

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

F.No. 01/92/171/31/AM-16/PC-VI/80/884, TR.No. 93 Date of Order: 22 .02.2021

Date of Dispatch: 22 .02.2021

Name of the Appellant: **Sapling Agrotech Pvt. Ltd.,
123A, A.J.C. Bose Road,
Kolkata - 700 014**

IEC No. : **4004000033**

Order appealed against: **Order-in-Original No. 2(1)/S-31/2003/2254 dated
23.09.2013 passed by the Development
Commissioner, Falta Special Economic Zone**

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

Order-in-Appeal

Sapling Agrotech Pvt. Ltd., Kolkata (hereinafter referred to as "the Appellant"), an EOU unit, filed an Appeal dated 08.11.2013 before the Additional Secretary, Department of Commerce under the Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order-in-Original dated 23.09.2013 (issued from F.No. 2(1)/S-31/2003/2254) passed by the Development Commissioner (hereinafter referred to as "DC"), Falta Special Economic Zone (FSEZ).

2.0. 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 DC, Special Economic Zones as Adjudicating Authorities. Hence, the present appeal is now before me.

3.0. **Brief facts of the case :**

3.1. Sapling Agrotech Pvt. Ltd., Kolkata was issued a Letter of Permission (LOP) on 05.05.2003 by DC, FSEZ for setting up a 100% EOU at Nandapur, Uchalan, Distt. Bardhman (West Bengal) having an annual production capacity of 1500



MT, as amended from time to time, for the manufacture and export of mushroom, subject to the conditions imposed therein. The validity of the LOP was three years from the date of issuance. As per the LOP, the Appellant was required to fulfill export performance by exporting the entire production to GCA/Hard Currency Area and also execute a Legal Undertaking (LUT). The Appellant submitted a LUT dated 05.08.2003 which was accepted by the DC.

- 3.2. Appellant vide letters dated 30.03.2006 and 11.04.2006 requested for extension of LOP for six months due to difficulty in implementing the project within the initial validity period. DC vide letter dated 21.04.2006 extended the LOP upto 04.01.2007. The Appellant vide letter dated 27.12.2006 informed that the trial production would commence on 31.12.2006 and requested for a revalidated Green Card. DC vide letter dated 13.07.2007 revalidated the Green Card.
- 3.3. Appellant vide letter dated 09.07.2007 informed that the Commercial production of the Unit has started from 16.03.2007. Upon a request made by the Appellant vide letter dated 14.07.2007, permission was granted to the Unit for enhancement of annual production capacity from 1500 MT to 2245 MT.
- 3.4. DC vide letter dated 05.02.2010 asked the Appellant about the status of the activities carried out by it as it had not submitted the Annual Performance Reports (APRs) for the FY 2007-08 and 2008-09. DC vide letter dated 20.04.2010 requested the Central Excise Authority for information about the activities undertaken by the Appellant.
- 3.5. Assistant Commissioner, Central Excise informed vide letter dated 11.06.2010 that the factory was closed and there was no one else except the gate keeper. Later, Assistant Commissioner, Central Excise vide letter dated 25.06.2010 enclosed unit's letter dated 24.05.2010 intimating that due to non-availability of working capital the production had stopped and they had sold the negligible production to DTA.
- 3.6. DC issued a Show-cause Notice (SCN) dated 28.06.2010 to the Appellant as why the LOP should not be cancelled for violation of conditions of LUT, provisions of Foreign Trade Policy (FTP) as well as various Rules and Regulations. Later, DC issued another SCN dated 18.8.2010 as to why further imports and DTA sale should not be suspended for violation of the provisions of HBP for non-submission of APRs within time. As no reply was received, a reminder was sent vide letter dated 23.09.2010.
- 3.7. DC vide letter dated 12.10.2011 requested the Appellant to clarify the reason for making DTA sale worth Rs. 31 lakhs (as per the APR for 2009-10) without prior permission from it.

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- 3.8. DC issued a SCN dated 24.06.2011 to the Appellant as to why LOP should not be cancelled in terms of the provisions of the HBP and Section 9 of the Act.
- 3.9. Appellant vide letter dated 11.07.2011 submitted that the situation was beyond their control and requested not to cancel the LOP, allow DTA sale and further imports so that the unit could start commercial production.
- 3.10. The validity of the LOP was extended from time to time and it lapsed on 16.03.2012.
- 3.11. Appellant vide letter dated 07.03.2012 requested to re-start its operation and for extension of the LOP and Green Card. DC extended the validity of the Green Card upto 15.03.2013.
- 3.12. On 23.01.2013, during the joint monitoring of the activities of the Unit, the MD of the Unit explained that it had been operating under 100% EOU Scheme on trial run basis and could not commence commercial production in view of its inability to finance the project in the absence of adequate working capital fund from the bank.
- 3.13. DC issued a SCN dated 10.07.2013 to the Appellant as to why for non-implementation of the project, non-submission of APRs for violation of the terms and conditions of the LOP and LUT, penalty should not be imposed in terms of Sections 11 and 13 of the Act.
- 4.0. The Appellant in its written submissions and Personal Hearing before the DC on 12.08.2013 stated that:-

- (i) Appellant had sent four status reports to the DC submitting that Exim Bank was not giving approval to gain access of various contractors, men and materials to commence business activities in various sectors and sought DC's kind intervention to resolve this. In the absence of the Exim Bank's co-operation the smooth progress of various activities was hampered.
- (ii) A meeting was convened by the DC on 12.03.2013 with the representatives of the Exim Bank and Appellant, in which DC issued directives for extending the bank's co-operation to the Appellant.
- (iii) Due to a serious ailment of their Chief Managing Director (CMD) there was a disruption in the activities. Only the CMD had the complete technical knowledge of all the details of the plant and machineries, overall responsibilities. The project management for the re-start had to wait for return of the CMD. Later, CMD visited the Appellant's Unit on



26.06.2013 and 29.06.2013 to commence activities within its premises and action has been undertaken to re-start the project.

5.0. DC after going through the contents of the SCN and all other related documents, proceeded to adjudicate the matter and cancelled the LOP which had lapsed on 16.03.2012, imposed a penalty of Rs. 10 crores on the Appellant for non-fulfillment of NFE equivalent to 100% of the duty, interest, fine and penalty, a penalty of Rs. 5 lakh each on the Directors for non-performance and a penalty of Rs. 75,000/- for non-submission of APRs for 3 years on the Appellant vide Order-in-Original dated 23.09.2013 for violation of provisions of the Act, LOP, LUT, FTP 2009-14 and HBP 2009-14 with the following observations :-

- (i) LOP was issued to the Appellant in 2003 to commence production. The production started from 16.03.2007 and goods produced for a value of approx. Rs. 34 lakhs were sold in the DTA without prior approval of DC.
- (ii) CMD of the Unit has stated that the project would restart in the month of August/early September, 2013. However, there was no activity in the Unit's premises till date.
- (iii) Central Excise Commissionerate had issued an adjudication order dated 24.02.2012 imposing duty, interest and penalty of Rs. 5 crores. The Appellant has filed an Appeal against the adjudication order before the CESTAT.

6.0. Aggrieved by the above stated adjudication order, the Appellant has filed the present Appeal. Office of the DC, FSEZ has furnished following comments on the Appeal vide letter dated 04.12.2013:-

- (i) There is no cogent reason, in terms of the FTP/HBP, FTDR Act & Rules for giving indefinite period of time to implement any project.
- (ii) The Appellant has violated the provisions of the LOP, FTP, HBP, FT(D&R) Act & FT(Regulation) Rules and any other Rules & guidelines.
- (iii) The LOP of the Appellant has been cancelled after giving sufficient opportunities for implementation of the project, as provided in the FTP/HBP.

6.1. During the personal hearing on 02.06.2015, the Appellant was asked to deposit a LUT for the balance amount of penalty of Rs. 10.14 crores on behalf of the firm and its three Directors.



6.2. In the personal hearing on 16.06.2015, the Appellant submitted a LUT for payment of penalty which was handed over to an official of DC, FSEZ for safe custody and further necessary action.

6.3. In the next hearing on 22.06.2015, an interim order was passed staying the Order-in-Original of the DC and keeping it in abeyance upto 15.09.2015. In this period, the Appellant was also asked to take following action as per its commitment:-

- (i) It shall settle all outstanding dues of all the Banks.
- (ii) It may seek revalidation/extension of LOP from the Board of Approval, which is the competent authority in this regard, in terms of provisions of FTP and submit decision of BOA to this Authority.
- (iii) The commitments made by the appellant in the LUT shall be reflected in the balance sheet and Accounts of the firm and evidence of the same shall be submitted to this Authority; and
- (iv) It shall install the "Canning Line" required for packaging and such other plant and machinery as required for starting the production.

7.0. The Appellant has been granted opportunities of personal hearing from time to time. The Appellant in its written submissions and oral submissions in the Personal hearing on 07.01.2021 stated that:-

- (i) The Appellant's unit was about to restart its operations by obtaining fresh funds from strategic investors but due to sudden sickness of the CMD it failed to re-start within the specified period mentioned on the Green card.
- (ii) DC from time to time extended the LOP/Green card of the Appellant mainly based on its realization about the readiness of the projects, investment details of the promoters and the financial partners, Buy Back Guarantee of the products, employment potential etc.
- (iii) DC did not consider that the operations being carried out in the Appellant's Unit were slowed down for want of working capital which was due to unreasonable lock in disbursement of sanctioned loan from Union Bank of India (UBI) without assigning any explicit reason. After the promoters had arranged working capital investments, the LOP was cancelled.
- (iv) DC failed to consider the fact that the Appellant had started its trial production. But due to shortage of working capital and packing credit it had to operate only 10 rooms (i.e. 30 % of their unit capacity). For technical reasons, they cannot make use of the 'Canning Lane facility'



for export of the products taken out of trial production. As the products were of perishable nature they could not be exported without canning and they were locally disposed of. As a result the Appellants mistakenly failed to observe 100% EOU formalities for such disposal. But the same was not done clandestinely and was recorded in their Book of Accounts and informed to the DC belatedly.

- (v) Appellant's Unit was a private limited company and its shareholders had invested around Rs. 7.06 crores out of total investment of Rs. 24.79 crores. A Netherlands based company had also given buy back guarantee. The promoters were inclined to re-start the unit and had also arranged the fund required for working capital and packing credit. At this juncture, cancellation of LOP and imposition of penalty thereof was not justified and proper.
- (vi) Appellant's Unit was not operational in years 2010-11 to 12-13 and they had informed DC consistently but did not submit the APRs. It was incumbent on the part of the Appellant for submission of NIL performance APR for non-violation of LUT, which was subsequently regularized. On this count cancellation of LOP was unjustified.
- (vii) The LOP of the Appellant lapsed on 16.03.2012. On 12.03.2013 it applied for the extension of validity period of LoP and Green Card but only the Green Card was renewed upto 15.03.2013 without extending the validity period of LOP, which is not tenable.
- (viii) The alleged gross non-performance of the Appellant's unit was not intentional but was due to untoward situation resulting from the act of UBI. No additional aids were taken from other banks, on the face of NPA declaration by UBI nor did the promoters have any scope of sourcing funds at that point.
- (ix) In compliance with the interim order 22.06.2015 of Appellate Authority, the Appellant could not settle all the dues with Bank since no investor was willing to invest money. They were searching for an investor for more than five years. Meanwhile, the Banks have handed over the assets to Asset Reconstruction Committee.
- (x) Recently, M/s. Market Pulse Global Corporation, a strategic investor has sanctioned a project loan worth Rs. 36 crores in September, 2020. The strategic investor has also issued a demand draft for Rs. 5.15 crores for one time settlement of dues of all the Assets Reconstruction Companies i.e. Edelweiss Asset Reconstruction Company Limited (Assignee of

Exim bank) and M/s. Pegasus Assets Reconstruction Pvt. Ltd. (Assignee of Union Bank of India).

- (xi) Since the loan has been sanctioned, the work can re-start in the Unit after a period of 3-4 months and requested for extension/revalidation of the LOP.

8.0. I have considered the Order-in-Original dated 23.09.2013 passed by the DC, FSEZ, Appeal preferred by the Appellant, oral/written submissions made by the Appellant, comments given by the DC on the appeal and all other aspects relevant to the case. It is noted that:-

- (i) Appellant was issued a LOP on 05.05.2003 for setting up a 100% EOU, subject to the conditions imposed therein. On the request of the Appellant, the validity of the LOP has been extended by the DC, FSEZ from time to time upto 16.03.2012.
- (ii) Appellant has stated that it had started trial production from 16.03.2007. For technical reasons, they could not make use of the 'Canning Lane facility' for export of the products taken out of trial production. Since the products were of perishable nature they could not be exported without canning and they were disposed of locally. After the trial run, the production could not be continued.
- (iii) Appellant was afforded an opportunity vide an interim order dated 22.06.2015 to re-pay the outstanding dues of banks, take steps for starting production etc.
- (iv) On 07.01.2021, the Appellant informed of its inability to comply with the order dated 22.06.2015 till date because they could not find any suitable investor for more than five years. Further, the Appellant admitted that their assets are currently under the control of the Asset Reconstruction Companies i.e. Edelweiss Assets Reconstruction Company Limited (Assignee of Exim bank) and M/s. Pegasus Assets Reconstruction Pvt. Ltd. (Assignee of Union Bank of India). In September, 2020, they have been able to find an investor and accordingly seek a further time of three to four months for re-starting the production.
- (v) However, this appeal has been filed against the order dated 23.09.2013 of the DC cancelling the LOP which had lapsed on 16.03.2012. imposition of penalty for non-fulfillment of NFE equivalent to 100% of the duty, interest, fine and penalty and non-submission of APRs.



- (vi) Appellant has availed of the incentives/benefits available under the EOU Scheme. However, from 05.05.2003 (the date of grant of LOP) till date, the Appellant has failed to undertake any exports. More than 13 years ago, it produced and sold goods worth approx. Rs. 34 lakhs in the DTA, that too, without taking any prior permission from the DC. In spite of grant of an opportunity by this Authority on 22.06.2015, it has been unable to re-start its production and undertake any exports.
- (vii) A long and reasonable opportunity has already been provided to the Appellant's Unit to start operations as an EOU since 2003. Hence, there is no justification to accept its request for grant of any more time and the Appellant is liable for penal action for violation of the provisions of LOP, LUT, FTP 2009-14 and FT(D&R) Act, 1992.
- (viii) Directors of the company also cannot escape responsibility as they were in control of the operations of the Appellant and are liable for penal action for violation of the provisions of FTP 2009-14 and FT(D&R) Act, 1992.


9.0. 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. 01/92/171/31/AM 16/ PC-VI

Dated: 22 .02.2021

The appeal stands dismissed.

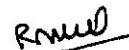


(Amit Yadav)

Director General of Foreign Trade

Copy to:

- 1) Sapling Agrotech Pvt. Ltd., 123A, A.J.C. Bose Road, Kolkata - 700 014.
- 2) Shri Subircndra Nath Bose, Director, Sapling Agrotech Pvt. Ltd., Kolkata.
- 3) Ms. Gopa Basu, Director, Sapling Agrotech Pvt. Ltd., Kolkata.
- 4) Shri Rahul Mitro, Director, Sapling Agrotech Pvt. Ltd., Kolkata.
- 5) Development Commissioner, Falta SEZ with an advance to make recoveries.
- 6) Addl. Secretary (SEZ Division), DoC, New Delhi for information.
- 7) DGFT's website.



(Randheep Thakur)

Joint Director General of Foreign Trade