

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

F.No. 18/59/2019-20/ECA.I/

Date of Order : 08 .04.2022

Date of Despatch: 08 .04.2022

Name of the Applicant:

Hetero Drugs Limited,  
Hetero Corporate, 7-2-A2, Industrial  
Estate, Sanath Nagar, Hyderabad -500 018

IEC No.

0991013361

Order appealed against:

Order-in-Original No. 21(83)/ DRI/  
HDL(FPS)/AM20 dated 05.12.2019 passed  
by Addl. DGFT, Hyderabad

Order-in-Appeal passed by:

Santosh Kumar Sarangi, DGFT

**Order-in-Appeal**

M/s Hetero Drugs Limited (here-in-after referred to as the 'Appellant') filed an appeal dated 25.01.2020 under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992, as amended (here-in-after referred to as 'the Act') against the Order-in-Original No. 21(83)/DRI/HDL(FPS)/AM20 dated 05.12.2019 (OIO) passed by Adjudicating Authority. The Adjudicating Authority had (i) cancelled the seventy three (73) Focus Product Scheme (FPS) Scrips issued to the Appellant, (ii) advised the Customs Authorities to recover balance excess benefits granted arising out of the cancellation of these FPS scrips, (iii) imposed a penalty of Rs. 4,00,000/- on the Appellant, and (iv) RA, Hyderabad was directed to initiate investigation in respect of FPS benefits claimed by all other bulk drug exporters where they have mis-declared the ITC HS Code as 29420090 instead of classifying them on the chemical composition of the export product.

**Brief Facts of the Case**

2.1 The Appellant submitted 1420 Shipping Bills filed against the Export of its bulk drugs during the period of April, 2011 to September, 2012 and obtained 73 FPS scrips amounting to Rs.6,93,66,257/- from RA, Hyderabad. DRI, Hyderabad





informed Addl. DGFT, Hyderabad on 02.08.2019 that they had registered a case against the Appellant for fraudulent availment and utilization of Duty Credit scrips under FPS and requested RA, Hyderabad to cancel the fraudulently availed 73 FPS duty credit scrips as per Section 9(4) of Foreign Trade (Development & Regulation) Act, 1992 read with Rule 10 of Foreign Trade (Regulation) Rules, 1993 and take further necessary action as deemed fit. In its report DRI indicated that the Appellant had misclassified the export products under the residual ITC(HS) Code 29420090 and availed duty credit scrips under FPS. However, the classification furnished in the Shipping Bills for availing Drawback (DBK) in terms of DBK schedule is at variance against the ITC (HS) Classification claimed for FPS for the same export product, that is, the Appellant declared two different classifications for the same product in the same Shipping Bill to claim two different benefits under FPS and DBK.

2.2. A Show Cause Notice (SCN) dated 15.11.2019 was issued to the Appellant by RA, Hyderabad asking them to show cause why :-

- (a) All the 73 FPS duty credit scrips as given in Annexure-I to the SCN and FPS scrip No. 0910053993 should not be cancelled as per Section 9(4) of the Foreign Trade (Development & Regulation) Act, 1992 read with Rule 10 of Foreign Trade (Regulation) Rules, 1993;
- (b) Penalty should not be imposed in terms of Section 12 of FT (D&R) Act, 1992; and
- (c) Importer Exporter Code Number should not be suspended/cancelled in terms of Section 8 of FT (D&R) Act, 1992.

2.3 The Adjudicating Authority granted PH on 29.11.2019 to the Appellant. The Appellant submitted its reply dated 29.11.2019 and made oral submissions. The Adjudicating Authority in its findings observed the following:

- (i) The Appellant was exporting bulk drugs under ITC HS Code 29420090 even before FPS was launched. It is also seen that it was exporting the goods under Advance Authorisation where however benefit is not contingent on ITC HS Codes. It is further seen that Customs authorities never objected till 2012 for declaring the said ITC HS Code.
- (ii) The Appellant had been exporting bulk drugs under the ITC HS 29420090 even when no FPS benefits were available and also the fact that after the Customs authorities starting objecting, it stopped utilizing FPS scrips already granted for the shipments made under ITC HS 29420090 and there is no malafide intention to mis-declare the ITC HS Code of the export product for claiming FPS benefits. Therefore, I like to take a lenient view on the alleged fault of exporter to declare correct ITC (HS) Codes. However, it is a fact that





HDL exported the bulk drugs under ITC HS 29420090 and claimed FPS benefits which were not due to them. To that extent FPS benefits which were wrongly passed on to the exporters are recoverable.

2.4 The Adjudicating Authority passed the Order-in-Original No. 21(82)/DRI/HLL(FPS)/AM20 dated 05.12.20019 (OIO). The Adjudicating Authority had in its order dated 05.12.20019 (i) cancelled the seventy seventy eight (78) Focus Product Scheme (FPS) Scrips (73 as mentioned in Annexure -I and 5 mentioned in Annexure-II of the OIO) issued to the Appellant, (ii) advised the Customs Authorities to recover balance excess benefits granted, arising out of the cancellation of these FPS scrips, (iii) imposed a penalty of Rs. 4,00,000/- on the Appellant, and (iv) RA, Hyderabad was directed to initiate investigation in respect of FPS benefits claimed by all other bulk drug exporters where they have mis-declared the ITC HS Code as 29420090 instead of classifying them based on the chemical composition of the export product.

3. The Appellant has submitted an appeal dated 25.01.2020 against the OIO dated 05.12.20019. The Appellant has submitted that :

- (i) It has been exporting bulk drugs for the last 15-16 years by classifying them under ITC(HS) coder 29420090 and even the customs authorities have allowed to export the bulk drugs under the said code. It followed the same classification even before FPS scheme was introduced. It did not do any misrepresentation to claim the benefit of FPS. It claimed the incentive under FPS during the period April 2011 to September 2012,
- (ii) All other bulk drug exporters also used the same code for all the bulk drugs exported pre and post the scheme. Customs Authorities never raised any objection to any one of the exporters,
- (iii) It declared two different ITC HS Codes for same product - one is as per the regular practice and another is as per DBK notification in 6 shipping bill and this is due to lack of awareness to claim DBK incentive. . On issue of the letter dated 30.03.2017 by DGFT asking it to repay the incentive claimed under FPS and DBK on one shipping bill, it repaid the same alongwith interest vide challan No. 16401 dated 02.05.2017,
- (iv) The Adjudicating Authority erred in imposing penalty on the Appellant though acknowledging the fact that the said ITC HS code was used by the Appellant and all other manufacturer exporters even prior to the introduction of the scheme and there was no malafide on the part of the Appellant,
- (v) The Adjudicating Authority erred in imposing the penalty without mentioning under which section of FT(D&R) Act the said penalty was imposed. In the SCN, it was proposed that penalty would be imposed under



*R.M.*



Section 12 of the said Act. But this Section does not pertain to imposition of penalty under this Act,

- (vi) The Adjudication Authority traversed beyond his powers by recording his advice to the customs authorities to collect the balance amount of duty foregone against the said licences. Such advice by way of part of the adjudication order is not correct particularly when it is a settled law that if the imports were made using the scrips which were in force at the time of imports, duty on the same cannot be demanded.

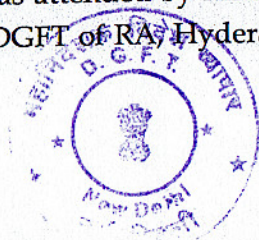
4. The Appellant has prayed for :

- (i) waiver of the the deposit of penalty amount and stay of operation of OIO dated 05.12.20019;
- (ii) setting aside the OIO dated 05.12.20019 and pass such other orders as deemed fit in the interest of justice.

5.1. The Appellate Authority granted the Personal Hearing (PH) to the Appellant on 16.12.2021. Ms Siri Reddy, Advocate attended the PH. She stated that the adjudicating authority had imposed penalty without mentioning the section under the Act it was imposed and that the SCN indicated that penalty to be imposed under section 12 which however does not pertain to imposition of penalty under the Act and therefore should be quashed. She informed that there are judicial pronouncements where it has been judged that penalty cannot be imposed if intention of such imposition is not indicated. The advocate stated that she would file documents to that effect in two weeks.

5.2. The Advocate of the Appellant has furnished an order dated 16.09.2016 in SCA No. 12597/2016 of the Hon'ble High Court of Gujarat. In this case, Development Commissioner, Kandla issued Show Cause Notice dated 11.12.2013 to Safari Fine Clothing Pvt. Ltd., KASEZ, Gandhidham for imposition of penalty under Rule 25 of SEZ Rules and Section 9 of FT(D&R) Act, 1992. Neither of these provisions pertain to penalty. There was no proposal in the SCN for imposition of penalty under Section 11 of FT(D&R) Act, 1992, but, the Development Commissioner, Kandla imposed penalty under Section 11(2) of FT(D&R) Act, 1992 vide OIO dated 73.02.2073. The Hon'ble Court observed that no such penalty could be imposed merely referring to some allegations in the SCN and dismissed the OIO dated 73.02.2073.

5.3 The matter was subsequently posted for another Personal Hearing on 08.04.2022 which was attended by Ms Siri Reddy, Advocate of the Appellant & Shri Poonam Kumar, DDGFT of RA, Hyderabad. The advocate Ms Siri Reddy reiterated



8.4.



the issue that the penalty amount was unjustified as there was no malafide intent in the misclassification and that the SCN of RA, Hyderabad referred to section 12 of the Act in which there is no reference to imposition of penalty by Adjudicating Authority. Shri Poonam Kumar, DDG appeared on behalf of RA, Hyderabad. He stated that the firm had used two different classification for the same export product obtaining benefits under DBK and FPS and therefore it was a case of misclassification.

6.1 I have gone through the facts and records of the case. The Appellant had obtained seventy three FPS scrips of Rs. 6,93,66,257/- on the basis of 1420 shipping bills where the classification of export products as per ITC(HS) Code was 29420090. However the DRI in its report submitted to the RA, Hyderabad mentioned that for the same export product a different classification was used for claiming Duty Drawback (DBK) benefits. A few illustrative examples were quoted by DRI in its report which indicated that in about twenty shipping bills, different classification for the same export product was used to claim FPS & DBK benefits. Thus, the Appellant was aware of the correct classification of its export product and the misclassification was resorted to claim FPS benefits.

6.2 It is a fact that the SCN dated 15.11.2019 issued by RA, Hyderabad inter-alia stated as to why penalty should not be imposed under Section 12 of the FT(D&R) Act, 1992 which has no reference to imposition of penalty by Adjudicating Authority. However, there was intent and indication on the part of the Adjudicating Authority to impose penalty after hearing the Appellant if the facts and circumstances of the case warranted. The mere typographical error cannot overrule the broad intent expressed in the SCN to impose penalty if the circumstances justified the same. It is observed that the Appellant in its reply dated 29.11.2019 to the SCN had not brought to the notice of the Adjudicating Authority that the penalty provision quoted of FT(D&R) Act in the SCN was incorrect. Having participated in the proceedings which had indicated that penalty could be imposed, albeit an incorrect section was mentioned, indicates an inconsistent action on the part of the Appellant and therefore cannot claim exemption from payment of penalty solely on the ground that an incorrect section was mentioned while referring to penalty under the Act.

6.3. The Appellant in its reply to SCN has admitted that they had used two different ITC HS Codes which they claim was inadvertent and due to lack of knowledge but which allowed the Appellant to claim ineligible benefit to the extent of Rs 6,93,66,257/- which it is liable to pay back. It is also observed that Appellant has utilized Rs. 5,86,69,446/- out of scrips worth Rs. 6,93,66,257/ that were issued and has paid back Rs. 5,86,69,446/- .





7. I, therefore, in exercise of powers vested in me under Section 15 of the Act pass the following order

**ORDER**

F.No.18/59/201920/ECA.I/15

Date: 08 .04.2022

The Appeal is dismissed. The Appellant is directed to pay the penalty of Rs. 4.00 lakhs within one month of issue of the order failing which the IEC of the firm shall be suspended.



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(Santosh Kumar Sarangi)  
Director General of Foreign Trade

Copy to:-

1. Hetero Drugs Limited, Hetero Corporate, 7-2-A2, Industrial Estate, Sanath Nagar, Hyderabad -500 018
2. The Addl. Director General of Foreign Trade, Hyderabad.
3. Central Economic Intelligence Bureau, 1<sup>st</sup>, 6<sup>th</sup> & 8<sup>th</sup> Floor, 'B' Wing, Janpath Bhawan, Janpath, New Delhi.
- ✓ 4. DGFT Website.

*(Handwritten signature)*

(Dilip Kumar)

Dy. Director General of Foreign Trade