

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

F.No. 01/92/171/15/AM-20/PC-VI/19

Date of Order: 24.09.2021
Date of Dispatch: 24.09.2021

Name of the Appellant: **Jindal Fibres**
Plot No.49 & 58, Sector-H,
Kandla SEZ,
Gandhidham (Kutch) 370230

IEC No. : **3303001189**

Order appealed against: **Order-in-Original No. KASEZ/51/2019-20 dated**
23.05.2019 Passed by the Development
Commissioner, Kandla Special Economic Zone

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

Order-in-Appeal

Jindal Fibres (hereinafter referred to as "the Appellant") filed an Appeal dated 06.06.2019 (received on 10.06.2019) under section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act") against the Order-in-Original dated 23.05.2019 (issued from F.No. KASEZ/IA/1890/2002-03/2279) passed by the Development Commissioner (hereinafter referred to as "DC"), Kandla Special Economic Zone (KASEZ) imposing a penalty of Rs. 1,41,67,000 (Rupees One Crore Forty One Lakh Sixty Seven Thousand only).

2.1. Vide Notification No. 101 (RE-2013)/2009-2014 dated 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 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.

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

3.1. Appellant was issued a Letter of Approval (LoA) by the DC, KASIEZ vide F.No. KASIEZ/IA/ 1890 /2002-03/20667 dated 03.03.2003 to set up a unit in KASIEZ for manufacturing of following items subject to the conditions imposed therein :-

S. No.	Items allowed for manufacturing	Annual Capacity as given in LoA
1	Processing & segregation of textile waste, reconditioning of clothing and manufacturing of yarn and yarn products of every description.	10,000 MTs

3.2. Appellant commenced commercial production w.e.f. 11.08.2005 and had affected duty free imports. The LOA of the Appellant was renewed on 02.05.2014. Appellant accepted the terms and conditions specified in the LoA and executed a written Bond-cum-Legal Undertaking in Form-II as required under Rule 22 of SEZ Rules, 2006.

3.3. According to the Rule 53 of the SEZ Rules, 2006, the Appellant was under an obligation to achieve positive Net Foreign Exchange (NFE) Earnings to be calculated cumulatively for a period of 5 years as per the formula given therein.

3.4. Appellant submitted its Annual Performance reports (APRs) for the five-year block period commencing from 2013-14 to 2017-18 under sub-rule (3) of Rule 22 of SEZ Rules, 2006. Appellant applied to DC for renewal of its LoA for further period of five years.

3.5. DC reviewed the performance of the Appellant and observed that the NFE Earning of the Appellant at the end of 5th year of the five year block period was negative by Rs. 2468.67 lakhs as per details given below :-

S. No.	Financial Year	NFE (Rs. in lakhs)
1.	2013-14	47.51
2.	2014-15	-486.95
3.	2015-16	-617.22
4.	2016-17	-909.57
5.	2017-18	-502.44
	Gross Total	-2468.67

3.6. According to Rule 54 of the SEZ Rules, 2006, if the Appellant fails to achieve positive NFE Earnings it shall be liable for penal action under the FT(D&R) Act, 1992 and the rules made thereunder.

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- 3.7. DC issued a Show-cause notice (SCN) dated 29.11.2018 bearing F.No. KASEZ/IA/1890/2002-03/9525-27 to the Appellant asking as to why penalty should not be imposed under Rules 25 and 54 (2) of the SEZ Rules, 2006 read with the provisions of the FT(D&R) Act, 1992 and Rule 54 of SEZ Rules for the above said violation.
- 3.8. DC granted three opportunities for personal hearing to the Appellant on 07.12.2018, 25.04.2019 and 06.05.2019. Appellant submitted written submissions dated 07.12.2018, 11.12.2018, 24.04.2019, 02.05.2019 and 03.05.2019 stating that :-
- (i) LoA No. 1890/2002-03/20667 dated 03.03.2003 issued to the Appellant was valid upto 30.11.2018. The said LoA was renewed for one year till 30.11.2019 with a condition that whatever shortfall was there in earning of NFE earnings prior to the renewal of LOA i.e. during 2011-12 to 2012-13 it was to be compensated during the next block period i.e. 2013-14 to 2017-18.
 - (ii) The NFE Earning of the Appellant upto 30.11.2013 was positive by Rs. 162.87 Lakhs. As per the rule, the positive NFE Earning till 30.11.2013 was not allowed to be carried forward.
 - (iii) The LoA was renewed from 01.12.2013 to 30.11.2018 as such the period of monitoring the NFE earnings has become due on 30.11.2018. However, in the SCN the NFE earning has been considered upto 31.03.2018 and the portion of remaining validity period of their LoA has not been considered. During the remaining period of validity i.e. from 01.04.2018 to 30.11.2018 they tried to make up the loss in NFE earning which has not been considered in the SCN.
 - (iv) Appellant submitted copies of APRs from 01.12.2013 to 30.11.2018 and stated that at the end of 5th block year period their NFE Earnings were negative by Rs. 1212.99 Lakhs.
 - (v) During the period under review, Appellant faced genuine hardships and because of prevailing adverse market conditions there was an adverse impact on the functioning of its unit.
 - (vi) As per the provisions of the SEZ Rules, 2006, Appellant had approached the Board of Approval (BOA) to grant extension them one year extension to make up the shortfall in the NFE earnings.

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4.0. DC after going through the contents of the SCN and all other related documents proceeded to adjudicate the matter vide Order-in-Original dated 23.05.2019 and imposed a penalty of Rs. 1,41,67,000/- (Rupees One Crore Forty One Lakh Sixty Seven Thousand only) on the Appellant under Rules 25 and 54(2) of the SEZ Rules, 2005, read with Section 11(2) of the FT(D&R) Act, 1992 with the following observations :-

- (i) Unit Approval Committee reviewed the performance of the Appellant for the block period 2013-14 to 2017-18 and found that it has not achieved positive NFE for the said block in contravention of the Rule 53 of the SEZ Rules, 2006.
- (ii) If the period of review is taken from 01.12.2013 to 30.11.2018, the accumulative NFE for entire period would be negative by Rs. 1416.70 lakhs instead of Rs. 1212.99 lakhs as claimed by the Appellant.
- (iii) NFE is required to be achieved on a five year period and cannot be carried forward.
- (iv) The reasons given by the Appellant like increase of customs duty, devaluation of INR, ban on import by African countries were faced by other units of SEZ also and not stand alone case of the Appellant.
- (v) Appellant had failed to produce a copy of exemption granted by the BOA.
- (vi) Rule 80 of the SEZ Rules inserted w.e.f. 19.09.2018 would not be applicable since the present case pertains to period prior to 19.09.2018. Department of Commerce has also clarified that the Rule 80 would have prospective effect.

DC dropped the proceedings initiated under Section 16 of the SEZ Act 2005 for cancellation of LoA.

5.0. Aggrieved by the Order-in-Original dated 23.05.2019, the Appellant has filed the present Appeal. The following grounds have been raised by the Appellant in its written submissions and oral submissions made by Shri S.C. Jain, Advocate appearing on behalf of the Appellant:-

- (i) The impugned order was not legal and proper and was contrary to provisions of law.
- (ii) The impugned order is bad in law as the same is in gross violation of principle of natural justice.

- (iii) DC was informed that request of Appellant to grant further period of one year to makeup for the loss in NFE Earning was pending before the BOA. DC should have kept the adjudication proceedings in abeyance till such time BOA took any decision.
- (iv) SCN was issued on 29.11.2018 giving a short period of 07 days to file the reply and the Personal Hearing was fixed on 07.12.2018. The Appellant had filed the interim replies on 07.12.2018, 1.12.2018 and 03.05.2019, wherein the PH was requested to be adjourned. DC decided to proceed ahead and adjudicate ex-parte.
- (v) Rule 80 of SEZ Rules provided for a penalty equal to 1% of the shortfall in achieving such export obligation or NFE Earning. The period of monitoring was up to 30.11.2018. SCN was issued on 29.11.2018 and the O-in-O was passed on 24.05.2019. This means Rule 80 was in force (w.e.f. 19.09.2018) and as such even if it applied prospective the penalty could have been only 1% of the shortfall in NFE as per Rule 80.
- (vi) SCN took into consideration the monitoring period from 2013-2014 to 2017-2018 but Appellant pointed out that the same should be from 01.12.2013 to 30.11.2018 as per the validity of the LoA.
- (vii) DC brought down the shortfall of Rs. 2468.67 lakhs in the SCN to Rs.1416.70 lakhs and imposed penalty of 10% of shortfall in the NFE.

6.0. Comments on the Appeal were obtained from the office of the DC, KASEZ. The DC vide letter dated 10.10.2019, inter-alia, stated as under: -

- (i) Appellant was granted three opportunities of personal hearing on 07.12.2018, 25.04.2019 and 06.05.2019. They however submitted written submissions dated 07.12.2018, 11.12.2018, 24.04.2019, 02.05.2019 and 03.05.2019 in their defence and the O-in-O was passed after considering all the facts and material evidences available on record.
- (ii) Appellant filed an appeal before the BOA to grant it one more year to make their NFE Earnings positive. However, it failed to produce such exemption before DC.
- (iii) Section 11(2) of the FT(D&R) Act, 1992, as amended, empowers the DC to impose a penalty not less than ten thousand rupees and not more than five times the value of the goods in respect of which any contravention are made.



- (iv) Rule 80 was inserted w.e.f. 19.09.2018 and provides that in cases of genuine default of non-achievement of Positive NFE the penalty should be imposed @1% of shortfall. However, Ministry of Commerce vide its letter dated 14.03.2019 clarified that "as regards such NFE calculation for a unit completing the reckoning period of five years as per relevant rule prior to the amendment dated 19.09.2018 would be dealt with under the provision of FTD&R Act. The Rule 80 inserted in SEZ rules on 19.09.2018 would apply prospectively".
- (v) SCN was issued on 29.11.2018 considering the figures upto 31.03.2018. In the O-in-O dated 23.05.2019, Adjudicating Authority has considered the period for NFE upto 30.11.2018. The present case pertains to period prior to 19.09.2018 as such Rule 80 cannot be applied in present case.

7.0. I have considered the Order-in-Original dated 23.05.2019 passed by the DC, KASEZ, 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) Each Appeal filed has to be decided on merits keeping in view the facts and circumstances of the case.
- (ii) DC issued a Show-cause Notice dated 29.11.2018 to the Appellant for having negative NFE of Rs. 2468.67 lakhs for the block period of five years from 01.04.2013 to 31.03.2018.
- (iii) After Appellant submitted that the correct block period will be 01.12.2013 to 30.11.2018 as per the validity of the LoA, DC re-calculated the shortfall in the NFE earnings for the said period as Rs. 1416.70 lakhs. DC imposed a penalty of Rs. 1,41,670/- i.e. 10% of shortfall on the Appellant vide Order-in-Original dated 23.05.2019.
- (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 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 at the time of issue of SCN dated 29.11.2018 and before expiry of the block period (01.12.2013 to 30.11.2018) for calculation of negative NFE for imposition of penalty by the DC.
- (vii) In the Order-in-Original dated 23.05.2019, DC has not given any detailed and proper justification for non-applicability of the Rule 80 of SEZ Rules, 2006 on the Appellant who had negative NFE during the five year block period 01.12.2013 to 30.11.2018.

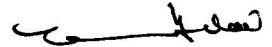
8.0. In view of the above, in the exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014 dated the 5th December 2014, I pass the following order:-

Order

F. No. 01/92/171/15/AM 20/ PC-VI

Dated: 24 .09.2021

Order-in-Original No. KASEZ/51/2019-20 dated 23.05.2019 is set aside. The case is remanded back to the DC, KASEZ with the directions to examine the case de-novo and to pass an appropriate speaking order as per extant law after taking into consideration the Appellant's submissions.

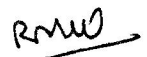


(Amit Yadav)

Director General of Foreign Trade

Copy to:-

1. Jindal Fibres Plot No. 49 & 58, Sector-II, Kandla SEZ, Gandhidham (Kutch) 370230.
2. Development Commissioner, KASEZ 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