Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi -110011
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F.No. 01/92/171/11/AM-20/PC-VI/85-86/TR No 95 Date of Order: 08.03.2021
Date of Dispatch: 08.03.2021

Name of the Appellant:	**Babu International, Shed No. 287-288, Sector-III, Kandla Special Economic Zone, Gandhidham-370230**
IEC No. :	**3703000937**
Order appealed against:	**Order-in-Original dated 10.04.2019 passed by the Development Commissioner, Kandla Special Economic Zone**
Order-in-Appeal passed by:	**Amit Yadav, DGFT**

Order-in-Appeal

Babu International (hereinafter referred to as "the Appellant") filed an Appeal dated 23.05.2019 under section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order-in-Original dated 10.04.2019 (issued from F.No. KASEZ/IA/1922/2003-04/Vol.II/786) 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 the 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 on 16.06.2003 to set up a unit having an annual capacity of 1600 MT, as

amended/extended from time to time, for manufacturing of "Shoddy synthetic yarn, shoddy woollen yarn, blankets, synthetic pulled fibre, blazer cloth and furnishing fabrics includes an intermediate product" in the KASEZ subject to conditions imposed therein.

3.2. Ministry of Commerce & Industries framed a policy issued vide F.No. C.6/10/2009-SEZ dated 17.09.2013 and the Board of Approval (BOA) in its 60th meeting dated 08.11.2013 granted approval for renewal of the LOA for processing of worn & used clothing. Accordingly, the LOA of the Appellant was extended for a period of five years from 01.12.2013 to 30.11.2018 for their authorized operations. In their renewal letter dated 02.05.2014, the following condition was inserted at S.No. 18 :-

> *"In terms of Rules 18(4) (c) the authorized operation are restricted to the unit to carry out the business of reprocessing of garments or used clothing or secondary textile materials and other recyclable textile materials into clipping or rags or industrial wiper or shoddy wool or yarn or blankets or shawls."*

Appellant accepted the said conditions of the LOA vide a Bond-cum-Legal undertaking dated 30.11.2013 as required under Rule 22 of SEZ Rules, 2006. In the Bond-cum-LUT, following condition was mentioned at S.No. 1:-

> *"We, the obligors shall abide by all the provisions of the Special Economic Zone, Act, 2005 and the Rules and orders made there under in respect of the goods for authorized operations in the Special Economic Zone."*

3.3. Appellant accepted the terms and conditions of the renewal letter dated 02.05.2014. As per the conditions at S.No. 12 and 14 of the renewed LOA dated 02.05.2014, the validity of LOA was to be governed by the provisions of policy dated 17.09.2013.

3.4. DC noticed that the Appellant was engaged in the activity of segregation of worn clothing, which did not fall within the ambit of its authorized operations, as per the LOA. As per the data available online, it did not export "Shoddy synthetic yarn, shoddy woollen yarn, Blankets, synthetic pulled fiber, Blazers cloth and furnishing fabrics includes an intermediate product" for the fulfillment of its export obligation. The Appellant was found to have violated the conditions at S.No. 18 of the LOA and S.No. 1 of the Bond-cum-LUT.

3.5. DC issued a Show cause notice (SCN) dated 29.11.2018 to the Appellant asking as to why LOA should not cancelled for violation of the terms and conditions of the renewal letter dated 02.05.2014, as well as of the Bond-cum-LUT submitted under the Section 16 of the SEZ Act, 2005.

4.0. Appellant in its written submissions and Personal Hearings before the DC stated that:-

(i) Appellant was granted LOA in the year June 2003 for authorized operation of Shoddy synthetic yarn, Shoddy woolen yarn, blankets, synthetic pulled fiber, blazer cloth and furnishing fabrics including an intermediate product, as amended from time to time. The required material for operations was old and used clothes.

(ii) Appellant duly installed machinery for manufacturing of Yarn and Fiber and commenced commercial production from 25.07.2003. In January 2008, a major fire broke in the factory resulting in the destruction of machinery and the building. The machinery was re-installed in the factory after importing major machinery from Turkey and rest of the spare and ancillary items procured from the DTA.

(iii) Appellant made exports of yarn and fiber on a regular basis during the financial years 2003-04 to 2018-19. It has cleared manufactured goods i.e. Shoddy Woolen Yarn in DTA after paying applicable duties. It also sold intermediate products, semi-finished goods meant for yarn manufacturing industry to the unit situated in KASEZ during the financial years 2016-17 and 2017-18.

(iv) DC has given permission to the Appellant for DTA sales and export of worn and used Clothing and Wipers being intermediate process and product vide letters dated 13.11.2003 and 27.07.2007.

(v) DC issued a letter dated 30.11.2012 regarding acceptance of condition which was added to the LOA by making an amendment to the addendum regarding import of used and worn clothing material/goods segregated to be allowed to be stored in bailed form.

(vi) BOA in its 60th Meeting on 08.11.2013 gave extension to units dealing in recycling of worn and used clothing and has permitted and classified the Appellant into worn and used clothing industry.

(vii) Appellant was granted permission for importing worn clothing and after sorting, segregating and grading, export worthy material was exported and remaining material which is not export worthy is being completely mutilated and cleared in DTA after payment of applicable duties.

5.0. 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. 1,00,000/- (Rupees One Lakh only) on the Appellant for not carrying out its authorized activity for a brief period

of about three years vide Order-in-Original dated 10.04.2019 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 contention of the Appellant regarding permission of sale to DTA and export of mutilated worn and used clothing/industrial wipers accorded by the administration is additional operational freedom to clear intermediate products but the fact remains that the Appellant should have concentrated on its main authorized activity and intermediate products such as mutilated worn clothing and wipers could also be cleared for DTA/export made out of export unworthy used and worn clothing.

(ii) The decision of the BoA in its 60th meeting on 08.11.2013 as well as condition at S.No. 19 of the LOA were to dissuade the worn clothing reprocessing units to indulge in any other activity not falling within the purview of the activities mentioned under the Rule 18(4)(c) of the SEZ Rules, 2006 and that the said restriction was a general one applicable to all such similar reprocessing units.

(iii) The authorized operations originally granted are in fact within the purview of the provision of Rule 18(4) of the SEZ Rules, 2006. Since the manufacturing of yarn and pulled fiber is very much part of the permissible activity for existing SEZ clothing reprocessing units, the Appellant should not interpret the decision of the BOA in any other manner and to construe that they have got freedom to do either of the activity mentioned under Rule 18(4)(c) of the SEZ Rules, 2006.

(iv) Appellant had the vital machinery installed and operational and it was carrying out the authorized activity mandated in its LOA till 2018-19 except for a gap of approximately three years without any giving any tangible explanation/reason for the same.

6.0. Aggrieved by the Order-in-Original dated 10.04.2019, the Appellant has filed the present Appeal. The Appellant in its written submissions and oral submissions in the Personal hearing on 22.01.2021 has raised the following grounds :-

(i) The impugned order is not legal and proper and thus the same was not sustainable.

(ii) Under the Section 11(2) of the Act, penalty can be imposed in contravention of import or export of goods. In the present case the proceedings pertain to alleged non-performance of authorized operations and thus admittedly the proceeding did not pertain to any contravention in relation to import and export and thus imposition of penalty under

Section 11(2) of Act was without any authority of law and or was in excess of jurisdiction.

(iii) Adjudicating Authority did not take note of the fact that the Policy circular dated 17.09.2013 nowhere mentioned any condition inserting the provisions of Rule 18 (4)(c) of SEZ Rules, 2006 and thus the condition at S.No. 19 of the renewed LOA dated 18.12.2013 was in excess of jurisdiction.

(iv) The provisions of Rule 18 (4)(c) of SEZ Rules, 2006 were not to be made directly applicable to the Units which were existing before the enforcement of the SEZ Act, 2005 and SEZ Rules, 2006 and thus the reference to Rule 18 (4)(c) was totally erroneous.

(v) Appellant was holding a valid LOA dated 16.06.2003 which was amended from time to time wherein it was allowed to import worn, used and second hand clothing and other worn clothing for manufacturing wipers, garments, yarn, and fiber out of the imported material and thus was entitled to carry out the operations for manufacture of wipers, garments, yarn and fibers etc., and thus the SCN and Order-in-Original erroneously held that the Appellant had to carry out the main authorized activity of manufacturing shoddy yarn, pull fiber etc. Thus, the penalty was wrongly imposed.

(vi) Adjudicating Authority mentioned about the main activity or primary authorized operations but no such distinction primary / main or secondary manufacturing activity was made in its LOA.

(vii) The authorized operations in the LOA were specifically separated by the use of word OR and thus it was having the option to choose any one or more of such operations or intermediate operations keeping in view their line of business providing market condition and the economic viability.

7.0. Comments on the Appeal were obtained from the office of the DC, KASEZ. The DC vide letter dated 05.11.2019, inter alia, stated as under: -

(i) Rule 54 of the SEZ Rules read with Section 11 of the Act empowers the adjudicating authority to impose penalty on the erring units and their authorized officer subject to terms and conditions mentioned therein. The adjudicating authority imposed penalty on the Appellant in terms of provisions of the Section 11(2) of the Act.

(ii) Rule 54 of the SEZ Rules specifically provides that if a unit fails to achieve positive NFE or stipulated value addition as specified in Rule 53 or failed

to abide by any of the terms and conditions of the Letter of Approval or Bond-cum-LUT, the unit shall be liable for penalty under provisions of the Act. Thus, in case of violation of conditions of LOA and Bond-cum-LUT, the adjudicating authority is empowered to impose penalty on such erring unit under provisions of the FTDR Act.

(iii) Appellant being a worn and used clothing SEZ unit was governed by the Policy Circular 17.09.2013 along with provisions of the SEZ Act and Rules. The Policy was formulated taking into consideration overall objective of SEZ scheme enshrined under Section 5 of the SEZ Act. Also, the Hon'ble Division Bench of Gujarat High Court vide Order dated 20.03.2019 in Letters Patent Appeal Nos. 694 to 702/2017 upheld the said Policy Circular in respect to worn and used clothing SEZ units.

(iv) Further, provisions of the SEZ Act and Rules were applicable to the units established even prior to enactment of the SEZ Act and Rules. As per the Bond-cum-LUT signed by the Appellant it had accepted to be governed by provisions of the SEZ Act and Rules.

(v) Appellant was granted permission of DTA sale and export of mutilated worn and used clothing/industrial wipers to clear intermediate products. However, the Appellant was inoperative for a period of three years and did not export anything during said period. Subsequently, the Appellant exported in January 2019 after period of three years. No justification was provided by the Appellant for it. Being non-operational for a period of three years without any clarification and tangible evidence the Appellant violated terms and conditions of LOA thus making it liable for action.

8.0. I have considered the Order-in-Original dated 10.04.2019 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) Appellant was issued a LOA on 16.06.2003 by the DC, KASEZ for setting up a Unit in the KASEZ, subject to the conditions imposed therein. On the request of the Appellant, the validity of the LOA has been extended from time to time.

(ii) One of the main objectives of the SEZ Scheme is to promote exports of goods and services by providing incentives and necessary infrastructure to the potential units.

(iii) Appellant has availed of the incentives/benefits available to the Units operating under the SEZ Scheme since the date of LOA i.e. 16.06.2003. It

was well aware that it was required to achieve the prescribed level of exports and fulfill the conditions of the LOA. However, the Appellant has failed to undertake any exports during the years 2015-16 to 2017-18 without submitting any valid reason. Therefore, Appellant has committed a violation of the provisions of LOA and Bond-cum-LUT. Any condonation of the violation will give an encouragement to other units in the SEZs to make exports as per their convenience.

(iv) After the DC issued a Show cause notice (SCN) dated 29.11.2018, Appellant has started making exports from the month of January, 2019.

(v) Appellant is liable for penal action under the provisions of the FT(D&R) Act, 1992 as made applicable vide Rule 54(2) of the SEZ Rules, 2006. Penal action is also necessary to instill a sense of discipline in the Units in SEZ.

(vi) DC has imposed a penalty of Rs. 1,00,000/- which is a reasonable amount and does not deserve any intervention.

9.0. 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. 01/92/171/11/AM 20/ PC-VI Dated: 08.03.2021

The appeal stands dismissed.

(Amit Yadav)
Director General of Foreign Trade

Copy to:

1. Babu International, Shed No. 287-288, Sector-III, Kandla Special Economic Zone, Gandhidham-370230.
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