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

F.No. 01/92/1/1/35/AM 18/ PC-VI/12 18 Date of Order: 27.10.2020
Date of Dispatch: 27.10.2020

Name of the Appellant:	Luckystar International Pvt. Ltd., Shed No. 336, 23-24 & 33-34, Sector-1, Kandla Special Economic Zone, Gandhidham – 370230, Gujarat.
IEC Number	3797000413
Order appealed against:	Order-in-Original No. KASEZ/112/2017 18 dated 18.01.2018 passed by the Development Commissioner, Kandla, Special Economic Zone, Gandhidham.
Order-in-Appeal passed by:	Amit Yadav, DGFT

Order-in-Appeal

Luckystar International Pvt. Ltd., (hereinafter referred to as "the Appellant"), filed an appeal on 13.03.2018 against Order-in-Original No. KASEZ/112/2017-18 dated 18.01.2018 issued from F.No. KASEZ/IA/16/3/96/10963 passed by the Development Commissioner, Kandla Special Economic Zone (hereinafter referred to as 'the DC') imposing a penalty of Rs. 1,50,00,000/-.

2.0 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.

3.0 Brief facts of the case:

3.1 The Appellant was issued a Letter of Approval (LoA) by the DC vide No. KFT7/IA/1673/96/2325 dated 04.06.1997, as amended and extended from time to time, to set up a Unit for manufacturing of (i) All types of plastic bags, Garbage collection, carry bags, shopping bags, house hold and allied and plastic granules, shredding, grinding pieces, crushing's, sheets, extruded and moulded articles (ii) Agglomerates, colored tarpaulins made from raw material produced from (i) above, with annual capacity of 5200 Mts. 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 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 DC that against its annual capacity of 5200 Mts. as approved in its LoA, the Appellant required to import/procure only 5304 MT of plastic waste. However, it imported much higher quantities of plastic waste and scrap. Its procurement of scrap (imported as well as intra zone purchases) was 16019.759 MT in 2007-08, 14544.557 Mts. in 2008-09, 7598.741 Mts. in 2009-10, 7414.487 Mts. in 2010-11, 5577.171 Mts.in 2011-12, 7262.939 Mts. in 2012-13 and 8968.925 Mts. scrap in 2013-14. This was

violation of Rule 18(4) of SEZ Rules, 2006, as the excess import was in contravention of the limits fixed in LoA.

3.4 Accordingly, a notice dated 11.4.2016 was issued to Appellant by the DC to show cause as to why its LoA should not be cancelled u/s 16 of the SEZ Act, 2005 and penalty should not be imposed on it u/s 11 of FT(D&R) Act, 1992, as amended, (as made applicable under Rule 54(2) of SEZ Rules, 2006) for contravening terms of the LoA and Bond cum Legal Undertaking, provisions of Rule 53 of the SEZ Rules, 2006, provision of the erstwhile Import Export Policy to SEZ and relevant provisions of the Handbook of Procedures. Earlier too, a Show Cause Notice (SCN) dated 7.3.2011 was also issued to the Appellant for exceeding average quantity of permissible annual import quantum for FY 2006-07 to 2010-11 (up to 31.12.2010). However, it was withdrawn as revised Show Cause Notice was issued on 11.4.2016.

3.5 The Appellant in its reply dated 13.06.2017 stated that there was no restriction on import of plastic waste in the LoA. The only restriction in the LOA is that it cannot manufacture agglomerates more than 5200 MT per annum which it has never exceeded. Further 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 On examination of the reply dated 13.06.2017 of the appellant, the DC found that:

(i) the SCN dated 7.3.2011 was required to be dropped as fresh proceedings were already initiated vide SCN dated 11.4.2016.

(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 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 SION. Hence, by taking 2% production loss, the annual quantum of import should be 5304 MT against the annual production capacity of 5200 MT.

(iv) Taking into consideration the actual imports and 2% production loss, the excess quantity of import comes out to 10715.759 Mts. in 2007-08, 9240.557 Mts. in 2008-09, 2294.741Mts. in 2009-10, 2110.487 Mts. in 2010-11, 273.171 Mts. in 2011 12, 1958.939 Mts. in 2012-13 and 3664.925 Mts. in 2013-14.

3.7 The DC found the Appellant violating excess import in contravention of 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. 1,50,00,000/- on the Appellant.

4.0 Aggrieved by the Order-in-Original dated 18.01.2018; the Appellant has filed the present appeal. The personal hearing was held on 20/02/2020. The Appellant, in its oral and written submissions, stated that:

(i) Provisions of Rule 18(4) of the Rules are not applicable as it has never applied for enhancement of annual import quantum nor was it fixed/approved by any authority. Even, annual import quantum was not fixed in the LOA or subsequent renewals.

(ii) There is no violation of the condition No. 22 of the LOA and condition No. 8 of the undertaking as there is no violation in r/o achieving positive NFE earnings.

(iii) The DC has gone beyond the scope of SCN by attempting to fix the deemed annual import quantum by considering a maximum of 2% production loss. Whereas it had specifically declared the waste and rejects during manufacturing process to the tune of 25% in its application to the BOA for setting up the unit in 1997 itself and the actual waste/reject generation in the past 4-5 years has come down to 6-10%.

(iv) An SCN was issued to it on 7.3.2011 on similar grounds which was replied in April, 2011. However, the same was not adjudicated upon for the next five years. If the DC was of the opinion that the imports made by it were in contravention of the LoA, it should not have been allowed further imports. However, no advisory or direction was issued to it by the DC in this regard even at the time of extension of its LoA. Further, the period 2006-11 was already covered by SCN of 2011. Hence, the same allegations cannot be the subject matter of the subsequent SCN.

(v) Even if the contentions of the DC are accepted, the average annual import quantum of a unit needs to be calculated since the commencement of its operations as per Rule 18(4)(b) of the Rules. Since, it had started manufacturing in 1997, the quantity of imports since 1997 till date should have been taken into account. If this calculation is accepted, the average import quantum comes out to 5142.961 MT which is less than 5200 MTs. Whereas, the DC has calculated average imports of plastic scraps only since 2006.

(vi) A loss of 2% is inordinately low for this industry because it is difficult to predict the quantity of relevant material that could be recovered from scrap. Average wastage in this industry is higher as compared to others. Wastage of 5% has been allowed by Falta SEZ to Precision Polyplast Pvt. Ltd., a unit engaged in similar activity, in its renewal letter.

(vii) While calculating the import entitlement, the DC has included 'Intra-zone Purchases' whereas 'Intra-zone sales' have not been excluded. It has not considered 9403 MT quantity of plastic scrap sold to other units in the SEZ.

(viii) If average quantum is calculated by considering imports made since 1997, by allowing wastage of 5% and by excluding Intra-zone sales, net import made is less than the total allowed imports quantum.

5.0 Comments on the appeal were obtained from the office of the DC, KASEZ. The DC, vide letters dated 25.04.2019 and 04.09.2020, inter alia, stated as under: -

(i) 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.

(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 Foreign Trade (Development and Regulation) Act, 1992.

6.0 I have considered the Order-in-Original dated 18.01.2018 passed by DC, KASEZ, appeal preferred by the Unit, oral/written submissions made by the Appellant, comments given by 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-i-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 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. This aspect becomes more relevant when it has been claimed that wastage of 5% has been allowed by Falta SEZ to a unit engaged in similar activity.

(iii) 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.

(iv) 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.

(v) 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. 01/92/171/35/AM 18/ PC-VI Dated: 27.10. 2020

Order-in-Original No. KASEZ/112/2017-18 dated 18.01.2018 is set aside. The case is remanded back to the Development Commissioner, KASEZ, Kandla, Gujarat with the directions to examine the case de-novo and to pass appropriate speaking order as per extant law after taking into consideration Appellant's submissions.

(Amit Yadav)
Director General of Foreign Trade

Copy To:

(1) Luckystar International Pvt. Ltd., Shed No. 336, 23-24 & 33-34, Sector-1, Kandla Special Economic Zone, Gandhidham – 370230, Gujarat
(2) Development Commissioner, SEZ, Kandla.
(3) DGFT's website.

(Shobhit Gupta)
Dy. Director General of Foreign Trade