

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

File Number: 01/92/171/38/AM-20/PC-VI/69-70 Date of Order: 22 .01.2021
Date of Dispatch: 22.01.2021

Name of the Appellant: Safari Fine Clothing Private Limited,
Shed No. 280-281,
Sector-III, Kandla SEZ,
Gandhidham, (Kutch)-370230

IEC No.: 0501040927

Order appealed against: Order-in-Original No. KASEZ/50/2019-20
dated 23.5.2019 passed by the
Development Commissioner, Kandla SEZ.

Order-in-Appeal passed by: Amit Yadav, DGFT

Order-in-Appeal

Safari Fine Clothing Pvt. Ltd. (here-in-after referred to as 'the Appellant'), an SEZ unit, filed an appeal on 24.06.2019 under section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (here-in-after referred to as "the Act") against Order-in-Original No. KASEZ/50/2019-20 dated 23.5.2019 passed by the Development Commissioner (here-in-after referred to as "DC"), Kandla Special Economic Zone (KASEZ), Gandhidham, imposing a penalty of Rs. 1,68,48,500/- on the Appellant under section 11(2) of the Act.

2. 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.

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

3.1. The Appellant was granted a Letter of Approval (LoA) vide F.No. KASEZ /IA/1852/2001-02/9780 dated 05.10.2001, as amended and extended from time to time, for setting up a manufacturing unit of T-Shirt wipers, clothing, Towel rags, Fleece wipers and colour T-shirt wipers subject to conditions imposed therein. The Appellant commenced commercial production w.e.f. 03.03.2003.

3.2. As per Rule 53 of the SEZ Rules, 2006, the Appellant was under an obligation to achieve positive Net Foreign Exchange Earning (NFE) to be calculated cumulatively for



a period of 5 years as per the formula given therein. Further, as per the Rule 54(2) of the SEZ Rules, 2006, if the Appellant fails to achieve positive NFE, the Appellant shall be liable for Penal action under the Act. These conditions were inserted in condition No. (6)m and (8) of the Bond-cum-Legal Undertaking (BLUT) which were accepted by the Appellant.

3.3. After completion of five-year block period from 01.12.2013 to 30.11.2018, the Appellant applied for further renewal of its LoA for another five years. Accordingly, performance of the Appellant was reviewed by the DC on the basis of Annual Performance Reports (APRs) submitted by it for the period from 2013-14 to 2017-18. The DC noticed that the NFE earned by the Appellant was negative by Rs. 2385.99 Lakhs Earnings for the said five-year block.

3.4. Hence, a notice dated 29.11.2018 was issued to Appellant by the DC to show cause as to why penalty should not be imposed on it u/s 11 of FT(D&R) Act, 1992, as amended, read with Rule 25 and Rule 54(2) of SEZ Rules, 2006 for the above said violation.

3.5. The Appellant in its written reply sent on 24.05.2017 as well as oral submissions during the Personal Hearings held on 06.12.2018, 24.04.2019 and 02.05.2019 submitted, inter-alia, before DC as under: -

- (i) Its LOA for the said five-year block was valid upto 31.11.2018. However, NFE has been calculated upto 31.03.2018. On calculating the NFE upto 31.03.2018, by considering the APR from 01.04.2018 to 30.11.2018, it was negative to the tune of Rs. 1684.85 lakhs only.
- (ii) Due to huge fire in its factory on 25.11.2011, there was a loss of raw material of 4509 MTs valued at Rs. 11.58 crore. In the year 2014, the Income-Tax authorities raised undue demand of Rs. 1.31 crore on account of TDS liability and frozen its ICICI bank account from 25.03.2014 to 19.11.2014.
- (iii) The Appellant faced genuine hardships and adverse market conditions having adverse impact on the functioning of the unit.

3.6 The DC, after considering the contentions of the Appellant, found the Appellant guilty of non-achieving positive NFE by Rs. 1684.85 lakhs during five-year block period ended on 30.11.2018. Accordingly, the DC proceeded to adjudicate the matter and imposed a penalty of Rs. 1,68,48,500/- on the Appellant under the Section 11(2) of the Act, read with Rule 25 and Rule 54(2) of the SEZ Rules, 2006 vide Order dated 23.05.2019 for contravening the Provisions of Rule 53 of the SEZ Rules, 2006 and the conditions of the Bond-Cum-Legal Undertaking executed by the Appellant.



4.0. Aggrieved by the Order-in-Original dated 23.05.2019; the Appellant filed the present Appeal. The Appellant, in its written as well as oral submissions during personal hearing held on 27.11.2020, inter-alia, stated that: -

- i. The DC did not give proper time and one more opportunity of Personal Hearing before deciding the matter.
- ii. The DC did not consider its request to keep the matter pending as its request for granting extension for one year to make-up the losses in NFE earnings under the proviso to Rule 53 of the SEZ Rules was pending with the Board of Approval (BOA).
- iii. The matter should have been decided as per Rule 80 (as amended on 19.09.2018) which was in force at the time of passing the Order-in-Original dated 23.05.2019 whereas it was willing to pay penalty @1% of the shortfall.
- iv. The SCN issued on 29.11.2018 was pre-mature as its LOA was valid upto 30.11.2018

5. Comments on the Appeal were obtained from the DC. The DC, vide letter No. KASEZ/IA/1852/2001/Vol.1/7829 dated 10.10.2019, inter-alia, stated as under: -

- i. Proper opportunity to represent the case was provided to the Appellant. Personal hearings were granted on 07.12.2018, 25.04.2019 and 06.05.2019. The Appellant made written submissions on 06.12.2018, 24.04.2019 and 02.05.2019.
- ii. Even after expiry of more than 5 months, the Appellant failed to obtain extension for one year under the proviso to Rule 53 of the SEZ Rules from the BOA. Hence the matter was decided.
- iii. Rule 80 of the SEZ Rules, as inserted on 19.09.2018, is not applicable to the present case as it was effective from the prospective date. Hence, the matter has been decided as per section 11 of the Act.
- iv. The SCN dated 29.11.2018 was issued by considering the figures up to 31.03.2018 as per APR submitted by the Appellant. However, in the Order-in-Original dated 23.05.2019, the Adjudicating Authority considered the period up to 30.11.2018.

7. I have considered the Adjudication Order dated 23.05.2019 passed by DC, KASEZ, oral/written submissions made by the Appellant, comments received from the DC, KASEZ and all other aspects relevant to the case. It is noted that:

- (i) DC, KASEZ granted to the Appellant a Letter of Approval (LoA) dated 05.10.2001, for setting up a manufacturing unit of T-Shirt wipers, clothing, Towel rags, Fleece wipers and colour T-shirt wipers subject to conditions imposed therein.
- (ii) The LOA of the Appellant was renewed for a block period of 5 years vide Letter No. KASEZ/IA/1852/2001/2756 dated 22.02.2016 for the period from 01.12.2013 to 30.11.2018. The Appellant accepted and

My

confirmed the terms specified in LOA and executed written BLUT in Form-H as required under Rule 22 of SEZ Rules, 2006.

- (iii) As per the provisions of the Rule 53 of the SEZ Rules, 2006, the Appellant was under an obligation to achieve positive NFE to be calculated cumulatively for a period of 5 years as per the formula given therein. Further, as per the Rule 54(2) of the SEZ Rules, 2006, if the Appellant fails to achieve positive NFE the Appellant shall be liable for penal action under the Act.
- (iv) The performance of the Appellant from 2011-12 to 2012-13 was reviewed by the Unit Approval Committee (UAC) on 16.04.2014 and it was noticed that the unit had negative NFE for the said two years by Rs. 2032.36 lakhs. Further, the UAC reviewed performance of the Appellant for the financial years 2013-14 to 2017-18 and found that it has not achieved positive NFE for this five-year block period and had contravened the provisions of Rule 53 of the SEZ Rules, 2006 and conditions mentioned in the LOA, as renewed from time to time. UAC further authorized the DC to initiate action against the said unit under the Act for not achieving the NFE for the year 2013-14 to 2017-18.
- (iv) DC noted that the Appellant had negative NFE to the tune of Rs. 2395.99 lakhs. Further, as contended by the Appellant if the period of 01.04.2018 to 30.11.2018 is also included in the review consideration, then from 2013-14 to 30.11.2018 the cumulative NFE for entire period of five-year block period will be negative by Rs. 1684.85 Lakh. This establishes that the Appellant had not complied with the provisions of the Rule 53 of the SEZ Rules, 2006 and is liable for imposition of penalty.
- (v) Rule 80 which has 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.”

The present proceedings do not fall under the ambit of Rule 80. Rule 80 is for regularization of bonafide default. It does not talk about imposition of penalty. It talks about regularization of only those defaults which are only bonafide in nature. Such defaults can be regularized by paying a regularization fee.

However, in the present case, the proceedings are for imposition of penalty under section 11(2) of the Act read with Rule 54(2) for contravening provisions of Rule 53 of the SEZ Rules, 2006. The Appellant has substantial negative NFE caused by huge domestic sales made by it over the years, without caring for NFE obligations. The

Appellant diverted goods meant for exports in the domestic market. Such deliberate regular non-compliance over such a long period, by making huge regular sales in the domestic market and earning undue gains, cannot be termed as bonafide default.

- (VI) As per section 11(2) of the Act, a penalty can be imposed up to five times of the value of goods which are in contravention of the Act/Rules. In the instant case, the Appellant has negative NFE to the tune of Rs. 1684.85 Lakh which is caused by clearing the goods of the similar value, which were meant for exports, in the domestic market. As per the provisions of section 11(2), the amount of penalty could have been up to Rs. 8424.25 Lakh whereas the Adjudicating Authority imposed a penalty of Rs. 1,68,48,500/- only. The amount of penalty imposed as such cannot, by any stretch of imagination, be termed as excessive.

8. 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. 01/92/171/38/AM-20/ PC-VI/

Dated: 22.01.2021

The Appeal is dismissed.



(Amit Yadav)

Director General of Foreign Trade

Copy to:

- (1) Safari Fine Clothing Private Limited, Shed Number 280-281, Sector-III, Kandla SEZ, Gandhidham (Kutch) - 370230
- (2) Development Commissioner, Kandla SEZ with an advice to make recoveries.
- (3) DGFT's web site



(Randheep Thakur)

Joint Director General of Foreign Trade