

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

F.No.01/92/171/31/AM-18/PC-VI / 17-18, TR.No 98

Date of Order: 16.08.2021

Date of Dispatch: 16.08.2021

Name of the Appellant: **New Plastomers India Limited,
Shed No. A-313, 320 & 321,
Marshalling Yard,
Kandla Special Economic Zone,
Gandhidham.**

IEC No. : **0388192101**

Order appealed against: **Order-in-Original No. KASEZ/102/2017-18 dated
08.01.2018 passed by the Development
Commissioner, Kandla Special Economic Zone.**

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

Order-in-Appeal

New Plastomers India Limited (hereinafter referred to as "the Appellant") filed an Appeal dated 24.02.2018 (received on 27.02.2018) under section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order-in-Original dated 08.01.2018 (issued from F.No. KASEZ/IA/1620/95/Vol. I/10455) passed by the Development Commissioner (hereinafter referred to as "DC"), Kandla Special Economic Zone (KASEZ) imposing a penalty of Rs. 2,00,00,000/- (Rupees Two Crores Only).

2.1. 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 Additional 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 is before me.

2.2. Any person/party deeming himself/itself aggrieved by this order, may file a Review petition under the provisions of the Section 16 of the FT(D&R) Act, 1992 before the Appellate Committee, Department of Commerce, New Delhi.



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

- 3.1. Appellant was issued a Letter of Approval (LoA) by the DC, KASEZ bearing F.No. KFTZ/IA/1620/95/1431 dated 20.05.1996 for manufacturing all types of plastic bags, garbage collection bags, carry bags, shopping bags, household and allied items subject to conditions imposed therein.
- 3.2. As per the terms and conditions of the LoA, the Appellant was required to achieve Net Foreign Exchange (NFE) Earnings as prescribed in the SEZ Scheme for a period of five years from the date of commencement of production under Rule 53 of the SEZ Rules, 2006. It started commercial production from 18.04.1997.
- 3.3. DC observed that the Appellant affected duty free imports as per the following details given in the Annual Performance Report (APR) for the year 2010-11 (Rs. in lakhs) :-

Capital Goods	:	0.00
Amortized Value of Capital Goods	:	0.00
(Import) Raw Materials consumed	:	1224.86
Other outgo of FE	:	0.00
Total	:	1224.86

- 3.4. DC reviewed the foreign exchange inflow of the Appellant for a period of five years from 01.04.2006 to 31.03.2011. It was observed that there was a foreign exchange inflow of Rs. 456.39 lakhs and foreign exchange outflow of Rs. 1224.86 lakhs which resulted in a shortfall of Rs. 768.47 lakhs. Therefore, the Appellant had achieved negative NFE and contravened the Rule 53 of the SEZ Rules, 2006 and conditions as mentioned in the LoA renewed from time to time.
- 3.5. According to Rule 54 of the SEZ Rules, 2006 and as per the conditions laid down in the LoA /Bond-cum-LUT, if a unit in SEZ continues to be NFE negative by the end of 5th year or failed to abide by any of the terms and conditions of the LoA or Bond-cum-LUT, the unit shall be liable for penal action under the provisions of the FT(D&R) Act, 1992 and the rules made thereunder.
- 3.6. DC issued a Show-cause notice (SCN) dated 10.07.2012 bearing F.No. KASEZ/IA/1620/95/Vol.I/3764 to the Appellant asking as to why penalty should not be imposed on it under Section 11(2) of the FT(D&R) Act, 1992, as amended for above said violation and it's LOA should not be cancelled under Section 16 of SEZ Act, 2005.



4.0. Appellant in its written submissions and Personal Hearing held on 06.04.2015 before the DC stated that :-

- (i) After the year 2007, the validity of its LoA was further extended for a period of five years as per SEZ Rules, 2006 which gave it an opportunity to plan its production. According to condition No. 22 of LoA letter dated 12.12.2013 in case the unit is NFE negative for the period which starts after completion of the previous 5 block year period till 30.11.2013, it shall be required to be not only NFE positive but NFE positive by atleast the amount for which it is NFE negative during this period. Hence, whenever LoA is less than 5 years at a time, then NFE should be subsumed thereafter for the next LoA issued.
- (ii) Before issue of a SCN by DC on 10.07.2012, Appellant had requested the DC vide letter dated 18.10.2010 to grant it extension in period so that it could achieve positive NFE. The reasons mentioned in support of request for extension were international monetary meltdown, fluctuation of polymer prices in the international market, heavy fluctuation in US dollar currency, detention of its raw material at the Mundra port by the Custom Authorities and blocking of IEC from September, 2009 to June, 2010. Due to unfavourable circumstances, it was forced it to sell the raw material in Domestic Tariff Area (DTA) thus leading to negative NFE.
- (iii) The possession of factory was taken by SEZ authorities and only on payment of rent arrears was it re-possessed by them.

5.0. DC after going through the contents of the SCN and all other related documents proceeded to adjudicate the matter vide Order-in-Original dated 08.01.2018 and imposed a penalty of Rs. 2,00,00,000/- (Rupees Two Crores only) on the Appellant under Rule 54(2) of the SEZ Rules, 2005, read with Section 11(2) of the FT(D&R) Act, 1992 with the following observations :-

- (i) Appellant commenced commercial production on 18.04.1997. The FTZ was converted to SEZ on 01.11.2000 thereby making it evident that the Appellant started production as an SEZ unit with effect from 01.11.2000. Accordingly, the first cumulative period should be calculated from 01.11.2000 to 31.10.2005 and second cumulative period from 01.11.2005 to 31.03.2011.
- (ii) The administration while calculating the NFE of the Appellant considered the cumulative period from 01.04.2006 to 31.03.2011 as was done for all the Units. The contention of the Appellant that whenever the validity of the LoA is less than 5 years at a time, then the



NFE should be subsumed thereafter for the next LoA issued is not sustainable as NFE is calculated on the basis of APR's filed by the Unit and the same are filed for respective financial years as per Rule 22 of the SEZ Rules. It is not possible to calculate the NFE on monthly basis.

- (iii) The claim of Appellant that as per condition No. 22 mentioned in the renewed LoA letter dated 12.12.2013 that whenever the validity of LoA is less than five years at a time, NFE should be subsumed thereafter for the next LoA issued is not correct as this condition was applicable for the period which starts after completion of the previous five year block till 30.11.2013 that too in the wake of new five year block for incorporation of new physical exports condition in line with guidelines for regulating the functioning of Plastic Recycling Units LoAs. This has no relevance for the present block period 2006-2011 in which the noticee has achieved negative NFE.
- (iv) The claim of prevailing adverse international market/trade conditions is general in nature and not specific to their unit.
- (v) The claim that Appellant was NFE positive in the years for three years for the period 2010-11 to 2012-13 has no relevance to the present SCN which pertains to period 2006-2011.
- (vi) The other contentions of blockage of IEC for short period, possession of land on grounds of non-payment of rent arrears etc. are not strong arguments.

6.0. Aggrieved by the Order-in-Original dated 08.01.2018, the Appellant has filed the present Appeal. Hon'ble High Court of Gujarat at Ahmedabad vide order dated 03.03.2021 in the SCA No. 4242/2021 (M/s New Plastomers India Ltd. v/s Union of India) directed as under :-

".... we dispose of this petition with a direction to the respondent no.2 – Directorate General of Foreign Trade, New Delhi to take an appropriate decision strictly in accordance with law in the pending appeal of the petitioner referred to above on 15th March, 2021 itself or at the earliest in any case within a period of four weeks from the date of submission of the certified copy of this order. We also make it clear that we have not entered into the merits of the matter."



7.0. The following grounds have been raised by the Appellant in its written submissions and oral submissions made by Ms. Reena Rawat, Advocate appearing on behalf of the Appellant :-

- (i) The impugned order is bad in law being contrary to the facts of the case and relevant provisions of law.
- (ii) The findings of the DC are contrary to facts and figures available on record as periodic statutory returns furnished by the Appellant.
- (iii) The penalty imposed is contrary to the settled law that the penal provisions of the statute are attracted only for contumacious conduct or willful infringement of statutory provisions which are evidently absent on the part of Appellant in the facts and circumstances of the case.
- (iv) DC has not considered all 3 replies filed by the Appellant during course of Adjudication and only took the last one, contrary to principles of natural justice and fair procedure.
- (v) DC in the contextual SCN erroneously took a block period of 01.04.2006 to 31.03.2011 as against 01.04.2007 to 30.11.2019.
- (vi) Despite there being a clear-cut provision of issuance of LOP for a period of 5 years, DC granted LOP in stagger manner in piecemeal :-

S. No.	LOA date	Period covered
1	12.03.2007	01.04.2007 to 31.03.2010
2	12.10.2010	12.10.2010 to 31.10.2011
3	08.11.2011	01.11.2011 to 31.12.2011
4	06.01.2012	01.01.2012 to 31.03.2012

- (vii) Provisions of Sub Rule 80 inserted vide amendment to SEZ Rules, 2005 providing for regulation of default on payment of amount of 1% of shortfall in FOB and the Appellant prays that the same being a beneficial piece of legislature inserted for granting relief the same may be applied in this case also.
- (viii) Default in the instant case occurred due to reasons beyond the control of the Appellant viz. (i) cyclone in 1998 (ii) Earthquake in 2001 (iii) melting down of international market in 2008-2009 (iv) blockage of IEC from Sept 2009 to June 2010 and (v) detention of goods by Customs Department imported by the Appellant vide Bs/E No. 7201 dated 21.01.2009 and 7936 dated 05.11.2009 (the consignments were released after a year).

8.0. Comments on the Appeal were obtained from the office of the DC, KASEZ. The DC vide letters dated 30.11.2018 and 19.03.2021, inter alia, stated as under: -

- (i) Rule 25 and Rule 54 of the SEZ Rules, 2006 very clearly state that failure to achieve positive NFE earnings by a Unit shall be liable for penal action under the provisions of FT(D&R) Act, 1992 and the rules thereunder. The Rules have been framed under the power vested in Government under Section 55 of SEZ Act. Therefore, the contention of the Appellant is without full understanding of law. Moreover, DGFT Notification No. 20 (RE-2013)/2009-2014 dated 13.06.2013 clearly empowers the DC to adjudicate and impose penalty under the said Act.
- (ii) DC has adjudicated the Order-in-Original based on the APRs submitted by the Appellant for the five year block period (2006-07 to 2010-11) wherein it has failed to achieve positive NFE during the said block period.
- (iii) The contention of the Appellant that the Adjudicating Authority did not consider all three replies filed by the Appellant during the course of adjudication is not correct, as the Appellant in its written submissions dated 09.09.2014 put forth the same points as in the written submissions dated 16.04.2015. Also, in the written submissions dated 22.11.2013 Appellant has stated that the second cumulative five year period is to be taken from 01.11.2005 to 31.10.2010 and whereas the show cause notice dated 10.07.2012 is issued for the period from 01.04.2006 to 31.03.2011 which is not tenable in view of the detailed discussions made by the Adjudicating Authority in the para 9 of O-I-O dated 08.01.2018.
- (v) LoA of the Appellant was extended in piece-meal from 01.11.2010 to 30.11.2013 as the policy of plastic recycling units was under consideration in the Department of Commerce (DOC) and after finalization of policy dated 17.09.2013, the LoA was renewed for a period of five years from 01.12.2013 to 30.11.2018.
- (vi) The provisions of Rule 80 inserted in the SEZ Rules vide Amendment dated 19.09.2018 will not be applicable to the Appellant as the SCN dated 10.07.2012 was issued for the period from 01.04.2006 to 31.03.2011. Moreover, Rule 80 has prospective effect only.
- (vii) Rule 53 of the SEZ Rules, 2006 stipulates that the unit shall achieve positive NFE to be calculated cumulatively for a period of five years from the commencement of production. Also, Annexure to Rule 54 of SEZ Rules, 2006 stipulates that annual monitoring in the case of old units

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which have completed more than five years will be undertaken for only such number of years which fall in the subsequent block/s of five years.

- (viii) The imposition of penalty of 1% as introduced under Rule 80 of SEZ Rules, 2006 will not be applicable, as the DOC vide its letter dated 14.03.2019 issued a clarification that the Rule 80 would apply prospectively.

9.0. I have considered the Order-in-Original dated 08.01.2018 passed by the DC, KASEZ, Appeal preferred by the Appellant, 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) Each Appeal filed has to be decided on merits keeping in view the facts and circumstances of the case.
- (ii) In the instant case, DC has issued the Show-cause Notice dated 10.07.2012 to the Appellant for having Negative NFE for the block period of five years from 01.04.2006 to 31.03.2011.
- (iii) 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.”

- (iv) Rule 80 of the SEZ Rules has come into force after expiry of the block period for which SCN was issued by the DC and the Order-in-Original dated 08.01.2018. DOC has also clarified that the Rule 80 will not have prospective effect.
- (v) The reasons furnished by the Appellant that it could not maintain positive NFE due to the worldwide recession, fluctuation of raw material prices etc. cannot be accepted as the grounds are too generic trade and business related reasons/situations.
- (vi) As per the Rules 25 and 54 of the SEZ Rules, 2006, if a unit in SEZ has not achieved positive NFE it shall be liable for penal action under the provisions of the FT(D&R) Act, 1992.



- (vii) The penalty in question has been imposed under the FT(D&R) Act, 1992. As per the Section 11(2) of the Act, the Adjudicating authority could have imposed penalty upto five times of the value of goods for which contravention has been made. In the instant case, the shortfall in NFE is Rs. 768.47 lakhs. Therefore, the penalty amount could have been upto Rs. 3,842.35 lakhs whereas the Adjudicating Authority imposed a penalty of Rs. 200.00 lakhs only. By any stretch of imagination, such a penalty cannot be termed as unreasonable.

10.0. 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. 01/92/171/31/AM-18/ PC-VI

Dated: 16.08.2021

The Appeal is dismissed.



(Amit Yadav)

Director General of Foreign Trade

Copy to:

1. New Plastomers India Limited, Shed Nos A-313, Marshalling yard, Kandla Special Economic Zone, Gandhidham-370230.
2. Development Commissioner, KASEZ with an advice to make recoveries.
3. Additional Secretary (SEZ Division), DoC, New Delhi for information.
4. DGFT's website.



(Randheep Thakur)

Joint Director General of Foreign Trade