

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

File No. 01/92/171/36/AM-18/PC-VI/50-51 Date of Order: 29 .12.2020
Date of Dispatch: 29 .12.2020

Name of the Appellant: M/s Kutch Polymers,
Shed No. 180-181, Sector-I, Kandla Special
Economic Zone, Gandhidham- 370230.
(Gujarat)

IEC Number 3798000131

Order appealed against: Order-in-Original No. Order-in-Original
Number KASEZ/109/2017-18 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

M/s Kutch Polymers (hereinafter referred to as "the Appellant"), filed an appeal on 13.03.2018 against Order-in-Original No. KASEZ/109/2017-18 dated 18.01.2018 issued from File Number KASEZ/1A/1689/97/10954 passed by the Development Commissioner, Kandla Special Economic Zone (hereinafter referred to as 'the DC') imposing a penalty of Rs.34,00,000/- under section 11(2) of the Foreign Trade (Development & Regulation) Act, 1992, as amended.



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 Appeal.

3.0 Brief facts of the case:

3.1 The Appellant was issued a Letter of Approval (LoA) vide File No. FTZ/1A/1689/97/10487 dated 27-01-1998, as amended and extended from time to time, to set up a Unit in Kandla SEZ for manufacturing of (i) All types of reprocessed plastic raw materials in granules, Agglomerates, shredding, grinding pieces, crushing chips from, lumps and chunks (ii) Ropes of all types and sizes made of polymers made from raw materials obtained from (i) above, with annual capacity of 4500 Mts. After implementation of the SEZ Act in 2005, the said LoA continued to be valid under the SEZ scheme. The Appellant executed a Bond undertaking to fulfill conditions of the LoA and other related acts/rules.

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 the DC that, in contravention of Rule 18(4) of SEZ Rules, 2006, the Appellant exceeded the annual import quantum of plastic waste and scrap as against that



allowed to it as per the LoA, by 652.39 Mts. in 2006-07, 392.52 Mts. in 2008-09, 514.29 Mts. in 2011-12, 2303.30 Mts. in 2012-13, 1905.00Mts. in 2013-14 and 1562.00 Mts. in 2014-15.

3.4 Therefore, a notice dated 18.04.2016 was issued to it by the DC to show cause as to why its authorized operations should not be cancelled under Section 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. Previously, a Show Cause Notice (SCN) dated 07.03.2011 had also been 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) but it was withdrawn as a revised show Cause notice was issued on 18.04.2016.

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 4500 MTs 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 18.4.2016.
- (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 established between annual import quantity and annual production capacity.

- (iii) The Appellant did not give any specific data to justify that in order to utilize its 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 Standard Input Output Norms (SION) as published by DGFT. Hence, by taking 2% production loss, the annual quantum of import should be 4590 MT against the annual production capacity of 4500 MT.
- (iv) Taking into consideration the actual imports and 2% production loss, the access quantity of import comes out to 562.39 Mts. in 2006-07, 302.52 Mts. in 2008-09, 424.29 Mts. in 2011-12, 2213.30 Mts. in 2012-13, 1815.00 Mts. in 2013-14 and 1472.00 Mts. in 2014-15.

3.7 Hence, the DC found the Appellant guilty of excess import in contravention of the 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. 34,00,000/- on the Appellant.

4.0 Aggrieved by the Order-in-Original dated 18.01.2018, the Appellant filed the present appeal. A 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) Neither the LOA nor any other communication/extension prescribed the Annual average import quantum for the Appellant. The only restriction imposed was in respect of annual output capacity, which was to be used for completing the export obligation.
- (iii) The LOA and the undertaking executed by the Appellant provided for the requirement of maintaining annual production capacity and positive Net Foreign Exchange. As the requirement of maintaining average annual import quantum was nowhere mentioned, there was no violation of the terms of the LOA or the undertaking warranting imposition of penalty.
- (iv) 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. The Appellant had specifically declared the waste during manufacturing process to the tune of 15% in its Application to the Approval Board, for setting up the Unit in 1998, itself. The waste suffered at the Appellant's Unit has varied from-6% to 10%. After considering average 8% of the waste and reject which comes to 5296.91 MT, the total quantity of input used consumed at 60903 MT (66198.99 - 5296.91) which is lower than the total of output capacity of 76500 MT.
- (v) The DC should have determined excess imports, if any, after comparing cumulative net imports made with the cumulative approved import entitlement from the date of commencement of operation of the units. In the O-i-O, the determination has been made for the period 2006-07 till 2014-15, seemingly for the reason that SEZ Rules, 2006 came into effect from 2006 onwards. However, Rule 18(4) (b) itself provides for examining average annual import quantum of the unit since its "commencement of operation while considering proposals for enhancement of approved import quantum.
- (vi) An SCN dated 07.03.2011 was issued to the Appellant covering the imports made during the years 2006-11. The allegations made therein were similar to the ones



contained in the SCN dated 18.04.2016. In the SCN dated 07.03.2011, it was alleged that the Appellant had imported excess quantity of inputs as per calculation done on the basis of annual output capacity. However, the annual quantum of imports was calculated based upon the actual imports made during the period 1998-2005, the DC dropped the charges in the said Show Cause Notice of 2011. Hence, the same allegations cannot be the subject matter of the subsequent SCN.

- (vii) Even if the contentions of the DC are accepted, the average annual import quantum of a unit needs to be calculated with effect from the commencement of its operations, as per Rule 18(4) (b) of the Rules. Since, the Appellant had started manufacturing in 1998, the quantity of imports should have been taken into account since 1998 till date. Following this method, the average annual import quantum since 2000, comes to 3894.05 MTs, (66198.99/17 years) which is less than the average import quantum of 4500 MTs. Whereas the DC has calculated average imports of plastic scraps only since 2006.
- (viii) 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 to Precision Polyplast Pvt. Ltd., a unit engaged in similar activity, in its renewal letter by Falta SEZ.
- (ix) While calculating the import entitlement, the DC has included 'Intra-zone Purchases' whereas 'Intra-zone sales' have not been excluded. It has not considered 2801.903 MTs quantity of plastic scrap sold to other units in the SEZ.
- (x) If average quantum is calculated by considering imports made since 1998, by allowing wastage of 5% and by excluding Intra-zone sales, net import made is less than the quantum of imports allowed.

5.0 Comments on the appeal were obtained from the office of the DC, KASEZ. The DC, vide letter dated 16.04.2019, inter alia, stated as under: -



- (i) Annual capacity for manufacturing specified items as indicated in the LoA was taken to determine permissible annual import.
- (ii) Since, the SEZ Rules, 2006 came into effect from 10.02.2006, the period from 2006-07 was only taken to determine excess annual imports.
- (iii) No SION has been specified in the instant matter. There were no significant losses in the manufacturing process and accordingly the percentage loss was taken as 2%.
- (iv) 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 the DC, KASEZ, appeal preferred by the Unit, 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) 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 the 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.

- (iii) It is also not specified as to under which provision of SEZ Act/Rules or orders made there under, provisions of EOU policy regarding wastage or SION notified by DGFT are applicable on the units in the SEZs.
- (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, it appears that 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.

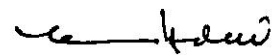
7.0 In view of the above, in exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, I pass the following order:

Order

F. No. 01/92/171/36/AM-18/PC-VI

Dated: 29 .12.2020

Order-in-Original dated 18-01-2018 is set aside and the matter is remanded back to the Adjudicating Authority for *de-novo* consideration.



(Amit Yadav)

Director General of Foreign Trade

Copy To:

1. Kutch Polymers, Shed No. 180-181, Sector-I, Kandla Special Economic Zone (KASEZ), Gandhidham- 370230 Gujarat.
2. Development Commissioner, SEZ, Kandla.
3. Addl. Secretary (SEZ Division), DoC, New Delhi.
4. DGFT's website.


(Shobhit Gupta)

Dy. Director General of Foreign Trade

