Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi -110011
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F. No. 01/92/171/30/AM-20/ PC-VI/36-37 Date of Order: 14 .12.2020
Date of Dispatch: 14 .12.2020

Name of the Appellant:	Kandla Polyplast (India) Pvt. Ltd. Shed No. 318&319, Type A-II, Marshalling Yard, Special Economic Zone, Gandhidham-370230, Gujarat
IEC Number:	3797000090
Order appealed against:	Order-in-Original No. KASEZ/21-22/2019-20 dated 02.05.2019 passed by the DC, KASEZ
Order-in-Appeal passed by:	Amit Yadav, DGFT

Order-in-Appeal

Kandla Polyplast (India) Pvt. Ltd., Gandhidham, Gujarat (here-in-after referred to as 'the Appellant'), an SEZ unit in Kandla Special Economic Zone (KASEZ), filed an appeal on14.06.2019 u/s 15 of the Foreign Trade (Development & Regulation) Act, 1992 (here-in-after referred to as "the Act") against Order-in-Original No. KASEZ/21-22/2019-20 dated 02.05.2019, issued from File no. KASEZ/IA/1665/96/Vol.II/1409, passed by the Development Commissioner (here-in-after referred to as 'DC'), KASEZ.

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 letter No KFTZ/IA/1665(A)/96/11340 dated 12.02.1997, as amended/extended, by the DC, KASEZ to set up unit in Kandla SEZ for manufacturing Plastic Polymer Granules and Flakes lumps/Powder / Grinding / Pallets / Bars /Agglomerates and all other such forms garbage / carry bags, polyester / pet grinding / drip irrigation pipes etc. made from raw materials from above, subject to conditions imposed therein, as per Special Economic Zones Act, 2005 (here-in-after referred to as 'SEZ Act') and the Special Economic Zones Rules, 2006 (here-in-after referred to as 'SEZ Rules') framed there under.

3.2. The Ministry of Commerce and Industries, Department of Commerce (DoC) vide circular no. C.6/10/2009-SEZ dated 17-09-2013 issued Policy Guidelines for regulating and monitoring the functioning of units in SEZs engaged in the recycling of plastic scrap/waste. Condition No. (x) of these Guidelines read as below:

"To ensure that plastic reprocessing units in SEZ fulfill their export obligations, in addition to meeting their NFE obligation, all such units would be required to ensure that certain minimum percentage of the unit's annual turnover is physically exported out of the country. The minimum physical export levels to be achieved by such units on a graduated upward scale, as a percentage of the unit's total turnover is prescribed as under:

Period	*Minimum Physical Export Obligation*
At the end of 2nd year	*Not less than 40% of the total annual turnover*
At the end of 4th year	*Not less than 80% of the total annual turnover*
At the end of 5th year	*100% of the total annual turnover*

The units will be required to continue to physically export 100%of their annual turnover, thereafter."

3.3. As per para (ix) of DoC's Guidelines dated 17.09.2013, the said progressive export obligation for plastic recycling units in SEZ was over and above the requirement of achieving the mandatory positive NFE requirement under Rule 53 of the SEZ Rules.

3.4. Accordingly, these conditions were inserted at Sl. No. 17 of the LoA of the Appellant as renewed on 12.12.2013. The Appellant accepted all the terms and conditions mentioned in the renewal letter dated 12.12.2013. According to Sub - Rule (2) of Rule 54 of the SEZ Rules, 2006, if a unit did not achieve Positive Net Foreign Exchange Earning or failed to abide by any terms and conditions of the LoA or Bond-Cum-Legal Undertaking, the said Unit was liable for penal action.

3.5. The said Policy Guidelines dated 17.9.2013 were challenged in the Hon'ble High Court of Gujarat at Ahmedabad on the grounds that those were contrary to the provisions of the SEZ Act and Rules made thereunder and also on the ground of not having followed the procedure prescribed under the SEZ Act and SEZ Rules for imposing or issuing Guidelines as per Section 5 of the SEZ Act as referred in the Policy. Vide Common *CAV* Judgment dated 24/01/2017, the Hon'ble High Court of Gujarat set aside the said Guidelines stating that the said Guidelines dated 17.09.2013 issued by the DoC were ultra vires of the provisions of the SEZ Act.

3.6. The Single Bench decision of the Hon'ble High Court of Gujarat was challenged by the Government of India in the Gujarat High Court vide Appeal No. 1548 to 1564 of 2017. It was submitted that:

i. To issue Policy Guidelines is within the powers under the SEZ Act and SEZ Rules. The provisions of Rule 18(4) of the SEZ Rules, empowers the authority i.e. the Board of Approval to insert conditions in the Letters of Approval. It was also contended that the Board is bound to follow directions of the government on the question of policy. This mandate is within the domain of the SEZ Act.

ii. The Approval Committee or the Board of Approval has the powers to modify/ reject and impose any other terms and conditions with regard to limiting the Domestic Tariff Area Sale and the policy of 17.09.2013 is therefore valid. It was further stated that Rule 15(4) of the Rules empowers the Board to incorporate such conditions in the Letter of Approval as it may deem fit.

iii. The Policy Guidelines are in consonance with the objectives of Section 5 of the SEZ Act and Rule 53 of the SEZ Rules.

3.7. The Division Bench, vide its judgment dated 20.03.2019, reversed the decision rendered by the Single Judge Bench dated 24.01.2017 and set aside the directions given therein by upholding the constitutional validity of the DoC's Policy Guidelines dated 17.09.2013. While delivering the judgment, the Hon'ble Court inter-alia observed as under:

i. The Guidelines notifying Special Economic Zone have to be read conjointly and not in isolation of each other. The Guidelines suggest promotion of export of goods and services. Hence, there is no impediment for the Union to suggest measures for Units to undertake activity which promotes exports, in line with the intentions of the SEZ Act.

ii. The Central Government is empowered by Section 55 of the SEZ Act to notify Rules for carrying out the provisions of the Act. Also, clauses (n), (0)

and (za) of sub-section (2) of section 55 indicate extent of the Rules which may be so framed. A reading of Rule 18(4) with Rule 19 clearly indicates that it is open for the Union of India to provide, while granting extension of Letter of Approval, limitations on DTA Sale.

iii. Section 9 and the Rules indicates that there is an inbuilt mechanism which empowers the Approval Committee to modify proposals, impose conditions regarding granting of approvals and subsequent renewals. When the Central Government brings out a policy change, the Board/ Approval Committee is bound to carry out such policy directions.

iv. The Approval Committee has the power to modify / reject and impose any other conditions of the Letter of Approval of SEZ Units, more particularly pertaining to limitation on the sale in Domestic Tariff Area. The power is so vested in accordance with Rule 19(2) of the SEZ Rules.

3.8. In the meantime, the Units in SEZ engaged in similar activities made representations to the DoC against the conditions as mentioned in the Policy dated 17.09.2013. After consulting with the stakeholders, DoC amended Para 3 (x) of the said Policy on 13.02.2018. As per the amended provision, the condition of Export obligation was relaxed w.e.f. 13.02.2018 as under: -

"To ensure that plastic reprocessing units in SEZ fulfill their export obligations, in addition to meeting their NFE obligation, all such units would be required to export not less than 35% of the total annual turnover."

The said conditions were incorporated in the renewed LoA of the Appellant.

3.9. Hence, the Appellant was under legal obligation to achieve physical Export obligations during 01.12.2013 to 30.11.2018 as under:

i. For the period from 01.12.2013 to 30.11.2015: 40% of the total turnover i.e. at the end of 2nd year;

ii. For the period from 01.12.2015 to 30.11.2017: 80% of the total turnover i.e. at the end of 4th year;

iii. For the period from 01.12.2017 to 12.02.2018: 100% of the total turnover;

iv. For the period from 13.02.2018 onwards: 35% of the total turnover.

3.10. However, while monitoring the performance of the Appellant for the said period, the DC observed that;

i. For the period between 1.12.2013 to 30.11.2015, it made export of only 3.54 % of the total turnover.

ii. For the period ranging between 01-12-2013 to 30-11-2017, it made exports of only 2.05 % of the total turnover.

iii. For the period 01-12-2017 to 12-02-2018, it made exports of only 6.39 % of the total turnover.

iv. During the period from 13.02.2018 to 30.11.2018 it made export equal to 8.76 % of the total turnover.

3.11. The Unit Approval Committee in its meeting no. 143 held on 05.04.2019 observed that the Appellant did not achieve the prescribed physical annual export turnover. Accordingly, a notice dated 10.04.2019 bearing File Number KASEZ/IA/EO/04/2019-20 was issued to show cause as to why LoA should not be cancelled and a penalty should not be imposed on it under Section 13 read with Section 11of the Act read with Rule 54 of the SEZ Rules, 2006. Prior to this, a Show Cause Notice bearing File No. KASEZ/1A/22/2015-16 dated 14.07.2016 had been issued to the Appellant for non-compliance of 40% physical export condition during the period from 01.12.2013 to 30.11.2015.

3.12. On examination of written submissions made by the Appellant, the DC adjudicated the matter and imposed a penalty of Rs. 419.11 Lakhs under Section 11 (2) of the Act, 1992 read with Rule 54 of the SEZ rules, 2006 for non-achievement of physical export obligations as stipulated in Policy Guidelines dated 17.09.2013, as amended. The DC dropped the SCN dated 14.07.2016 as

the SCN dated 10.04.2019 covered full five years period i.e. from 01.12.2013 to 30.11.2018.

4. Aggrieved by the above stated Adjudication Order, the Appellant filed the present Appeal. Personal Hearing was held on 6.2.2020. The Appellant, in its oral and written submissions dated 14.06.2019, 24.02.2020, and email dated 22.11.2020 broadly pleaded the following:

i. The DC has passed the O-i-O without providing sufficient time to file written reply and without hearing the Appellant in violation of the principles of natural justice.

ii. The policy was also challenged by Plastic Processors and Exporter Pvt. Ltd., a unit in NSEZ, vide Writ Tax No. 708/2018 before Hon'ble Allahabad High Court which vide order dated 7.2.2019, has held that the policy changes requiring physical exports were ultra vires of the provisions of the SEZ Act. Hence, both orders of Hon'ble Allahabad High Court and DB of the Hon'ble Gujarat High Court co-exist.

iii. The Guidelines dated 17.09.2013 were quashed by the Hon'ble High Court of Gujarat and both the Guidelines i.e. dated 17.09.2013 and 13.02.2018 were quashed by the Hon'ble High Court of Allahabad. Penalty cannot be imposed as the legality of the Guidelines was under challenge before the Courts and there was no *mens-rea* on part of the Appellant.

iv. The UAC was not competent to introduce a condition regarding minimum physical export in as much as the power vested in it under Rule 19(2) is circumscribed by provisions of Section 14(1)(d) of the SEZ Act. The aforementioned section allows the UAC to impose only such conditions in the LOA that were provided for by the Central Government under section 15(8) of the SEZ Act through Rules duly notified in the official gazette. Copies of the Rules are required to be laid before each house of the Parliament in terms of section 55(3) of the SEZ Act. However, the policy dated 17.09.2013 was not notified in the official gazette. Hence, condition of physical export in the LoA is contrary to the provisions of the statue.

v. By amending Rule 18 of the SEZ rules, The Central Government has added two sub-rules viz. 4A and 4B w.e.f. 19.09.2018. As per clause (c) of Rule 18(4B), the units engaged in clothing re-processing in SEZ are required to fulfill their export obligation in addition to meeting their NFE obligation and all such units are required to ensure that certain minimum percentage of their annual turnover is physically exported out of the country. This condition is applicable for units engaged in clothing re-processing and not units engaged in recycling of plastic waste. Further, this condition cannot be applied retrospectively.

vi. As per principal of *promissory estoppels*, the DC cannot impose an additional substantive condition of achieving export obligation through Policy Guidelines of 2013 when a substantive condition of achieving positive NFE as per SEZ Act is already in force.

vii. DoC's Guidelines dated 13.2.2018 amending para 3(x) of Guidelines dated 17.09.2013, specifically acknowledge that the stipulation regarding physical exports under policy para 3(x) dated 17.09.2013 was unachievable. On examination of this stipulation, DoC decided to amend, with immediate effect, the said para prescribing an achievable condition of export not less than 35% of the total turnover in addition to NFE. Since, this guideline dated 13.2.2018 is silent for the period 17.9.2013 to 12.2.2018, the NFE was the only requirement for that period as the Department cannot implement an unachievable condition.

viii. DoC, in various communications dated 4.5.2018, 18.4.2018 and 19.4.2018 has recognized that achieving 100% export was not techno-commercially viable or practically not achievable.

ix. Though Single Bench Order dated 24.1.2017 was overruled by DB order dated 20.3.2019, no observation was made by DB on the nature and requirement of compulsory physical export obligation. This over-ruling can only be prospective as no court can insist for complying non feasible and non-achievable condition.

x. DB of Hon'ble Gujarat High Court did not give any stay on the single Bench Order dated 24.01.2017. Hence, it was in operation till it was overruled by

DB on 20.3.2019. Therefore, during this period, the only requirement was to fulfill NFE criteria which they have complied.

xi. In accordance with Rule 80 of the SEZ Rules 2006, the penalty of 1% should be calculated on the exports which falls less than the limit of 35% and that also w.e.f. the order of DB dated 20.03.2019.

xii. The DC has not given an independent judgment while imposing the penalty of 5% of the shortfall in export value as he has imposed the penalty on the basis of decision taken by UAC in 139th meeting in the context of default by worn clothing unit.

xiii. The period from 01.12.2013 to 30.11.2015 was already covered by SCN issued in 2016. Hence the same cannot be a subject matter of the subsequent SCN issued in 2019.

xiv. This case may be kept in abeyance for the time being, as the Hon'ble Apex Court has seized of the subject matter involved in the appeal.

5. Comments on the appeal were obtained from DC. The DC vide letter F. No. KASEZ/1A/1665/96/Vol.II/6222 dated 22.08.2019, inter-alia, stated that:

i. Opportunities of PH were given to the Appellant on 16.04.2019 and 30.04.2019. However, the Appellant did not appear. Vide letter dated 22.04.2019, it sought time for filing the reply of SCN dated 10.04.2019, eighteen days were granted to it. Hence, sufficient opportunities were given to the Appellant.

ii. The Division Bench of Hon'ble High Court of Gujarat vide its Order dated 20.03.2019 allowed the LPAs No. 1548 to 1564 of 2017 and upheld the validity of DoC Guidelines dated 17.09.2013 by setting aside the Order of Single Judge dated 24.01 2017. Thus, the said progressive physical export obligation was in force during all the relevant period of time i.e. 01.12.2013 to 30.11.2018.

iii. As per Section 15(8)(b) of the SEZ Act, 2005, the Central Government may prescribe the terms and conditions, subject to which the Unit in SEZ shall undertake its authorized operations and the Government vide the said

Policy Guidelines dated 17.09.2013 imposed certain physical export obligations. As per Section 9(5) & 9(6) of SEZ Act, 2005, the BoA is bound to follow those directions.

iv. As per condition no. 17 of the unit's LoA, as renewed on 12.12.2013, the Appellant was required to fulfill the prescribed export obligation. As the Appellant failed to fulfill the prescribed export obligation, the Adjudicating Authority has rightly imposed penalty.

v. The plea of the unit for acting bona-fide is not tenable as the Appellant was required to export the goods as per LoA conditions and Policy Guidelines dated 17.09.2013 and the unit kept on making DTA sales without bothering to make exports.

vi. The decision to impose penalty equivalent to 5% of the shortfall in export value was taken to avoid any discrimination as the orders in respect of worn clothing units for similar violations was also passed by the same authority.

vii. The SCN dated 10.04.2019 was issued on the basis of information supplied by the Appellant for full five years period including the periods covered in SCN dated 14.07.2016. Hence, the DC decided to adjudicate the SCN dated 10.04.2019 and dropped the SCN dated 14.07.2016.

6. I have considered the Adjudication Order dated 02.05.2019 passed by DC, KASEZ, oral/written submissions made by the Appellant, comments received from DC, KASEZ and all other aspects relevant to the case. I find that:

i. The Appellant has not contested the quantum of sales made by it in DTA and of physical exports. The following table shows the obligation to export and actual exports:

(Rs. In Lakh)

Period	Total Sales (Rs.)	Obligation to export (%)	Obligation to export (Rs.)	Actual Exports (Rs.)	Shortfall (in Rs.)

1.12.13 to 30.11.15	5513.26	40	2205.30	195.01	2010.29
1.12.15 to 30.11.17	6781.77	80	5425.42	56.89	5368.53
1.12.17 to 12.02.18	415.80	100	415.80	26.58	389.22
13.2.18 to 30.11.18	2340.05	35	819.02	204.89	614.13
Total	15,050.88		8865.54	483.37	8382.17

ii. The DC provided ample opportunities to the Appellant to defend its case. However, it chose not to avail them rather it adopted delaying tactics by asking the documents which were already in public domain or supplied by the Appellant itself.

iii. Although, the Policy Guidelines dated 17.09.2013 were challenged before the courts, the legality of the Guidelines was upheld by the Double Bench of Hon'ble High Court of Gujarat vide order dated 20.03.2019 by setting aside the contentions of the Appellant. The said Guidelines were in force since its inception. Hence, the plea of the Appellant that Rule 18 of the SEZ Rules as amended on 19.09.2018 cannot be applied retrospectively and that the penalty imposed was illegal is not tenable.

iv. As provisions of Policy dated 17.09.2013 were applicable in the interregnum of the single bench judgment and the Division bench judgment, the plea of the Appellant that it was required to fulfill the NFE criteria only and that the imposition of penalty in case of default only after the order of the double bench is also not tenable.

v. The Appellant knew that it was required to achieve the prescribed level of physical exports. It executed an undertaking to fulfill the conditions of its LOA. Knowing the obligations fully well, the Appellant went on conducting its business, the way it suited him and continue to sell in the domestic market ignoring its obligations. Plea of the Appellant that the levels were unachievable, does not provide legitimacy to the huge sales made by it in

the domestic market. If the Appellant knew that the level of export as prescribed was unachievable, it should not have imported the goods and carried on its business resorting to DTA sales. Therefore, taking a plea that the govt. itself scaled down these levels does not absolve the Appellant from its obligations.

vi. Section 55 of the SEZ Act empowers the Central Government to notify Rules for carrying out the provisions of the Act. The paramount objective of SEZ is to promote export of goods and services. Accordingly, the Central Government is empowered to prescribe the terms and conditions that are required to be followed by the Units in SEZ to carry out its operations under Section 15(8) of the SEZ Act. The DB observed that the procedure prescribed under the SEZ Act does not require the approval of Parliament under Section 55 (3) as such an interpretation would work in thwarting the working of the Act.

vii. As per Rule 18(4) read with Rule 19 of the SEZ Rules, the Central Government/ BoA/ UAC can impose limitations on Domestic Tariff Area Sale while granting extension of Letter of Approval.

viii. The DB has observed that the concept of promissory estoppels cannot bind the Union from withdrawing the benefits when such a withdrawal is in public interest and in furtherance of a policy decision based on a rationale.

ix. Since inception of the Policy Guidelines dated 17.09.2013, the Appellant was well aware of the fact that it was mandatorily required to achieve physical export turnover as prescribed therein in addition to achieving the positive NFE criteria. The condition of Policy Guidelines was *sine qua none*. However, the Appellant did not make any effort to comply with the condition. The physical export turnover attained by the Appellant suggests that it never had an intention to do the physical exports as per the Policy Guidelines as it had exports of only 3.54% of the export turnover during 01.12.2013 to 30.11.2015; 0.84 % during 01-12-2015 to 30-11-2017; 6.39% during 01-12-2017 to 12-02-2018. Even after relaxation in the Policy Guidelines on 13.02.2018, it failed to achieve 35% threshold and could make 8.76% only.

x. As per Rule18(4)(a) of SEZ Rules, no new Plastic Reprocessing Unit is allowed to be established in SEZ and the Appellant was enjoying the benefits of doing business of recycling of imported plastic waste and scrap in SEZ. Hence, the Appellant was expected to be more vigilant and careful in achieving the export obligations. However, the Appellant, in flagrant violation of the conditions of its LOA, continued to sell in DTA without making any effort to make export as per conditions of Policy Guidelines. Hence, the default on the part of the Appellant cannot be termed as a bona-fide.

xi. As per Section 14(1) (f) of the SEZ Act, the UAC is empowered to monitor and supervise compliance of conditions subject to which the LoA has been granted to a unit. Accordingly, the UAC was empowered to discuss the matters associated with non-compliance of such conditions. There is no bar on the Adjudicating Authority to have views of the UAC before deciding a matter. Rather, the Adjudicating Authority is required to ensure that there is no discrimination in dealing with the similarly placed cases. In the present case, the Adjudicating Authority has passed the Adjudication Order independently and after due diligence.

xii. As regards Appellant's request for imposition of 1% penalty as per Rule 80 of the SEZ Rules, I find that the said Rule is not applicable in the instant case. The said Rule is not for imposition of penalty. It is for regularization of bonafide defaults for not achieving the minimum specified NFE/value addition. Here the Appellant has failed to make specified physical export and has in fact sold goods meant for exports in the domestic market. The penalty in question has been imposed under the FT(D&R) Act, 1992. As per section 11(2) of the Act, the Adjudicating could have imposed penalty up to five times of the value of goods for which contravention has been made. In the instant case, the value of goods under contravention is of Rs. 8382.17 Lakh. Therefore, the penalty amount could have been up to Rs. 41,910.85 Lakh whereas the Adjudicating Authority imposed a penalty of Rs. 419.11 Lakh only. By any stretch of imagination, such a penalty cannot be termed as unreasonable.

xiii. The Appellant has not filed any SLP before Hon'ble Supreme Court of India against the order of Division bench judgment. Therefore, I have no reason to keep the matter pending.

7. 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 hereby pass the following order:

Order

F. No. 01/92/171/30/AM-20/ PC-VI Dated: 14 .12.2020

The Appeal is dismissed.

(Amit Yadav)
Director General of Foreign Trade

Copy To:

(1) Kandla Polyplast (India) Pvt. Ltd., Shed No. 318 and 319, Type A-IIMarshalling Yard, Special Economic Zone, Gandhidham-370230 Gujarat
(2) Development Commissioner, Kandla SEZ with an advice to make recoveries.
(3) Addl. Secy, (SEZ Division), DoC, Udyog Bhavan, New Delhi for information.
(4) DGFT's web site.

(Shobhit Gupta)
Dy. Director General of Foreign Trade