

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

F. No. 18/14/2021-22/ECA.I/

Date of Order : 09 .05.2023

Date of Despatch : 10 .05.2023

Name of the Petitioner:

M/s Ambalal Sarabhai Enterprises Ltd.
Wadi Wadi, P.B. No.31,
Baroda-390007 (Gujarat).

IEC No.

0888001177

Order Reviewed against:

Order-in-Appeal No.03/16/144/00092AM.18
dated 20.11.2018 passed by Addl. DGFT,
Mumbai

Order-in-Review passed by:

Santosh Kumar Sarangi, DGFT

Order-in-Review

M/s Ambalal Sarabhai Enterprises Ltd., Baroda (here-in-after referred to as the 'Petitioner') has filed a Review Petition dated 22.06.2021 under Section 16 of the Foreign Trade (Development & Regulation) Act, 1992, as amended (here-in-after referred to as 'the Act') against Order-in-Appeal No. 03/16/144/00092/AM.18 dated 20.11.2018 passed by Addl. DGFT, Mumbai upholding the Order-in-Original (OIO) passed by the adjudicating authority in order No. 34/36/021/00001/AM02 dt. 02.02.2018 imposing a penalty of Rs. 10 crores on the Firm and its Proprietor/Partners/Directors under Section 11(2) of the Foreign Trade (Development & Regulation) Act, 1992.

Brief Facts of the Case

2.1 The Petitioner obtained an EPCG Authorization No. 3430000031 dt. 05.09.2001 for CIF value Rs. 9,18,52,500/- to import capital goods at 5% concessional customs duty subject to fulfilment of export obligation for FOB value Rs. 45,92,62,500/- by exporting Pharmaceuticals Bulk Drugs and Formulations within a period of 8 years from the date of issue of authorization. The Petitioner was to maintain annual average past export



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performance. One of the condition of the authorization was that the Petitioner would submit the export documents within the prescribed period after the expiry of Export Obligation Period (EOP).

2.2 The Petitioner did not submit the documents evidencing fulfillment of export obligation after the EOP which expired on 04.09.2009. Hence, the Petitioner was issued a Demand Notice dt. 03.11.2009 and a personal hearing (PH) was granted on 25.11.2009. Shri S. Ruparel, representative of the Petitioner appeared before the Smt. Lata Shukla, Jt. DGFT on 26.11.2009. He was given one week time to submit shipping bills as proof of export. The Petitioner submitted partial export documents on 22.12.2009 and 19.02.2010. A letter dt. 08.07.2010 was issued with opportunity for PH on 23.07.2010 but none appeared. However, the Petitioner submitted a letter dt.17.07.2010 stating reason for not attending the PH. Letters dt. 03.08.2010 and 24.09.2010 offering PH on 24.08.2010 and 25.10.2010 were issued but none appeared for hearing on behalf of the Petitioner.

2.3 A Show Cause Notice (SCN) was issued with opportunity of PH on 28.09.2017 asking the Petitioner to show cause as to why action u/s 11(2) the Act should not be taken for the failure to comply with the conditions of the authorization. The Petitioner submitted a letter dt. 28.09.2017 but did not submit documents showing complete fulfillment of export obligation. The Petitioner was offered another PH on 16.01.2018 vide letter dt. 08.01.2018. Shri S. Ruparel, representative of the Petitioner appeared before the adjudicating authority on 08.01.2018. The Petitioner was given time upto 31.01.2018 for submission of documents evidencing fulfillment of export obligation as per the conditions of the authorization. Another opportunity of PH on 31.01.2018 was offered but the Petitioner did not appear. The Adjudicating Authority therefore, decided to finalize the case on the basis of documents and information available on records.

2.4 The Petitioner had fulfilled total EO to the extent of Rs. 72,66,65,809/- out of 1,21,57,44,948/- imposed. The Petitioner had failed to fulfill specific export obligation block-wise and maintain average export performance as required by the condition of the authorization. The Adjudicating Authority concluded that the Petitioner and its Directors violated the conditions of the authorization and hence the adjudicating authority imposed a penalty of Rs.10,00,00,000/- (Ten Crore) vide Order-in-Original No. 34/36/021/00001/AM02 dt. 02.02.2018 on the firm for non fulfillment of specific export obligation block-wise and average export performance as required by the condition of the authorization.

3.1 Aggrieved by the OIO dt. 02.02.2018, the firm had filed appeals against the said OIO before the Appellate Authority. The Appellate Authority granted PH to the Petitioners on 01.08.2018 and Petitioner vide its fax dt. 31.08.2018 requested to adjourn the same. A second PH was granted on 27.08.2018. Shri Ratan Jain and Shri Akhilesh Kangsia, Advocates of the



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Petitioner appeared before the appellate authority. They submitted copies of Notification, Chapter 6 of HBP and copies of Judgement and requested to adjourn the PH. Third PH was granted on 02.11.2018 which was postponed to 12.11.2018. In the said PH, Shri Akhilesh Kangsia, Advocate of the Petitioner appeared and stated that they have fulfilled the export obligation of 59.77% and Customs Authority had en-cashed Bank Guarantee of Rs. 2.24 Crores as partial duty of unfulfilled export obligation of 41%.

3.2 The appellate authority recorded the following observations :

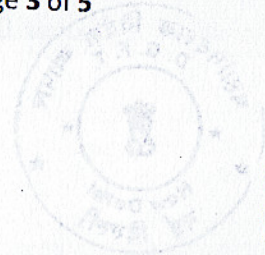
The Adjudicating Authority passed the order imposing fiscal penalty as the Petitioner failed to fulfil specific export obligation block-wise and maintain average export performance as required by the condition of the authorization as per Para 6.5(v) of FTP 1997-2002. The said para elaborates that "The export obligation under the scheme shall be over and above, the average level of exports achieved by him in the preceding three licensing years for same and similar products."

As per the condition of Annexure-A of the authorization, the Petitioner was under obligation to export items 'Manufacturing of Pharmaceuticals bulk drugs and Formulations'. As per the condition No. 3 of Annexure A, the Petitioner was also required to maintain its average of the past three years performance of the products/services mentioned in para 2 above. The annual average of the past export performance is Rs. 9,45,60,305.90/-.

Thus, the Petitioner was required to fulfil specific export obligation of Rs. 45,92,62,500.00 and average export obligation of Rs. 75,64,82,448.00 in 8 years. But the Petitioner had exported goods worth Rs. 72,66,65,809.00 only. Thus, there is shortfall in export obligation (Specific and Average combined) and the Petitioner was directed to regularize as per para 6.19 which reads as 'In case EPCG license holder fails to fulfil the prescribed export obligation, he shall pay duties of Customs plus 24% interest per annum to the Customs authority as per paragraph 6.11'. Thus, the appellant is liable for penal action as per Para 6.16 of Hand Book of Procedure which state that 'In case of failure to fulfil the export obligation or any other condition of the licence, the licence holder shall be liable for action under the Foreign Trade (Development & Regulation) Act 1992, the Orders and Rules made thereunder, the Orders and Rules made thereunder, the provisions of the Policy and Customs Act, 1962.

Since the Petitioner had neither fulfilled export obligation as per conditions No. 2 & 3 of Annexure of the authorization nor regularized the bonafide default as per para 6.19 , the Petitioner is liable to penal action as per para 6.

3.3 The Appellate Authority dismissed the appeal filed by the firm vide O-I-A No. 03/16/144/00092/AM18 dt. 20.11.2018.



4. The Petitioner has submitted the present review petition dated 22.06.2021 on the following grounds :-

- (a) The impugned order is non-speaking and is in violation of principles of natural justice since it has been passed without considering the submissions made by the Petitioner,
- (b) The impugned SCN, on which the OIO and the impugned order is based, is factually incorrect, and therefore, is liable to be dropped,
- (c) The impugned SCN, on which the OIO and the impugned order is based, is vague, non-est and perverse, and therefore, is liable to be dropped,
- (d) Penalty is not imposable under Section 11(2) of the FTDR Act, 1992,
- (e) Penalty cannot be imposed jointly on the company and its Directors without specific quantification,
- (f) Rule 10, 13 and 14 of FTDR Rules are not invokable,
- (g) EPCG is not a licence (Prior to 19.08.2010) and the provisions of the FTDR Act, 1992 or FT(Regulation) Rules, 1993 are not applicable,
- (h) The impugned SCN was issued beyond reasonable period of time and there is an inordinate delay in adjudication proceedings,
- (i) Without prejudice, the unfulfilled EO is to the extent of 29.21% if the same is computed as provided in para 6.11 of HBP read with Notification No.49.

5. The Petitioner has prayed for :-

- (i) Setting aside the OIA dt. 20.11.2018,
- (ii) Issuing a clarification as to whether penalty so imposed by the impugned order is only on the applicant, and not on its directors and accordingly review filed by (out of an abundant caution) may be allowed,
- (iii) Granting an opportunity of personal hearing,
- (iv) Passing such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

6. The Reviewing Authority had granted a PH on 17.03.2023 which was postponed as Shri Mihir Thakore Advocate informed that he would be out of country from 29th March – 9th April 2023 and will not be able to attend the personal hearing. Another PH was granted on 2nd May, 2023. Shri Dhruv Matta, Advocate, appeared on behalf of the Petitioner and two Directors Shri Vipin Jikar and K.V. Sarabhai alongwith Shri Sahil Jaggi, Advocate, Shri Navin Chandra Patel, Shri Chaula Shashtri, and Shri Anushree Kapadia. Shri Mihir Jakhore Sr Advocate appeared on behalf of Independent Director Shri B.R. Shah. Shri Satya Raja Shekhar G., DDG, RA, Mumbai was also present during the hearing. The advocate of the Petitioner admitted that the Petitioner has not completely fulfilled the export obligation. According to their calculations they had fulfilled 59 % of the export obligation and had submitted documents evidencing the same to RA, Vadodara. The Petitioner submitted that the Customs authority had encashed their bank guarantee (BG) of Rs. 2.24 Crore which cover the shortfall in exports . He also contended that the shortfall in export obligation is



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bonafide and therefore the imposition of penalty of Rs 10.00 Crore is unjust and excessive and deserves to be set aside.

7. I have gone through the facts and records of the case and the submission made by the Advocate to the Petitioner and written submissions. The Appellate Authority had provided sufficient opportunity to the Petitioner to submit its case and the advocates of the Petitioner duly appeared and presented their submissions before the Appellate Authority. The Petitioner has submitted that it has partially fulfilled its export obligations and that the excess duty saved (Customs duty) has been also been paid due to the encashment of the bank guarantee (BG) of Rs 2.24 crore by the Customs authorities. However, the Petitioner was unable to satisfy that the interest on the Customs duty saved has also been accounted for while encashment of BG. The Petitioner has to completely extinguish its liability towards its unfulfilled portion of export obligation and submit documentary proof thereof to the Regional Authority.

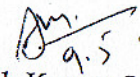
ORDER

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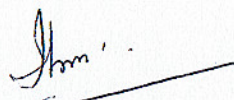
The Review Petition is admitted. The Petitioner is directed to submit documentary evidence of having paid the full Custom duty and Interest on the unfulfilled portion of export obligation within one month of issuance of the order to RA, Vadodara. The case is remanded to RA, Vadodara for de novo consideration of the documents submitted by the Petitioner.




(Santosh Kumar Sarangi)
Director General of Foreign Trade

Copy to:-

1. M/s Ambalal Sarabhai Enterprises Ltd., Wadi Wadi, P.B. No.31, Baroda-390007
2. The Addl. Director General of Foreign Trade, Mumbai.
3. The Joint Director General of Foreign Trade, Vadodara.
4. Central Economic Intelligence Bureau, 1st, 6th& 8th Floor, 'B' Wing, Janpath Bhawan, Janpath, New Delhi - 110001.
5. DGFT Website.


(A.S. Lungreishang)
Dy. Director General of Foreign Trade

