

**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 21/PC- VI / 1-2

Date of Order: 05.04.2022

Date of Dispatch: 05.04.2022

Name of the Appellant:

**ONGC Petro Additions Limited**  
**Plot no. Z-1 & Z-83,**  
**Dahej Special Economic Zone,**  
**Taluka- Vagra,**  
**District- Bharuch,**  
**Gujarat-392 190**

IEC No.:

**0508073952**

Order appealed against:

**Order-in-Original No. 02/2020-21 dated 20.10.2020 of**  
**passed by the Development Commissioner, Dahej SEZ**

Order-in-Appeal passed by:

**Santosh Kumar Sarangi, DGFT**

**Order-in-Appeal**

ONGC Petro Additions Limited (hereinafter referred to as "the Appellant") filed an Appeal dated 01.12.2020 (received on 04.12.2020) under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order-in-Original dated 20.10.2020 (issued from F.No. KASEZ/P&C/6/28/2007-08/3829) passed by the Development Commissioner (hereinafter referred to as "DC"), Dahej Special Economic Zone imposing a penalty of Rs. 85,00,00,000/- (Rupees Eighty Five Crores only).

2.1. Vide Notification No. 101 (RE-2013)/2009-2014 dated the 5<sup>th</sup> 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. ONGC Petro additions Limited (hereinafter referred to as "the Appellant") was issued a Letter of Approval (LoA) by the DC, Dahej SEZ on 17.10.2007 to set up a new undertaking in Dahej SEZ for manufacturing activities, subject to conditions as imposed therein. Appellant commenced commercial production from 31.08.2015.
- 3.2. As per the terms and condition of the LoA, Appellant was required to achieve positive Net Foreign Exchange (NFE) as prescribed under Rule 53 of SEZ Rules, 2006.
- 3.3. As per the provisions of Rule 54 of SEZ Rules, 2006, if the Appellant did not achieve positive NFE Earnings, it would be liable for action under Section 11 of FT(D&R) Act, 1992.
- 3.4. Appellant requested for renewal of LoA alongwith Annual Performance Reports (APRs) for 2015-16 to 2019-20. DC reviewed the export performance of manufacturing activity for the period 2015-16 to 2019-20 on the basis of APRs submitted under Rule 22 of SEZ Rules, 2006. After review, it was observed by the DC that the Appellant made exports of Rs. 4,945.81 crores against the foreign exchange outgo of Rs. 13,426.92 crores leading to a shortfall of Rs. 8,481.11 crores.
- 3.5. The case of the Appellant was considered by Approval Committee of DC in its 97th meeting held on 27.07.2020 as required under the provisions of the Rule 54 of the SEZ Rules, 2006. Considering the huge investment of Appellant as one of the major Petrochemical units of the country and occupation of 500 hectares of land, the Committee desired that DC, Dahej SEZ should renew the LoA of the Appellant with conditions as deemed fit and to take appropriate penal action as per FTDR Act and Rules for failure to achieve positive NFE earnings.
- 3.6. As per Rule 54 of SEZ Rules, 2006 and condition (iv) of the LoA, if a unit in SEZ did not achieve positive NFE or failed to abide by any of the terms and conditions of the LoA or Bond-cum-LUT, the said unit shall be liable for penal action under the provisions of FT(D&R) Act, 1992 and the rules made there under.
- 3.7. DC observed that the Appellant failed to achieve positive NFE Earnings consistently for the fifth year of first block of five years and also cumulatively for the whole block of five years. The NFE for the first five years was negative to the tune of Rs. (-) 8,481.11 crores. Thus, the Appellant had contravened the condition of the original LoA, conditions of the Bond-cum-LUT executed with the DC and Rule 53 of the SEZ Rules, 2006.





3.8. DC issued a SCN dated 03.09.2020 to the Appellant as to why action should not be taken against it for not achieving positive NFE under Section 11 of the FT(D&R) Act, 1992 read with section 20(2) of the said Act.

3.9. Appellant in response to the SCN filed written submissions dated 25.09.2020 and appeared before the DC for Personal hearing on 22.09.2020. Appellant in its written/oral submissions stated as under :-

- (i) By the time Appellant started production, the Indian petrochemical landscape had already changed and approx. 28% of the demand was met through imports despite significant capacity addition.
- (ii) The investment estimated at Rs. 13,690 crores increased to more than Rs. 30,680 crores on account on delay in setting up of the project. As on date, Appellant is carrying a debt of Rs. 24,000 crores.
- (iii) Appellant employs 950 persons directly and approx. 10,000 persons indirectly in SEZ unit.
- (iv) In view of huge debt and stiff competition in international market and in interest of stakeholders, the Appellant started clearance of goods in the domestic market as demand and realization was increasing compared to international market.
- (v) On one hand, the Appellant is required to export Polymers while domestic consumers of Polymers are forced to import it.

3.10. On examination of the Appellant's submissions, the DC found that :-

- (i) As per APRs for the period 2015-16 to 2019-20, Appellant has made export of Rs. 4945.81 crores against the import of Rs. 13426.92 crores for the purpose of computing positive NFE under Rule 53 of the SEZ Rules, 2006 which has lead to a shortfall.
- (ii) There is a clear provision for penal action under FTDR, 1992 read with Rules 53 and 54 of SEZ Rules, 2006 on non-achievement of positive NFE and for failure to abide by the conditions of the LOA.

4.0. DC after going through the contents of the SCN and all other related documents proceeded to adjudicate the matter vide Order-in-Original dated 20.10.2020 and passed the following order :-

*"... the noticee could not achieve positive NFE as discussed above, I find it appropriate to impose a penalty of Rs 85 Crores (Rupees Eighty Five Crores only) under the provisions Section 11 of the Foreign Trade (Development & Regulation) Act, 1992"*





5.0. Aggrieved by the Order-in-Original dated 20.10.2020, the Appellant has filed the present Appeal. Shri Dhruv Matta and Ms. Shambhavi Mishra, Advocates appeared on behalf of the Appellant in the hearing held on 25.03.2022 alongwith Shri Dilip Prajapati, representative of Appellant. Shri R. Muthuraj, DC, Dahej SEZ was also present. The Appellant in its written and oral submissions has raised the following grounds :-

- (i) SEZ Rules are ultra-vires SEZ Act inasmuch as they provide for imposition of penalty without any provision of SEZ Act providing for the same.
- (ii) SEZ Rules are not in consonance with the FTDR Act in as much as they provide for imposition of penalty under the FTDR Act without any corresponding provision under the Act. Penalty under section 11 of the FTDR Act cannot be imposed in absence of mention of any specific provision.
- (iii) Appellant had initiated the process of exiting from the SEZ unit in 2019 to operate as a DTA unit and had also received in-principle approval for exit. Pertinently, the unit had applied for renewal of LOA to operate as an SEZ until till the time the exit formalities are completed. Therefore, the SEZ unit will operate as a DTA unit as soon as it completes its exit formalities.
- (iv) As per Section 74 of SEZ Rules, the unit will reverse the duty benefits/exemptions availed under the SEZ at the time of exit i.e. pay applicable duties on the imported or indigenous capital goods, raw materials, components, consumables, spares and finished goods in stock.
- (v) The intent of the SEZ scheme has been taken into consideration by the Appellant as the unit will forgo the duly benefits availed at the time of exit. Therefore, the quantum of penalty imposed due to non-fulfillment of NFE is liable to be reduced.
- (vi) The SEZ unit of the Appellant could not achieve positive NFE in the first block of 5 years due to circumstances which were beyond its control.
- (vii) The impugned order mentions that a penalty of Rs. 85 crores has been imposed under Section 11 of the FTDR Act on the Appellant. But there is no mention of Rule 80 of the SEZ Rules in the impugned order. The imposition of Rs. 85 crores on the Appellant is in the nature of penalty.
- (viii) No malafide intent can be attributed to the Appellant as it is a Joint venture of Government companies i.e. M/s ONGC Ltd (49.36%), M/s GAIL (India) Ltd (49.21%) and M/s. Gujarat State Petroleum Corporation Limited (1.43%).
- (ix) A lenient view be adopted while imposing penalty under Section 11 of the FT(D&R) Act, 1992 considering the objective of the SEZ Scheme and other factors that resulted in negative NFE.





6.0. Comments on the Appeal were obtained from the office of the DC, Dahej SEZ. The DC has stated as under :-

- (i) The basic purpose of the SEZ is to promote exports of goods and services. Therefore the units are expected to fulfill the export obligations to mitigate incentives and tax benefits given to them by the law.
- (ii) Rule 54 of the SEZ Rules, 2006 clearly stipulates for imposition of penalty on non-compliance to the export obligations.
- (iv) DC has taken into consideration all the circumstances put forth by the unit at the time of adjudication and accordingly quantum of penalty was determined. Appellant has deposited the amount of penalty vide Banker's cheque number 045390 dated 11.11.2020.

7.0. I have considered the Order-in-Original dated 20.10.2020 passed by the DC, Dahej SEZ, 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) Section 11(2) of the FT(D&R) Act, 1992, as amended, empowers the DC to impose penalty on a person who makes export/import or abets it subject to terms and conditions mentioned therein. The relevant extract of Act is reproduced below :-

*“ (2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy, he shall be liable to a penalty of not less than ten thousand rupees and not more than five times the value of the goods or services or technology in respect of which any contravention is made or attempted to be made, whichever is more.”*

Therefore, any person who makes or abets or attempts to make any export or import in contravention of any provision of the Act shall be liable for penalty.

- (ii) As per the Rules 25 and 54 of the SEZ Rules, 2006, if a unit in SEZ has not achieved positive NFE it shall be liable for penal action under the provisions of the FT(D&R) Act, 1992. Therefore, the adjudicating authority (DC) was empowered to impose a penalty under the provisions of the Section 11(2) of the FT(D&R) Act on unit of the Appellant in SEZ.
- (iii) DC issued SCN dated 03.09.2020 to the Appellant for having negative NFE of Rs. 8,481.11 crores during the period 2015-16 to 2019-20.
- (iv) After giving an opportunity of Personal hearing, DC imposed a penalty of Rs. 85 crores on the Appellant vide Order-in-Original dated 20.10.2020.



(v) Rule 80 which been inserted w.e.f. 19.09.2018 in the SEZ Rules, states that :-

*“if a Special Economic Zone Unit, in case of bona fide default, fails to achieve the minimum specified Net Foreign Exchange or specified value addition, then such shortfall may be regularized after the Unit deposits an amount equal to one per cent.”*

(vi) Rule 80 of SEZ Rules, 2006 mentions about ‘bona fide default’ i.e. SEZ unit inspite of its earnest efforts was unable to achieve minimum specified NFE Earnings. This rule was in force during the period for which negative NFE was calculated by the DC, SCN were issued and later penalty was imposed.

(vii) The penalty of Rs. 85 crores has been imposed under the Section 11 of the FT(D&R) Act, 1992. As per the Section 11(2) of the Act, the Adjudicating authority could have imposed a penalty upto five times of the value of goods for which contravention has been made. In the instant case, the shortfall in NFE is Rs. 8,481.11 crores. Therefore, the penalty amount could have been upto Rs. 42,405 crores whereas the Adjudicating Authority imposed a penalty of Rs. 85 crores only, which is approx. 1% of the shortfall in NFE.

(viii) The penalty imposed by DC is in accordance with the Rule 80 of the SEZ Rules, 2006 and requires no intervention.

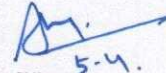
8.0. In view of the above, in the exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014 dated the 5<sup>th</sup> December 2014, I pass the following order :-

**Order**

F.No. 01/92/171/08/AM 21/PC- 6

Dated: 05.04.2022

The Appeal is dismissed.

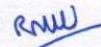


(Santosh Kumar Sarangi)

Director General of Foreign Trade

Copy to:

1. ✓ ONGC Petro Additions Limited, Plot no. Z-1 & Z-83, Dahej Special Economic Zone, Taluka- Vagra, District- Bharuch, Gujarat-392 190.
2. ✓ Development Commissioner, Dahej SEZ for information.
3. Additional Secretary (SEZ Division), DoC, New Delhi for information.
4. DGFT's website.



(Randheep Thakur)

Joint Director General of Foreign Trade