC-VI

Dated: 21.01.2021

Order-in-Original dated 18-01-2018 is set aside and the matter is remanded back to the Adjudicating Authority for de-novo consideration.



(Amit Yadav)

Director General of Foreign Trade

Copy To:

- 1) M/s Oswal Polymers, Plot No. 4 and 11, Sector-2, KASEZ Gandhidham-Kutch, Gujarat.
- 2) Development Commissioner, SEZ, Kandla for compliance.
- 3) Addl. Secretary (SEZ Division), DoC, New Delhi for information.
- 4) DGFT's website.



(Randheep Thakur)

Joint Director General of Foreign Trade