

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

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F.No. 01/92/171/12/AM 17/ PC-VI/154,155 Date of Order: 14.03.2018

Date of Dispatch: 14.03.2018

Name of the Appellant: M/s Euro Multivision Limited, Boston House,  
Ground floor, Suren Road, Mumbai- 400093

Order appealed against: Order-in-Original No. KASEZ/P&C/5/104/2008-09  
dated 29.02.2016 passed by the Development  
Commissioner, Kandla Special Economic Zone

Order-in-Appeal passed by: Shri Alok Vardhan Chaturvedi, DGFT  
Shri Jaikant Singh, Addl. DGFT

**Order-in-Appeal**

M/s Euro Multivision Limited, Mumbai (hereinafter referred to as 'the appellant'), an SEZ unit, has filed an appeal dated 31.03.2016 against Order-in-Original No. KASEZ/P&C/5/104/2008-09 dated 29.02.2016 passed by the Development Commissioner, Kandla Special Economic Zone.

2. 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 the appeal is before us.

3. Although, the appeal is filed beyond the period of 45 days from date of receipt of the order as stipulated in under section 15 (1) (b) of the Foreign Trade (Development & Regulation) Act, 1992 (amended in 2010), the appeal has been accepted and heard. Further, second proviso to section 15 (1) (b) of the Act stipulates that in the case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of the penalty or redemption charges has been deposited. Further, it has also been provided that where the Appellate Authority is of the opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose. The Unit has requested for waiver of pre deposit of penalty for hearing the appeal, as the Company's networth is eroded/has become negative. In view of this, we have acceded to the Unit's request for dispensing with the penalty amount.

o/c

4.0 Brief facts of the case are that:



4.1 The appellant was granted Letter of Approval (LoA) by the O/o The Joint Development Commissioner, Kandla vide letter No. KASEZ/P&C/6/71/09-10/2717-19 dated 09.06.2009 to set up a unit and for undertaking the authorized operations namely for manufacture of Solar Photovoltaic Cells subject to certain terms and conditions imposed therein. The SEZ unit started its commercial production effect from 24.08.2010 and completed its five year period on 23.08.2015

4.2 The unit had shown their projected exports of Rs. 1,30,902 lakhs and Net Foreign Earnings valued at Rs. 18,317 lakhs for the 1st five years block period and submitted their Annual Performance Reports duly certified by the Chartered Accountant from time to time for the 1st five years block period i.e. from 2010-15 under sub-rule (3) of Rule 22 of SEZ Rules, 2006. As per the SEZ provisions, the APRs for 1st five years block period from 2010-15 were placed before the Approval Committee in its 5th meeting held on 20.07.2015. It was observed by the Approval Committee that the SEZ unit had started their production on 24.08.2010. The Approval Committee also observed that the unit had made import of raw materials, consumables etc. valued at Rs. 7921.44 lakhs and imported capital goods valued of Rs. 9361.32 lakhs during the 1st five years block period. It was further observed by the Approval Committee that in terms of Rule 53 B (d) of SEZ Rules, 2006, the unit had amortized the capital goods at the rate of ten percent, every year on the value of imported capital goods for the purpose of annual calculation of Net Foreign Exchange which was shown by the unit in the APRs as Rs. 4711.13 lakhs. The Approval Committee noted that no considerable exports were made by them at the end of 1st five years block period. It was observed that the SEZ unit made exports to the tune of Rs. 5366.65 lakhs which included supplies worth of Rs. 924.25 lakhs DTA sales during the above period. Therefore, the Net Foreign Exchange came to be negative by Rs. 7133.23 lakhs in 1st five years block period of 2010-15.

4.3 As, the Unit did not fulfil the conditions of the LoA and Bond-cum-Legal Undertakings, on recommendations of the approval Committee, a show cause notice bearing No. KASEZ/P&C/5/104/2008-09 dated 09.09.2015 was issued to them asking why penalty should not be imposed on them under Rule 54(2) of the SEZ, Rules 2006 read with the provisions of Section 11 of the Foreign Trade (Development & Regulations) Act, 1992 and rules made thereunder for not achieving the positive Net Foreign exchange (NFE) at the end of 5th year of the first five years block;

4.4 The unit in its reply had admitted that the Net Foreign Exchange Earnings of their unit was negative and submitted the reason that they had established a PV Solar Cell manufacturing Plant of 40 MW capacity during the year 2009-11, which was operational for the ten months only, thereafter resumed the Commercial operations only in the month of May, 2015. During the gestation period, their business suffered owing to technology risk, stiff competition from China and price erosion by 90% since 2011 to 2015 and as a result they were compelled to shut down their business. The Unit's positive net worth got eroded and significantly became negative. The supports from Bankers were withdrawn and the loans given by the Bank to the unit became Non Performing Assets. The cash flows and revenues were deeply impacted and the unit became sick. The Unit therefore filed before the Board of Industrial and Financial reconstruction the application for Rehabilitation and was eventually

registered under provisions of The Sick Industrial Companies (Special Provisions) Act, 1985.

4.5 On examination of the reply to the Show Cause Notice submitted by the unit along with full facts of the case, the Development Commissioner, Kandla SEZ, in exercise of powers vested under under Rule 54 of SEZ Rules, 2006 imposed a penalty of Rs. 2500 Lakhs (Twenty Five Crore Rupees only) vide Order-in-original No. KASEZ/P&C/5/104/2008-09 dated 29.02.2016.

5. Aggrieved by the adjudication order dated 29.02.2016, the Unit has filed the present appeal, mainly on the following ground: -

- (i) To achieve the positive net foreign exchange earnings (NFE) as prescribed by Rule 53 of SEZ Rules was beyond the control of the appellant.
- (ii) The appellant has filed before the Honorable Board of Industrial and Financial Reconstruction the application for Rehabilitation of the unit and the company is registered under provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.
- (iii) The Development Commissioner, KASEZ has not granted the extension of the period for achieving the positive net foreign exchange earnings (NFE).

6. Comments from the office of the Development Commissioner, KASEZ have also been obtained on the appeal filed by the Unit. Comments furnished by office of the Development Commissioner, KASEZ vide their letter dated 04.10.2016 are as follows: -

- (i) The Adjudicating Authority in Para 16 of the Order-in-Original No. 01/2016, has mentioned in his findings that the reasons for contravention of the provisions of Rule 53 of SEZ Rule, 2006 were beyond the control of the appellant and hence taken a lenient view by imposing penalty of Rs. 25 (Twenty Five) Crores Only.
- (ii) The adjudicating authority in para 9 (vii) of the OIO under Heading "Defense Submission" has acknowledged the fact that the "unit filed application for Rehabilitation and registered under the provisions of SICA Act, before the Hon'ble Board of Industrial and financial Reconstruction. However, no exception has been provided in the provisions of SEZ Rules, 2006 regarding relief to the Units registered under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 as far as levying of penalty, under Rule 54 of the SEZ Rules, 2006 read with the provisions of the Foreign Trade (Development and Regulation) Act, 1992 is concerned.
- (iii) SEZ Rules, 2006 do not have any provision for extended period for achieving NFE.
- (iv) The quantum of penalty has been decided by the adjudicating authority, considering the fact that the appellant got many benefits in the form of tax exemptions, refund, export incentives etc. for goods imported and domestically procured goods and so to say after considering all facts of the case.

7. Personal hearing was afforded to the unit on 13.10.2017 in which Mr. Hitesh Shah, MD accompanied by Mr. Sunil Nemani, Finance Manager appeared and represented the Unit before us. They made verbal submissions but added nothing to whatever had been stated in their appeal petition. However, they sought two days additional time to file their

supplementary which was allowed. However, they requested for additional time in view of Diwali holidays. The appellants vide letter dated 28.10.2017 made following additional submissions and requested for waiver of penalty :

- (a) Government has allowed import of photovoltaic cell at zero duty since 17.3.2012.
- (b) China has huge manufacturing base, as a result, they are offering their product to the Indian buyers at throw away price.

8. We have considered the Order-in-Original dated 29.02.2016 passed by DC, KASEZ, appeal preferred by the Unit and oral submissions made by its representatives, report/comments of office of the DC, KASEZ and all other aspects relevant to the case. We have observed that the unit had made import of raw materials, consumables etc. valued at Rs. 7921.44 lakhs and imported capital goods valued at Rs. 9361.32 lakhs during the 1<sup>st</sup> five years block of period of 2010-15 and made exports to the tune of Rs. 5366.65 lakhs only which included supplies worth of Rs. 924.25 lakhs to DTA units during the above period. Therefore, the appellant achieved negative Net Foreign Exchange of Rs. 7133.23 lakhs in 1<sup>st</sup> of five years block period of 2010-15. It is noted that the value of imported raw materials, consumables etc. is more than that of the total value of export. The appellant got many benefits in the form of tax exemptions, refund, export incentives etc. for goods imported and domestically procured. For contravention of the provisions of Rule 53 of SEZ Rules, 2006, the DC has taken a lenient view by imposing penalty of Rs. 25 (Twenty Five) Crores Only. We have also noted that the provisions of SEZ Rules, 2006 do not provide any exceptions regarding relief to the Units registered under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, which in any case has been repeated.

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

**Order**

F.No. 01/92/171/12/AM17/ PC-VI/

Dated: 14.03.2018

Order-in-Original No. KASEZ/P&C/5/104/2008-09 dated 29.02.2016 passed by the Development Commissioner, KASEZ, Gandhidham, Gujrat is upheld and the appeal is rejected

  
(Jaikant Singh) 14/3/18

Addl. Director General of Foreign Trade

  
(Alok Vardhan Chaturvedi)  
Director General of Foreign Trade

**Copy To:**

- (1) M/s Euro Multivision Limited, Boston House, Ground floor, Suren Road, Mumbai- 400093.
- (2) Development Commissioner, SEZ, Kandla.

  
(Shobhit Gupta) 14/3/18

Dy. Director General of Foreign Trade