

**Government of India**  
**Ministry of Commerce & Industry**  
**Directorate General of Foreign Trade**  
**Udyog Bhawan, New Delhi -110011**  
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F.No. 01/92/171/07/AM-21/PC-VI/44-45

Date of Order: 20.01.2022  
Date of Dispatch: 20.01.2022

Name of the Appellant: **Sai Wardha Power Generation Limited**  
**B-2, Warora Growth Centre, MIDC,**  
**Warora, Wardha SEZ,**  
**Chandrapur-422907**

IEC No.: **0907007236**

Order appealed against: **Order-in-Original No. SEEPZ-SEZ/NEWSEZ**  
**/WARDHA-CHNDPR/01/2008-09/12699 dated**  
**16.10.2020 passed by the Development Commissioner,**  
**SEEPZ Special Economic Zone**

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

**Order-in-Appeal**

Sai Wardha Power Generation Limited (hereinafter referred to as "the Appellant") filed an Appeal dated 05.11.2020 (received on 01.12.2020) under section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order-in-Original dated 16.10.2020 (issued from F.No. SEEPZ-SEZ/NEWSEZ/WARDHA-CHNDPR/01/2008-09/12699) passed by the Development Commissioner (hereinafter referred to as "DC"), SEEPZ Special Economic Zone (SEEPZ) imposing a penalty of Rs. 4,25,00,000/- (Rupees Four Crore Twenty five Lakhs only).

2.1. Vide Notification No. 101 (RE-2013)/2009-2014 dated the 5<sup>th</sup> 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 appeal is before me.

2.2. Any person/party deeming himself/itself aggrieved by this order, may file a review petition under the provisions of Section 16 of the FT (D&R) Act, 1992 before the Appellate Committee, Department of Commerce, New Delhi.





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

3.1. Appellant was issued a Letter of Approval (LoA) on 01.10.2008 under the SEZ Scheme for undertaking authorized operations, Electrical Energy subject to the condition that the unit shall follow the provisions of SEZ Rules, 2006 and conditions of LoA. The Appellant commenced its commercial production from 05.06.2010. One of the conditions of LOA is as under :-

*"The unit would be required to achieve positive Net Foreign Exchange (NFE) as prescribed in the Special Economic Zone Rules, 2006 for the period of your operation as a unit in the Special Economic Zone from the commencement of the production, failing which you shall be liable for penal action under the Foreign Trade (Development & Regulation) Act, 1992."*

3.2. After acceptance of the terms and conditions of the LoA, the Appellant executed the Bond-Cum-Legal Undertaking on 27.10.2008.

3.3. Appellant's performance for the period 2015-16 to 2018-19 was placed before the Approval Committee held on 17.03.2020. It was noted that the Appellant had achieved negative NFE of Rs. 55061.46 lakhs and it was decided to initiate action under the FT(D&R) Act, 1992.

3.4. As per the LoA read with Rule 53 of SEZ Rules, 2006, the Appellant was required to achieve positive NFE cumulatively for a period of five years from the date of commencement of production/from the date of renewal of LoA. In case of failure to achieve the positive NFE, the Appellant was liable for penal action under the provisions of the FT(D&R) Act, 1992.

3.5. DC, SEEPZ-SEZ issued a Show-cause Notice (SCN) dated 26.05.2020 to the Appellant as to why penal action should not be taken for not achieving positive NFE under the section 11(2) of the FT(D&R) Act, 1992.

3.6. Appellant in response to the SCN submitted written submissions dated 01.06.2020 and appeared before the DC for Personal hearing on 22.06.2020. Appellant in its written/oral submissions stated as under :-

(i) No imports were made during the years 2017-18 and 2018-19 of any capital goods, raw materials, consumables etc. and only an amount of Rs. 4.97 Crores was paid towards the ECB loans and Rs. 130 Crores towards the Amortized amount of earlier years and Rs. 130 crores for the period 2018-19 taking the total deficit amount to Rs. 265 crores.

(ii) During the previous block of 5 years, there was no import of raw materials and only Capital goods and consumable imports amounted to Rs. 25 Crores.

*My*



- (iii) Negative NFE Earnings were mainly due to the Amortized Amount amounting to Rs. 520 Crores and ECB amounting to Rs. 287 Crores.
  - (iv) ECB loan taken by the Appellant should not be considered for the computation of NFE as even a non-SEZ company takes ECB loans but no NFE has to be met by them. Therefore after exclusion of ECB, negative NFE amounts to Rs. 266.75 Crores only.
  - (v) Since December 2018, the Appellant's Unit was closed/ shut down. Earlier due to the unsteady financial condition of the Appellant its unit was running at 50% capacity. Further, it had to make payment of Rs. 0.26/- per unit towards Customs duty and was unable to avail SEZ benefits. All this resulted in un-competitiveness of power supply rates, as no other unit/Power Plant was incurring these additional costs towards making payment of Customs Duty.
  - (vi) The period till 2016-17 was already assessed and penalty was paid for the same. Hence, it cannot be reassessed and no SCN can be issued twice for the same period and same act.
- 3.7. Appellant requested DC to keep the SCN in abeyance for submitting the APRs for 2019-20 and 2020-21 for which there was negative NFE. It was further requested to adjudicate the matter by clubbing that period as Appellant had requested for exiting from SEZ scheme.
- 3.8. The APRs for 2019-20 and 2020-21 (up to August 2020) were duly scrutinized by the Specified officer and placed before Approval Committee in the meeting held on 28.09.2020. The Committee observed that the Appellant achieved negative NFE on cumulative basis amounting to Rs. 68508.34 lakhs for the period 2015-16 to 2019-20 and Rs. 966.11 Lakhs for the year 2020-21 (up to August 2020) i.e. total negative NFE for the period 2015-16 to 2020-21 (up to August 2020) was Rs. 69474.45 lakhs.
- 3.9. After noting the performance of the Appellant, Approval Committee decided to take penal action for violation of SEZ Rules. Subsequently a corrigendum dated 01.10.2020 was issued to the SCN dated 26.05.2020.
- 3.10. In the second Personal Hearing held on 08.10.2020, the Appellant stated that :-
- (i) Appellant faced financial hardships as well as challenges like delay in grant of open access, extremely high prices charged for coal supplies made to it by Western Coal Fields, denial of PPA by the state government etc.
  - (ii) Due to change in power guidelines issued by Ministry of Commerce & Industries, the Appellant's operations became economically unviable. This led to a huge financial crunch and eroded the Appellant's capital and net worth.

*By*



- (iii) Appellant was under insolvency since 08.11.2018 and NCLT vide its order dated 17.10.2019 granted relief to it by directing the government authorities to wave all past non-compliances.
- (iv) The issue of negative NFE Earnings of Rs. 86869.49 lakhs on cumulative basis from 2010-11 to 2014-15 and Rs. 30211.58 lakhs during the 2015-16 to 2016-17 was already adjudicated upon and a penalty of Rs. 10 lakhs was imposed on it and the same was paid by the Appellant.
- (v) Appellant showed a desire to exit from the SEZ scheme in 2017 but it could not do so because of non-availability of funds.

4.0. On examination of the Appellant's submissions, the DC found that :-

- (i) SCN and Corrigendum to SCN were issued on the ground that the Appellant failed to achieve positive NFE Earnings during the period 2015-16 to 2018-19, 2019-20 to 2020-21 (up to August 2020).
- (ii) Appellant violated provisions of Rules 25 and 54(2) of the SEZ Rules, 2006 and conditions No. 2 and 8 of the Bond-cum-LUT.
- (iii) Appellant had stated that NCLT directed all the Government Authorities to waive all past non-compliances of the corporate debtor. But NCLT had mentioned the non-compliances and not the obligations of any SEZ unit as per the SEZ Act and Rules. Nowhere in the order of NCLT it was mentioned that the obligations of the Appellant as a SEZ Unit were directed to be waived off.
- (iv) SEZ Act has an overriding effect over other Acts and Laws, including the IBC, 2016. The appeal against the order of NCLT was dismissed.
- (v) Appellant has not utilized the option available under the Rule 80 of SEZ Rules, 2006 to regularize the negative NFE.

5.0. DC after going through the contents of the SCN and all other related documents proceeded to adjudicate the matter vide Order-in-Original dated 16.10.2020 and passed the following order :-

*"I impose a penalty of Rs. 425 Lakhs (Rupees Four Hundred Twenty Five Lakhs only) on M/s. Sai Wardha Power Generation Limited in terms of Section 11 of the FT (D & R) Act, 1992, for the aforesaid violations of SEZ Rules. However, the said penalty shall stand reduced to Rs. 25 Lakhs in case M/s. Sai Wardha Power Generation Limited exercises the option available under Rule 80 of the SEZ Rules, 2006."*

6.0. Aggrieved by the Order-in-Original dated 16.10.2020, the Appellant has filed the present Appeal. Shri Saurabh Dixit, Advocate appeared on behalf of the Appellant in the Personal hearings held in person on 12.08.2021 and 23.12.2021. Shri Vishal Parakh, AGM was also



present in the hearing held on 12.08.2021. The Appellant in its written and oral submissions has raised the following grounds :-

- (i) Due to various policy bottlenecks completely beyond its control, the SEZ unit could not achieve positive NFE from the beginning. A nominal token penalty of Rs. 10 lakhs was imposed on the Appellant for the blocks during 2010-11 to 2016-17 by the DC, SEEPZ, Mumbai vide Order dated 19.06.2017.
- (ii) The position worsened in subsequent period and there was negative NFE. DC issued the SCN dated 26.05.2020 and corrigendum dated 01.10.2020 for penalizing the Appellant for the period 2017-18 to August 2020.
- (iii) Appellant had applied for de-notification from SEZ vide application dated 24.03.2017 but no action was taken thereon by DC.
- (iv) In the meanwhile, proceedings were initiated against the Company under IBC, 2016 and matter was before NCLT since 08.11.2018. The business operations were taken over by Resolution Professional (RP) on 09.11.2018 and unilaterally the business operations were shut down in December 2018. It had become impossible for the company to do any activity towards achieving NFE after initiation of IBC process.
- (v) Despite sending intimation letter dated 14.11.2018 to the DC, SEEPZ about IBC proceedings, the DC neither participated nor lodged any claim for existing / future liabilities which may arise before the RP.
- (vi) NCLT vide Order dated 17.10.2019 granted relief by directing the relevant governmental authorities to waive all past non compliances of the Corporate Debtor in relation to any undertakings.
- (vii) IBC, 2016 has precedence over all other laws in India and once the relief is granted by NCLT under IBC, all past non-compliances/dues/recoveries/proceedings/offences/penalties etc. for past period can be initiated/continued or held against the successful Resolution Applicant (the Appellant in this case).
- (viii) If for a block of 7 years (2010-11 to 2016-17), a token penalty of Rs. 10 lakhs was imposed under Section 11 of FT(D&R) Act, 1992, it is inconceivable how a high quantum of penalty can be imposed for the years 2017-18 till August, 2020, especially when the situation had become even more grim after 2017 and it had become economically unviable to continue business.
- (ix) During 2017-18 and 2018-19, there was no import of any Capital goods, raw materials or consumables etc. at all and only Rs. 4.97 crores were spent on ECB loans and Rs. 130 crores was the amortized amount for earlier years. The total net deficit as such was much less. The Company had already applied on 24.03.17 for de-notification from SEZ and had filed reminder on 14.11.19 for this purpose, and



eventually the DC, SEZ granted final exit after almost one year from such reminder, in October 2020.

- (x) If the DC had entertained the de-notification request within time, there would have been no question of negative NFE during period 2017-18 to August 2020. In any case, final exit should be considered effective from 24.03.2017/ 14.11.2019, i.e. date of application or date of reminder request and there is no question of any NFE required to be achieved during 2017-18 onwards.
- (xi) Appellant incurred avoidable Customs duty liability of approx. Rs. 25.36 Crores on electricity cleared in DTA after NCLT final order dated 17.10.2019 till final exit being granted in October, 2020.
- (xii) The order of NCLT was upheld by the NCLAT in its judgment dated 23.07.2020 upon an appeal preferred by the Specified Officer, SEZ, Warora-Chandrapur, Maharashtra.
- (xiii) It is impermissible to penalize the new entrant / buyer who has assumed control of the Appellant under IBC proceedings for past non-compliances and IBC, 2016 specifically grants protection against this, which was not considered by the DC in the Order-in-Original.
- (xiv) DC in the Order-in-Original has itself expressed a view that benefit under Rule 80 of SEZ Rules, 2006 is available to the Appellant, meaning thereby that the present case is one of bonafide default.

7.0. Comments on the Appeal were obtained from the office of the DC, SEEPZ. The DC vide letters dated 09.04.2021 and 09.09.2021, inter-alia, stated as under :-

- (i) The comparison of two penalties of different block period is not correct.
- (ii) NCLT in its order had mentioned the non-compliances and not the obligations of any SEZ unit as per SEZ Act and Rules. There is no mention in the order of NCLT that the obligations of the Appellant as SEZ unit have been directed to be waived off. These obligations shall continue to be in force till the Appellant remains as SEZ unit.
- (iii) The order of the NCLT was appealed before the NCLAT New Delhi. Though the Appeal was dismissed on merits, however the issue of the imposition of penalty by the DC, SEEPZ and exit from the SEZ has been dealt with at length by the Hon'ble NCLAT in different paras.
- (iv) NCLAT has held that the SEZ Act 2005 has overriding effect and whenever the extant laws dealing with the matters dealt with under the Act are inconsistent with the provisions of the Act, the provision of the Act will prevail. It has also been noted that the dues or penalty payable is to be calculated at the time of exit





noted that the dues or penalty payable is to be calculated at the time of exit from SEZ with the approval of the DC and subject to payment of applicable duties.

- (v) Appellant violated the Rule 54 of the SEZ Rules, 2006 by not achieving the positive NFE which is the basic criteria of performance of the unit. There is a negative NFE of Rs. 69474.45 lakhs for the period 2015-16 to 2020-21 (upto August 2020) which is a very conspicuous non-performance on the part of Appellant.
- (vi) In view of the findings of the NCLAT with regards to the provisions of the SEZ Act and conclusion to the effect that the Adjudicating Authority (NCLT) has not encroached upon the jurisdiction of the DC under the Act, the DC had every authority and power to impose penalty on the Appellant as it had prior to passing of the order by NCLT.
- (vii) Appellant had come for exit under section 74 of the SEZ Act but could not exit as they had not paid Custom duties. Rule 54 of SEZ Rules, 2006 itself provides for the action. Hence, the proceedings for penal action were started under the said Rule and the penalty was imposed as per the provisions of the said Act.
- (viii) Adjudicating authority had given the opportunity to the Appellant under Rule 80 of the SEZ Rules, 2006 to regulate the shortfall in NFE.

8.0. I have considered the Order-in-Original dated 16.10.2020 passed by the DC, SEEPZ-SEZ, Appeal preferred by the Appellant, oral/written submissions made by the Appellant, comments given by the DC and all other aspects relevant to the case. It is noted that :-

- (i) DC issued Show-cause Notice dated 26.05.2020 and corrigendum dated 01.10.2020 to the Appellant for having negative NFE of Rs. 69474.45 lakhs during the period 2015-16 to 2018-19, 2019-20 to 2020-21 (up to August 2020).
- (ii) Since the negative NFE of Rs. 28956 lakhs for period 2015-16 to 2016-17 had already been adjudicated earlier, DC considered the negative NFE of Rs. 40518 lakhs for the period 2017-18 to 2020-21 (upto August, 2020).
- (iii) DC imposed a penalty of Rs. 425 lakhs on the Appellant vide Order-in-Original dated 16.10.2020. It was further directed that the said penalty shall stand reduced to Rs. 25 Lakhs in case the Appellant exercises the option available under Rule 80 of the SEZ Rules, 2006.
- (iv) As per the Rules 25 and 54 of the SEZ Rules, 2006, if a unit in SEZ has not achieved positive NFE it shall be liable for penal action under the provisions of the FT(D&R) Act, 1992.





(v) Rule 80 which been inserted w.e.f. 19.09.2018 in the SEZ Rules, states that :-

*“if a Special Economic Zone Unit, in case of bona fide default, fails to achieve the minimum specified Net Foreign Exchange or specified value addition, then such shortfall may be regularized after the Unit deposits an amount equal to one per cent.”*

(vi) Rule 80 of SEZ Rules, 2006 mentions about 'bona fide default' i.e. SEZ unit inspite of its earnest efforts was unable to achieve minimum specified NFE Earnings. This rule was in force during the period for which negative NFE was calculated by the DC, SCNs were issued and later penalty was imposed.

(vii) In the Order-in-Original dated 16.10.2020, DC has given an option to the Appellant to opt for Rule 80 of SEZ Rules, 2006 for reduction in penalty to Rs. 25 lakhs.

9.0. In view of the above, in the 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 5<sup>th</sup> December 2014, I pass the following order :-

**Order**

F.No. 01/92/171/07/AM -21/ PC-VI

Dated: 20.01.2022

Order-in-Original No. SEEPZ-SEZ/NEWSEZ/WARDHA-CHNDPR/01/2008-09/12699 dated 16.10.2020 is set aside. The case is remanded back to the DC, SEEPZ-SEZ with the directions to examine the case de-novo and to pass an appropriate speaking order as per extant law after taking into account the Appellants submissions and giving the Appellant an option to regularize the shortfall under Rule 80 of SEZ Rules, 2006.



(Amit Yadav)

**Director General of Foreign Trade**

Copy to:

1. Sai Wardha Power Generation Limited, B-2, Warora Growth Centre, MIDC, Warora, Wardha SEZ, Chandrapur-422907.
2. Development Commissioner, SEEPZ, SEZ for compliance and necessary action.
3. Additional Secretary (SEZ Division), DoC, New Delhi for information.
4. DGFT's website.



(Randheep Thakur)

**Joint Director General of Foreign Trade**