

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

F. No. 01/92/171/100/AM-16/ PC-VI/59-60 Date of Order: 08 .01.2021
Date of Dispatch: 11 .01.2021

Name of the Appellant: Niagra Metals India Ltd.,
Vill-Laton Dana, Katani Kalan,
Chandigarh Road, Ludhiana-141113

IEC Number: 3004011778

Order appealed against: Order-in-Original No.03-335/2005-
100%EOU/9674 dated
22/23.09.2015 passed by the
Development Commissioner, Noida,
Special Economic Zone.

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

Order-in-Appeal

Niagra Metals India Ltd., Ludhiana (here-in-after referred to as 'the Appellant'), an Export Oriented unit (EOU), filed an appeal on 10.11.2015 u/s 15 of Foreign Trade (Development & Regulation) Act, 1992 (here-in-after referred to as "the Act") against Order-in-Original No. 03-335/2005-100%EOU/9674 dated 22/23.09.2015 passed by the Development Commissioner (here-in-after referred to as 'DC') Noida, Special Economic Zone (NSEZ).

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 Permission (LoP) by DC, NSEZ vide LOP No. 03-335/2005-100%EOU/9674 dated 12.05.2005, as amended, for setting up an EOU for manufacture and export of Fabricated Metal Components for use by manufacturers of Rail cars etc., as amended. The unit started commercial production on 10.11.2005. As per the terms and conditions of the LoP, the unit was required, inter-alia, to achieve Positive Net Foreign Exchange (NFE), to make only authorized clearances in the Domestic Tariff Area (DTA), to engage only in the manufacturing activities and to claim only approved wastages etc. as prescribed in the Foreign Trade Policy (FTP).
- 3.2 On 28.02.2011, the Appellant sought permission to exit from the EOU scheme as per Para 6.18(d) of the FTP. Whereas, in terms of Para 6.18(d) of FTP, 2009-14, for de-bonding under EPCG, the Appellant was required to be NFE positive. Therefore, the unit's performance was examined by NSEZ. It was observed that:
- (i) The Appellant achieved positive NFE during 1st five years block as completed on 09.11.2010 whereas it failed to achieve positive NFE in the second block period starting from 10.11.2010 to 30.09.2012 and there was negative NFE to the tune of Rs. 678.99 lakhs in contravention of provision of Para 6.5 of the FTP.
 - (ii) The Appellant neither obtained any permission, in terms of Para 6.8 of the FTP, from the DC for making sales in DTA nor submitted any application to determine the extent of permissible DTA sale and for issuing permission in terms of value of such DTA sale, in terms of Guidelines under Appendix 14-I-H of Handbook of Procedure (HBP) read with Para 6.17 of HBP.
 - (iii) Sale of goods by the Appellant, to BHEL, JCB and ISGEC for Rs.1200.75 lakhs, Rs.768.62 lakhs and Rs.298.74 lakhs respectively, claimed to be Deemed Exports, tantamount to sale in DTA as these supplies are not covered under Para 6.9 of FTP for counting towards NFE. Further, these supplies could not be treated as Third Party Exports as the Shipping Bills of the ultimate exporters did not contain name of the Appellant.
 - (iv) The Appellant resorted to "Trading" of the goods during 2008-09 and 2009-10 in contravention of provision of Para 6.1 of the FTP.
 - (v) The Appellant sold waste/scrap in DTA, on concessional rate of duty, for Rs. 906.35 lakhs claiming 14% to 30% wastage. Whereas, as per Para 6.6 (e) of the HBP read with Para 6.8(e) of the FTP, in the absence



of any application for fixation of Standard Input Output Norms (SION), wastage could be allowed up to 2% input quantity.

3.3 Accordingly, a notice dated 05.04.2013 was issued to the Appellant by DC, NSEZ to show cause as to why action should not be taken against it for making above said supplies ineligible; for imposition of penalty under Section 11 of the Act read with Para 6.6.1(c) of the FTP; for cancellation of IEC as per section 8 of the Act and for cancellation of LOP in terms of Rule 10 of the Foreign Trade (Regulation) Rules, 1993 (here-in-after referred to as "the Rules") read with section 9(4) of the Act.

3.4 In oral and written submissions before the DC, the Appellant stated that:

- (i) Amortization of the value of capital goods imported by it should be considered only if it gives an undertaking that it would not exit prior to first 10 years. No such undertaking was furnished by it. Therefore, for calculation of NFE for the second block, amortized value of capital goods imported in 1st block should not be considered in the 2nd block.
- (ii) Name of the EOU is not required to be mentioned on the Shipping Bills for the purpose of calculation of the NFE in terms of para 6.18 of HBP read with Policy Circular 19(RE-2006)/2004-09 dated 11.09.2006. Therefore, the supplies made by it to JCB and ISGEC should be counted towards fulfilment of NFE.
- (iii) Para 6.9 (e) of the FTP allows counting of supplies of goods to such organisations, which are entitled for duty free imports of such items as per General Exemption Notification issued by Ministry of Finance, towards NFE. Therefore, Deemed Exports supplies made by it to BHEL under Para 8.2(f) and (g) of FTP should be counted for fulfilment of NFE.
- (iv) Goods worth Rs. 2.42 Crore only were sold in DTA at concessional rate of duty. Scrap & rejects and goods worth Rs.53.85 Crore were sold in DTA on full payment of applicable duties/taxes. Para 6.8 of the FTP nowhere prescribes getting prior permission of the DC for such DTA sale. In terms of Para 6.38.8 of HBP, being a Status Holder, vide letter dated 26.12.2007, the Appellant intimated DC regarding such sale in DTA.
- (v) EOU Scheme does not prohibit an EOU from carrying out trading activities.
- (vi) The SION norms as specified in Appendix 182 Serial No.103 allow 15% scrap/waste generation on imported goods for engineering components using CR/HR sheets.



3.5 On examination of the Appellant's submissions, the DC found that:

- (i) Amortized value of capital goods is required to be considered while calculating NFE as per guidelines given in Appendix 14-I-G. As the unit has obtained extension of LoP for a period of another 5 years in the second block, it showed its intention to continue and to amortize the value of Capital Goods during the second block.
- (ii) As Para 9.62 of FTP clearly prescribes that export documents such as shipping bills should indicate name of both the manufacturing exporter/manufacturer and the third-party exporter. In the present cases, Shipping Bills do not contain name of the Appellant and hence, supplies to JCB and ISGEC cannot be counted towards fulfillment of NFE.
- (iii) Supplies to BHEL cannot be counted towards NFE as these supplies are neither covered under Para 6.9 (i) of FTP nor under Para 6.9 (v) of FTP. Para III(d) of Appendix 14-I-H of HBP clearly specifies the Notifications that are relevant for the purpose of Para 6.9(e) of FTP and supplies to BHEL are not covered under any of these Notifications.
- (iv) Permission or authorization from Development Commissioner is essential for availing DTA sale at concessional rate of duty in terms of Para 1(e) of Appendix 14-I-H read with Para 6.8(a) of FTP. Even no intimation was given regarding such sales after obtaining Status Certificate on 06.02.2008. Information given in Annual Performance Report (APR) as submitted by the Appellant cannot be taken as 'prior intimation'.
- (v) Para 6.1 of FTP makes it clear that only manufacturing activity is permissible under EOU Scheme and no trading activity is allowed.
- (vi) The Appellant's contention that permissible limit for selling waste is 15% is not correct as permissible limit for selling scrap/waste is 2% of input quantity as per Para 6.6(e)(i) of HBP 2009-2014. Provisions quoted by the Appellant pertain to 2002-03 policy which were amended subsequently.

3.6 In view of the above, vide Order-in-original dated 22/23.09.2015, the DC proceeded to adjudicate the matter and imposed a penalty of Rs. 50 Lakh on the Appellant.

4.0 Aggrieved by the Order-in-Original dated 22/23.09.2015, the Appellant filed the present appeal. The Appellant, in its written as well as oral submissions during personal hearing held on 06.02.2020, reiterated the



same/similar arguments made before the DC. The Appellant also made the following additional submissions vide e-mail dated 31.08.2020.

- I. In holding that the NFE in the second block period (10.11.2010 to 30.9.2012) was negative, the DC took into account the entire value of the capital goods/ raw material imported during the second block.
- II. That a company or entity needs not be only an EOU. A company could also be engaged in other domestic business apart from having an EOU unit. Only that manufacturing unit which has been declared as a Custom Bonded Premises for the EOU can avail duty free imports under the procedure for importing duty free goods into the EOU (bonded premises) for which CT1 form has to be issued by the customs department.
- III. There is no restriction in law or under the FTP for a company to import allowable goods by paying the full amount of duty thereon. In this regard, the Appellants submitted that it had in 2012 imported goods on paying full duty. The goods were not brought into the EOU unit. Hence, no entry was made in Form 4, which is a mandatory prerequisite for goods entering EOU.
- IV. Para 6.8 of the FTP provides that such units may also sell in the DTA goods up to 50% of FOB value of exports subject to fulfillment of positive NFE, on payment of concessional duties. The Para also permits the Unit, within entitlement of DTA sale, to sell in DTA its products which are similar to the products exported or expected to be exported from the Unit.
- V. In 2011, it had imported goods totaling to Rs. 65,37,520 after paying duty. The goods were utilized for domestic consumption, thus not falling within the ambit of FTP. Since, the goods were imported by paying full duty; their value was not to be taken while calculating NFE for the second block. The SCN dated 5.04.2013 did not take into account these imports.

5. Comments of DC were also obtained on the appeal and additional submissions filed by the Appellant. The DC vide letter dated 17.05.2019, 29.12.2020 and message dated 07.01.2021 has, inter-alia, stated that:

- i. As regards taking entire value of Capital Goods imported in the second block, the NFE has been correctly calculated in terms of para 6.9.1 of HBP, 2009-14 in 2nd block of operation. Amortized rate would be applicable in terms of para 6.9.4 of HBP, 2009-14 only if an undertaking is given by a unit that it will not exit to DTA in the first 10 years. Since, the appellant has not worked for 10 years, complete value of capital goods has been taken.



- ii. As regards the Appellant having a unit in DTA, as per provisions of the FTP, all inputs used for production of finished products in EOUs are required to be maintained in separate accounts.
- iii. As regards treatment of goods imported by paying customs duty, in terms of para 6.9.1 of HBP, 2009-14, all type of imported inputs, whether duty free or duty paid, are required to be taken into account for calculation of NFE.
- iv. The EOUs having Status Holder Certificate can sell finished goods in DTA under para 6.8(a) of FTP under intimation to the DC and Jurisdictional Central Excise Authority in terms of para 6.38.8 of HBP. However, there was no such intimation by the Appellant. The Appellant was issued a Status Certificate No. A-3282 dated 06.02.2008 which was valid up to 31st March 2009.
- v. The supplies to JCB and ISGEC cannot be counted towards fulfilment of NFE of this EOU. As per Para 6.18 of HBP and Policy Circular No.19 (RE-2006)/2004-09 dated 11-9-06, export documents such as shipping bills should indicate name of both manufacturing exporter/manufacturer and the 'Third Party' exporter. However, the shipping bills of the export made by JCB and ISGEC did not contain the name of the Appellant.
- vi. The supplies made to BHEL cannot be counted towards NFE as these supplies were neither covered under Para 6.9 (a) nor under Para 6.9 (e) of FTP.
- vii. As the wastage norms for the Appellant's products were not notified in SION, the permissible limit for selling scrap/waste was 2% of input quantity as per Para 6.6(e)(i) of HBP 2009-2014.
- viii. The Para 6.1 of FTP clearly prescribes essential eligibility criteria to set up a unit under EOU scheme and it states that trading activities are not covered under this scheme.

6. I have considered the Adjudication Order dated 22/23.09.2015 passed by DC, NSEZ, oral/written submissions made by the Appellant, comments of office of the DC, KASEZ and all other aspects relevant to the case. It is noted that:

- (i) For calculation of NFE, the provisions as given in Para 6.10 read with guidelines given in Appendix 14-IG for EOUs and NFE calculation as per annexure 1 to appendix 14- I-H are required to be strictly adhered to. As per guidelines, the amortization of value of capital goods imported in first block is required to be considered in second block also. Hence, the contention of the Appellant that the value of capital goods imported in the first block should not be considered in the second block is not tenable when the LoP has been extended for the second block.



- (ii) Full amount of Capital Goods imported in the second block has rightly been taken into account in the second block as the Appellant did not work beyond the second block. Rather, it applied for exit during the second block only.
- (iii) Supplies made to JCB and ISGC are domestic sales in terms of definition given in Para 9.62 of FTP for which name of both manufacturing exporter/manufacturer and third-party exporters are required to be mentioned on export documents to establish a nexus. Hence, the supplies made to JCB and ISGC cannot be counted towards fulfillment of NFE. Further, Policy circular No. 19 dated 11.09.2006 also categorically states that the Shipping Bills must indicate the names of both manufacturer and third party.
- (iv) Only such supplies as indicated in Para 6.9 of FTP are eligible for counting towards NFE calculations. I find that as per Para 6.9(e), supply of goods to such organizations which are entitled for duty free import of such items in terms of general exemption notification issued by MOF, as provided in HBP v1 are counted towards fulfillment of NFE. For the purpose of this Para, Ministry of Finance has notified certain notifications as specified in Para III (d) of Appendix 14-I-H of the HBP. Since, supplies made to BHEL are not covered by any of these notifications, hence such supplies cannot be counted towards fulfillment of NFE.
- (v) The provisions of Para 6.8(a) read with guidelines given in Appendix 14-I-H of HBP clearly prescribes that the Appellant was required to obtain prior permission of DC for making DTA sale at concessional rate of duty in terms of Para 6.8(a) of FTP. During the period the Appellant was holding Status Certificate, it was required to intimate the DC before clearance of such DTA sale. The Appellant obtained Status Certificate No. A-3282 on 06.02.2008 which was valid up to 31st March 2009. However, it failed to obtain any prior permission for clearing goods in DTA during the period prior to 06.02.2008 and after 31.03.2009. Even after getting Status Certificate, the Appellant did not intimate DC, the quantum of DTA sale. Hence, such DTA sale is in contravention of the FTP.
- (vi) Contention of the Appellant that trading activity is not prohibited under EOU scheme is not tenable as Para 6.1 of FTP specifically states that trading units are not allowed under this scheme.
- (vii) In the EOU Scheme, for calculation of NFE, there is no distinction between goods imported with or without duty. As per para 6.9.1 of HBP, 2009-14, all type of imported inputs, whether duty free or duty paid, are required to be taken into account for calculation of NFE. Hence, the



contention of the Appellant that only duty-free inputs should be taken into consideration while calculating the NFE is not tenable.

- (viii) As regards sale of scrap/waste in DTA, it is observed that in absence of any application for fixation of norms by the Appellant or any such norms appearing in the SION, the DC can allow waste within permissible limit of 2% of input quantity only for selling scrap/waste in DTA as per Para 6.6(e)(i) of HBP 2009-2014. Neither the Appellant got any higher wastage norms fixed nor wastage norms of the product manufactured by the Appellant were notified in the SION Book. Therefore, the Appellant would not be entitled to wastage higher than 2%.

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 pass the following order:

Order

F.No. 01/92/171/100/AM-16/ PC-VI/

Dated: 08.01.2021

The appeal is dismissed.



(Amit Yadav)
Director General of Foreign Trade

Copy to:

- (1) Niagra Metals India Ltd., Vill - Laton Dana, Katani Kalan, Chandigarh Road,
Ludhiana-141113.
- (2) Development Commissioner, Noida SEZ with an advice to make recoveries.
- (3) DGFT's web site



(Shobhit Gupta)

Dy. Director General of Foreign Trade