

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

F.No. 01/92/171/06/AM-21/PCVI /7-9

Date of Order: 28.04.2022
Date of Dispatch: 29.04.2022

Name of the Appellant: **Lucent Cleanenergy Pvt. Ltd,
14/15, First Floor, Pushpak Apartment,
Opp. Kaladarshan Flats,
Prernatirth Derasar Road, Satellite,
Ahmedabad**

IEC Number: **0811012786**

Order appealed against: **Appeal filed against Order-in-Original No. 03/2020-21
dated 11.09.2020 passed by the Development
Commissioner, Kandla Special Economic Zone**

Order passed by: **Santosh Kumar Sarangi, DGFT**

Order-in-Appeal

Lucent Cleanenergy Pvt. Ltd (hereinafter referred to as "the Appellant") filed an appeal on 22.10.2020 (received on 02.11.2020) under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order No. 03/2020-21 dated 11.09.2020 (issued from F.No. KASEZ/100%EOU/II/11/2011-12/1550) passed by the Development Commissioner, Kandla Special Economic Zone (hereinafter referred to as "the DC") imposing a penalty of Rs. 65,00,000/- (Rupees Sixty Five Lakh Only) on the Appellant and Rs. 10,00,000/- (Rupees Ten Lakh Only) on Shri Prafulbhai Bavishiya, Director of the Appellant.

2.1 Vide Notification No. 101 (RE-2013)/2009-2014 dated 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 is before me.

2.2 Any person/party deeming himself/itself aggrieved by this order, may file a review petition under the provisions of 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 Lucent Cleanenergy Pvt. Ltd, Ahmedabad (hereinafter referred to as "the Appellant") was issued a Letter of Permission (LoP) by the DC, KASEZ vide No. KASEZ/100%EOU/II/11/2011-12/3270 dated 28.06.2012, as amended, for manufacture and export of Solar Encapsulant Film (Fast Cure) etc. as amended.

3.2 After accepting all the terms and conditions of the aforesaid LoP, Unit executed a Legal Undertaking (LUT) with the DC, KASEZ. The Unit commenced commercial production under EOU Scheme w.e.f. 19.09.2012.

3.3 DC reviewed the export performance of the Unit for the first five year block as on 31.03.2017 and Annual Performance Reports (APRs) revealed negative NFE of Rs. 645.46 lakhs.

3.4 DC issued a Show-cause notice (SCN) dated 12/13.04.2018 to the Unit, Shri Prafulbhai Bavishiya, Director, Lucent Cleanenergy Pvt. Ltd and Shri Akash Donmadiya, Director, Lucent Cleanenergy Pvt. Ltd as to why LoP should not be suspended/cancelled in terms of Section 9 of the FT(D&R) Act, 1992, as amended, read with Rule 10 of FT(Trade Regulation) Rules, 1993, as amended and penalty should not be, imposed under Section 11 of the FT(D&R) Act, 1992,

3.5 DC granted a number of opportunities to be heard in person on 25.04.2018, 18.09.2018, 18.02.2020, 16.03.2020, 17.06.2020 and 10.08.2020 through video conferencing. The representative of Unit appeared on 10.08.2020. DC observed that :-

- (i) Noticee firm has failed to fulfill the stipulated positive NFE for the period 2012-2017.
- (ii) The firm has stated that it made an application to the Board of Approval (BoA) for extension of LoP in terms of para 6.04 of FTP, 2015-20. In view of said request, LOP has been extended till 18.09.2022. Further, demand of solar products has increased and number of companies engaged in manufacturing of solar panels and now the Unit is able to achieve the NFE in subsequent years and shortfall in achieving NFE is diminishing.
- (iii) The representative of the Unit stated that their first block period was 2012-2017 and they applied to the BoA for renewal/extension of LoP well before its expiry. The contention of the firm is that once the LOP has been extended by the DC, no action can be taken till expiry of the extended period.
- (iv) As per the records of Personal hearing dated 25.01.2016, Shri Prafulbhai Bavishiya, Director submitted that the Unit will seek broad banding permission for Solar Panel and meet their NFE commitment. The firm was granted broad banding permission on 18.03.2016 but even after grant of permission the Unit did not have positive NFE and was negative by Rs 6.45 crores in the first block period of 5 years.
- (v) The extension of LoP upto 18.09.2022 does not mean that the period for calculation of NFE has also been extended as both are distinct and separate issues.

- (vi) From the documents available on record, it is evident that the block period of NFE was never extended by BoA as proposal for extension of NFE Block was never forwarded to BoA by DC, KASEZ.

3.8 DC observed that the Appellant did not fulfill the conditions of the LOA and Bond-cum-LUT and also not achieved positive NFE in five years block of 2012-17. The unit had a shortfall in NFE of Rs. 645.46 lakhs.

3.7 DC vide Order-in-Original dated 11.09.2020 imposed a penalty of Rs. 65 lakhs on Lucent Cleanenergy Pvt. Ltd. for non-achievement of positive NFE and a penalty of Rs. 10 lakhs on Shri Prafulbhai Bavishiya, Director, Lucent Cleanenergy Pvt. Ltd. for breach of assurance given by him and for mis-declaring the facts to the DC. The order was passed under Section 11(2) read with Section 20(2) of the FT(D&R) Act.

4.0 Aggrieved by the Order-in-Original dated 11.09.2020, the Appellant has filed the present Appeal. Opportunities of Personal hearings were given to the Appellant on 15.03.2021, 06.05.2021, 25.06.2021, 11.11.2021, 07.04.2022 and 25.04.2022. Shri K. J. Kinariwala appeared on behalf of the Appellant in the hearing held on 25.04.2022. Ms. Mona Pahilajani was present on behalf of the DC, KASEZ. The following written/oral submissions have been made in the Appeal :-

- (i) The order is bad in law, not sustainable and contrary to facts and law. The only failure on the part of the Lucent Cleanenergy Pvt Ltd (EOU) was breach of condition of positive NFE in a stipulated period.
- (ii) On account of unforeseen and unfortunate conditions like tough competition from other countries, the Unit could not export the goods as projected and has continuously made huge financial losses.
- (iii) The main reason behind the negative NFE was on account of the cost of Capital Goods. The Appellant had imported raw materials worth Rs. 7.07 crores against export of goods amounting to more than Rs. 9.07 crores. So considering the cost of capital goods, there is certainly a positive gain.
- (iv) There is no charge of any malafide intention or any wrong doing by the Unit or the Appellant in the SCN or the impugned order.
- (v) The firm realized that it would not achieve the positive NFE even at the end of period of five years, then vide letter dated 25.03.2017 it requested the BoA to extend the period as per the para 6.04 of the FTP, 2015-20.
- (vi) LoP granted to the unit of the firm was extended vide letter dated 23/29.08.017 for a further period of five years upto 18.09.2022 and thereunder fresh projection of exports and in turn NFE earnings were also approved. Therefore, it was not open for the DC to initiate any penal action either against the firm or the Appellant before the expiry of the extended period.



- (vii) Appellant had imported capital goods worth Rs. 11.13 crores in 2012-13 but the quality of EVA film manufactured on those machinery was poor and has impacted their exports badly. Appellant is hopeful that before end of their extended period of LoP, they will be able to achieve the positive NFE in all respects.
- (viii) No opportunity of hearing is given by DC which is a violation of principle of natural justice. DC has erred in observing that the Appellant has mis-declared and hidden the facts and did not fulfill the commitment to achieve the positive NFE. There is no allegation of any malafide on the part of the Appellant and Shri Prafulbhai Bavishiya, Director. Further, penalty of note not more than 0.5% shall be imposed on such cases.

5.0 Comments on the Appeal were obtained from the office of the DC, KASEZ. The DC vide letter dated 28.01.2021 stated as under: -

- (i) As per the para 6.05(c) of FTP, 2015-20, the failure to achieve positive NFE shall render the unit liable to penal action under FT(D&R)Act, 1992. Appellant was NFE negative by Rs. 6.45 crores in the block period 2012-17.
- (ii) Shri Prafulbhai Bavishiya, Director of the firm did not fulfill the commitment given to the DC at the time of Personal hearing that they will achieve the positive NFE after broad banding on completion of the block period 2012-17.
- (iii) As per the SCN, charges were framed against the Appellant and its two Directors (including Shri Prafulbhai Bavishiya, Director) and SCN was also marked to them. Appellant was given a number of opportunities to be heard in person and on 10.08.2020, representative of the noticees appeared before the DC.
- (iv) The Order-in-Original was passed by DC after taking into consideration all the relevant facts and figures and as per the extant provisions of law.

6.0. I have considered the Order-in-Original dated 14.09.2020 passed by DC, KASEZ, Appeal and oral/written submissions preferred by the Appellant, comments given by the DC and all other aspects relevant to the case. It is noted that :-

- (i) The para 6.05(c) of FTP, 2015-20 stipulates as under :-

“Unit shall execute an LUT with DC concerned. Failure to ensure positive NFE or to abide by any of the terms and conditions of LoP /LoI / IL / LUT shall render the unit liable to penal action under provisions of the FT(D&R) Act, as amended, and Rules and Orders made there under, without prejudice to action under any other law /rules and cancellation or revocation of LoP / LoI / IL.”

- (ii) As per the policy/procedure, the NFE is calculated cumulatively for a period of five years and the Appellant was found to have negative NFE for the five year block period from 2012 to 2017. Hence, the action taken by the DC, KASEZ for



imposition of penalty for contravening the provisions of the FTP and conditions of the LoP is in accordance with the Act.

- (iii) As regards the quantum of penalty imposed, Adjudicating authority could not have imposed a penalty less than Rs. 10,000/- and not more than five times of the value of goods for which contravention has been made or is attempted to be made, whichever is more, as per the Section 11(2) of the FT(D&R) Act, 1992.
- (iv) The broad banding permission was given by DC, KASEZ in March, 2016 and the Appellant i.e. Lucent Cleanenergy Pvt Ltd had a limited time till 31.03.2017 to achieve positive NFE within the 5 year block period. Hence, I am inclined to take a lenient view for deciding the quantum of penalty imposed on Appellant by the DC.
- (v) Shri Prafulbhai Bavishiya was holding the post of Director in Lucent Cleanenergy Pvt Ltd and no element of *mens rea* has been established by the DC before imposing penalty on him under the provisions of the FT(D&R) Act 1992. Hence, the request for setting aside the penalty imposed on him merits consideration.

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. 01/92/171/06/AM-21/PCVI

Dated: 28.04.2022

Partial relief is granted. Amount of penalty imposed vide Order-in-Original No. KASEZ/03/2020-21 dated 11.09.2020 by DC, KASEZ on Lucent Cleanenergy Pvt Ltd is reduced from Rs. 65,00,000 to Rs. 4,00,000 (Rupees Four Lakhs Only) and penalty imposed on Shri Prafulbhai Bavishiya, Director, Lucent Cleanenergy Pvt Ltd is set aside.


28.4.

(Santosh Kumar Sarangi)
Director General of Foreign Trade

Copy to :

1. Lucent Cleanenergy Pvt. Ltd, 14/15, First Floor, Pushpak Apartment, Opp. Kaladarshan Flats, Premnathir Derasar Road, Satellite, Ahmedabad.
2. Shri Prafulbhai Bavishiya, Director, Lucent Cleanenergy Pvt. Ltd, 14/15, First Floor, Pushpak Apartment, Opp. Kaladarshan Flats, Premnathir Derasar Road, Satellite, Ahmedabad.
3. Development Commissioner, KASEZ for information and to make recoveries.
4. Additional Secretary (SEZ Division); DoC, New Delhi for information.
5. DGFT's website.



(Randheep Thakur)
Joint Director General of Foreign Trade