

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

F.No. 18/57/2019-20/ECA-I

Date of Order: 2) .12.2021

Date of Dispatch: 24.12.2021

Name of the Applicant:

McNally Bharat Engineering Company Limited,
Ecospace Campus 2B 11F/12, New Town
Rajarhat, North 24 Parganas, Kolkata -700160

IEC No.

0288021479

Order reviewed against:

Order-in-Appeal No. 18/88/16-17/ECA/
KOL/Appeal-196 dated 27.07.2017 passed by
Additional DGFT, Kolkata

Order-in-Review passed by:

Amit Yadav, DGFT

Order-in-Review

McNally Bharat Engineering Company Limited, Kolkata (here-in-after referred to as the 'Petitioner') filed a Review Petition dated 16.01.2020 under Section 16 of the Foreign Trade (Development & Regulation) Act, 1992 as amended (here-in-after referred to as 'the Act') against Order-in-Appeal (OIA) No. 18/88/16-17/ECA/KOL/Appeal-196 dated 27.07.2017 passed by the Additional DGFT, Kolkata dismissing the appeal preferred against the Order-in-Original (OIO) dated 09.06.2016 imposing a penalty of Rs.10,48,952/- in addition to refund of Rs.1,04,89,520/- plus 15% per annum interest thereon, on the Petitioner and its Directors for ineligible refund of Terminal Excise Duty of Rs.1,04,89,520/- from RA, Kolkata.

Facts of the case:

2.1 The Petitioner obtained refund of Terminal Excise Duty (TED) for Rs.1,04,89,520/- vide approval letter dated 30.11.2011 paid on 30.12.2011 and 24.02.2012 for supply of one Slewable Boom Stacker and one Bucket Wheel to EPCG holder Essar Steel Orissa Ltd. against Invalidation No. 0359012498 dated 22.10.2009 of direct import against an EPCG Authorisation No. 0330022069 dated 17.12.2008.



2.2 Customs Receipt & Audit Department (CRAD) , Kolkata raised an objection that the supply price of Rs.17,56,46,142/- for supplied goods was inclusive of Central Excise Duty (base value 15,05,00,000/- + Excise and other taxes/duties Rs.2,51,46,142/-). The supply invoices once charged with Excise Duty and the contract value of supplies were inclusive of Excise Duty and as such the Petitioner had received the Excise Duty paid by him from the recipient which resulted in double payment of Rs.1,04,89,520/- to the Petitioner. Once a supplier receives payment inclusive of the Excise Duty from the recipient of the Capital Goods, the claim of TED refund to the supplier, cannot be allowed.

2.2. RA, Kolkata issued a letter dated 09.06.2014 requesting the Petitioner to clarify the objections raised by CRAD, Kolkata or refund the TED amount. A Show Cause Notice (SCN) dated 01.03.2016 under Rule 7(1)(k) of Foreign Trade(Regulation) Rules, 1993, as amended was also issued to the Petitioner. The Petitioner replied to the SCN, but RA, Kolkata did not find it satisfactory. The Adjudicating Authority passed an OIO No.02/40/083/00018/AM12 dated 08.06.2016 imposing a penalty of Rs. 10,48,952/- on the Petitioner and its Directors in addition to refund of Rs.1,04,89,520/- plus 15% per annum interest thereon.

3. The Petitioner filed an appeal on 15.06.2017 before the Appellate Authority. The Appellate Authority dismissed the appeal as time barred vide OIA dated 27.07.2017.

4.1 The Petitioner has now submitted a Review Petition dated 14.11.2019 to the undersigned. The Petitioner has submitted the following: -

- (i) that the appeal was dismissed only on the basis of being time barred,
- (ii) that Mr. Debasish Mukhopadhyay who was the only person in charge of export-import division was remained indisposed due to his Renal Cancer which was the sole reason for non submission of appeal petition within the due date,
- (iii) that it raised tax invoice to Essar Project India Ltd. and charged excise duty as per the provision of Central Excise Act, 1944. However, it reduced such excise duty amount from the said invoices and received payment from the customer without any excise duty. The contention of the Appellate Authority of taking double payment is baseless and without justification,
- (iv) that it did not obtain double benefit towards TED refund.



4.2 The Petition has prayed that:

- (i) the OIA dated 27.07.2017 be set aside,
- (ii) the fiscal penalty of Rs.10,48,952/- be waived off,
- (iii) waiver from refund of TED amounting to Rs. 1,04,89,520/- be granted as the documentary evidences towards non receipt of double benefit of TED has been submitted,
- (iv) revocation of IEC suspension order No 18/88/2016- 17/ECA/ KOL/ Adjn./429 dated 08.11.2019 be granted.

5. The Petitioner was granted personal hearing on 02.09.2021 which was attended by Shri Utpal Kumar Saha, DGN, Indirect Taxation of the Petitioner. He informed that based on excise invoices RA, Kolkata had allowed TED refund. Subsequently SCN was issued by RA Kolkata on the grounds that the Petitioner had obtained double benefit. He stated that base value and excise duty are clearly mentioned and it was also mentioned that excise duty is not payable. The payment received from customer through bank is minus the excise duty amount. The customer has issued a certificate on 15 May 2019 that the Petitioner may avail excise duty refund. The Petitioner also informed that all complete documents were filed on 21st May 2019 before RA, Kolkata for which the firm has an acknowledgement receipt. Shri Anand Mishra, Deputy DGFT informed that the Petitioner submitted documents on 21.05.2019 but were not examined, being time barred.

6. A report was called from RA, Kolkata. RA, Kolkata vide their letter dated 03.03.2021 furnished the facts of the case. After personal hearing, a confirmation was sought from RA, Kolkata regarding date of submission of documents by the Petitioner. RA, Kolkata vide their letter dated 01.12.2021 have forwarded a letter dated 29.11.2021 of the Petitioner alongwith copies of (i) invoices, (ii) a declaration from Essar Steel India Limited regarding non availment of CENVAT credit under the Central Excise Rules on supply of one Slewable Boom Stacker and one Bucket Wheel, and (iii) export statement.

7. I have gone through the facts and records carefully. Essar Construction (India) Limited gave a purchase order to the Petitioner for one Slewable Boom Stacker and one Bucket Wheel reclaimer at a cost of Rs. 17,56,46,142/- inclusive of excise duty and other taxes/cess. The consignee was Essar Steel Orissa Ltd. RA, Mumbai issued an invalidation number 0359012498 dated 22.10.2009 in favour of the Petitioner for supply of one Slewable Boom Stacker and one Bucket Wheel to the EPCG holder Essar Steel Orissa Limited. The Petitioner supplied these items against Advance Authorization No 0210136596 dated 18.10.2010 issued by RA, Kolkata. The invoices submitted by the firm to the consignee M/s Essar Steel Ltd (formerly Essar Steel



Orissa Ltd) indicate that excise duty has not been claimed by the petitioner and, therefore, the firm has not made any ineligible claim of refund of Terminal Excise Duty of Rs. 1,04,49,520/-

8. I, therefore, in exercise of powers vested in me under Section 16 of the Act pass the following order:

ORDER

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Dated: 21.12.2021

The Review Petition dated 16.01.2020 is upheld. Order-in-Appeal No. 18/88/16-17/ECA/KOL/Appeal-196 dated 27.07.2017 and OIO No 02/40/083000/18/AM12 dated 08/06/2016 are dismissed. The case is remanded to RA, Kolkata for de-novo consideration.



(Handwritten signature)

(Amit Yadav)

Director General of Foreign Trade

Copy To:

- (i) McNally Bharat Engineering Company Limited, Ecosope Campus 2 B, 11F/12, New Town Rajarhat North, 24 Parganas, Kolkata-600 160.
- (ii) The Addl. Director General of Foreign Trade, 4, Esplanade East, Kolkata-700 069.
- (iii) CEIB, 8th Floor, 'B' Wing, Janpath Bhawan, Janpath, New Delhi - 110001.
- ✓(iv) DGFT Website.

(Dilip Kumar)

Dy. Director General of Foreign Trade