

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

F.No. 01/92/171/33/AM18/ PC-VI / 228-229 Date of Order: 19 .8.2019  
Date of Dispatch: 20 .8.2019

Name of the Appellant: Reliance Naval & Engineering Ltd.,  
Pipavav Port, Post Ucchaiya, Via- Rajula, Amreli,  
Gujarat- 365560.

IEC Number 0899003702

Order appealed against: Order-in-Original No. 33/17-18 dated 05.12.2017  
passed by the Development Commissioner,  
Kandla Special Economic Zone, Gandhidham

KASEZ File No. KASEZ/ACCTS/CRA/01/13-14(Vol.III)/9521

Order-in-Appeal passed by: Shri Alok Vardhan Chaturvedi, DGFT

**Order-in-Appeal**

Reliance Naval & Engineering Ltd.(Earlier known as Pipavav Defence & Offshore Eng. Company Ltd. hereinafter referred to as 'the appellant'), a 100% EOU, has filed an appeal on 16.02.2018 against Order-in-Original No. 33/17-18 dated 05.12.2017 passed by the Development Commissioner, Kandla Special Economic Zone, Kandla.

2. 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 (DC), Special Economic Zones as Adjudicating Authority. Hence, the present the appeal is before me.

3.0 Brief facts of the case are as under:



3.1 During the CRA review/ Audit on Deemed export benefits like DBK/TED and CST conducted by CAG, Ahmadabad, it was observed that claims for an amount of Rs. 1,64,47,474/, as per following details, were erroneously obtained by the appellant :

- (i) Refund of CST of Rs. 33,79,986/- against inadmissible items.
- (ii) Refund of TED of Rs. 85,94,320/- on wrong calculation of duty on High Speed oil.
- (iii) Refund of TED of Rs. 28,53,357/- on HSD used for fabrication of capital goods.
- (iv) DEPB scrip for value of Rs. 15,95,503/- without submission of requisite documents.
- (v) Refund of CST of Rs. 24,308/- against inadmissible items.

3.2 As the appellant did not give any reply to the Demand Notices issued to it, a notice dated 01/03.11.2016 was issued to the appellant by the DC, KASEZ to show cause as to why action for recovery of the above said claims and for imposition of penalty may not be taken against it as per Para 2.15(a) of the Foreign Trade Policy (FTP) and under section 9, 13 & 14 of the Foreign Trade (Development & Regulation) Act, 1992, as amended.

3.3 The appellant vide reply dated 19.04.2017 and 28.06.2017 submitted that:

(i) It claimed refund of CST of Rs 33,79,986/- and Rs. 24,308/- in respect of various goods such as TMT bars, MS portable containers, MS channels and angles, HSD etc. used in the fabrication of the plant (Dry dock) at its ship building yard. The said refunds were duly sanctioned in accordance with the provisions of FTP. The department has objected to the refund of CST/TED only on the ground that Dry dock is not 'capital goods' in terms of definition of capital goods given in Para 9.12 of FTP 2009-14 whereas a dry dock is a capital good under the definition of "Capital Goods" as given in Para 9.12 of the FTP.

(ii) As regards TED refund of Rs. 85,94,320/-, it applied for refund of duty on HSD based on the actual duty paid as per the documents and the certificates issued by the supplier Indian Oil Corporation (IOC). The invoices were issued by a Public Sector Company and the rate of duty was mentioned on the invoices which cannot be questioned and the amount of TED refund claimed by it was actually paid to the IOC.

(iii) As regards TED refund of Rs. 28,53,357/- on HSD used for fabrication of capital goods, it was the appellant who had actually paid for the said HSD. The audit did not raise any objection to it, as they had verified its books and were satisfied. The audit objected the TED refund on the premise that the HSD so procured was utilised for fabrication of dry dock which according to audit is not a capital goods whereas a dry dock is a capital good under the definition of "Capital Goods" as given in Para 9.12 of the FTP.

(iv) As regards wrong issuance of DEPB scrip, the appellant contended that it had filed all the required documents for issue of DEPB scrip including the Shipping Bill with its application and accordingly DEPB scrip was issued to it. On being intimated that export promotion copy (EP) of

the shipping bill is not available in the file, the appellant vide letter dated 04.12.2014 submitted EP copy of the shipping bill.

3.4 The Development Commissioner made the following observations:

(i) On the issue of CST refund on inadmissible items, the DC concluded that in view of the definition of capital goods as defined in Rule 2(e) of SEZ Rules, 2006 and also under Para 9.08 of FTP, 2015-2020/Para 9.12 of FTP, 2009-14 and the case laws referred by the appellant, Dry Dock is a capital good and hence TED/CST refund was rightly issued on the inputs in the fabrication of the dry dock. Therefore CST reimbursement against inadmissible items as mentioned by the Audit was in fact admissible.

(ii) On the issue of TED refund granted on wrong calculation of duty on HSD, the DC found that as per notification no. 4/2008 CE dated 01.03.2008, High Speed Diesel (HSD) falling under chapter heading 27101930 attracts excise duty @ Rs. 1.60 per litre or Rs. 2.60 per litre as amended from time to time when intended for sale without a brand name and @6 % plus Rs. 1.25 per litre when intended for sale with a brand name. During the Deemed Export review for 2007-08 to 2010-11, it was noticed that the unit had claimed TED refund on procurement of HSD. As per Annexure I to ANF8 of the relevant period which was issued by Public Sector Companies, the duty rate calculated on HSD was @6% plus Rs. 3.25 per litre. The applicable Central Excise Duty was @6% plus Rs. 1.25 per litre instead of 6% plus Rs. 3.25 per litre. Thus, the unit had claimed excess TED on HSD @ Rs. 2 per litre. This resulted in excess refund of RS. 85,94,320/-.

(iii) On the issue of TED refund of Rs. 28,53,357/- granted on HSD used for fabrication of Capital goods viz. dry dock, the DC found that the appellant entered into an agreement with the agency E Complex Pvt. Ltd. for construction of Dry Dock at Pipavav for which the HSD was procured. The HSD was supplied to the agency E complex Pvt. Ltd., by the EOU and the payments to IOC, Rajkot was made by the agency. Based on the journal entry passed by the EOU in its books in favour of E Complex Pvt. Ltd. the claims were sanctioned. DC found that the HSD was not utilized by the agency/EOU in production of goods meant for export/ export services. Since the HSD purchased on which TED refund paid was neither a raw material nor a capital goods, therefore the TED refund was inadmissible.

(iv) On the issue of wrong issuance of DEPB scrip, the DC found that the appellant was issued DEPB License No. 3710001573 dated 27.06.2011 for Rs. 15,95,503/- against submission of Exchange Control Copy instead of Export Promotion copy. Therefore the DEPB entitlement was inadmissible.

3.5 Observing the above, the Development Commissioner, Kandla SEZ, vide Order-in-Original dated 05.12.2017 issued the following order:

- (i) To drop the proceedings in respect of the matter pertaining to CST refund on inadmissible items as detailed in Para 3.1(i) and (v) supra and
- (ii) To submit an amount of Rs. 1,14,47,677 in the Government Account and Rs. 15,95,503 in the appropriate Government Customs Duty account under section 13 read with section 11 of FT(D&R) Act 1992, as amended and to pay a penalty of Rs. 10,00,000/- and Rs. 1,00,000/- for delaying the refund of amount/customs duty.

4. Aggrieved by the Order-in-Original dated 05.12.2017; the appellant filed the present appeal. An opportunity of personal hearing was granted to the appellant on 31.01.2019 in which Dr. Manoj Upadhyay General Manager; Shri Abhishek Kumar, Manager and Mr. Ashutosh Mishra, Advocate appeared and represented the appellant before us. The appellant in its written as well as oral submissions stated that:

**4.1 On the issue of TED refund of Rs. 85,94,320/- granted on HSD:**

(i) The adjudication order has been passed considering only the basic central excise duty on HSD in terms of Notification No. 4/2008-CE dated 1.3.2008 and does not consider the subsequent notifications issued from time to time. With effect from 1.3.2008, the basic excise duty was Rs. 2.60 per litre on unbranded HSD and 6% plus Rs. 1.25 per litre on all branded HSD. In addition to this as per the Second Schedule of the Finance Act, 1999, both varieties of HSD also attracted Additional Duty on HSD at Rs. 2 per litre with effect from 1.3.1999.

(ii) Vide notification No. 14/2009-CE dated 7.7.2009, basic duty of central excise was revised to Rs. 1.60 per litre on all unbranded HSD and Rs. 2.75 per litre on branded HSD. Vide notification No. 10/2010-CE dated 27.2.2010, the basic duty was again revised to Rs. 2.60 per litre on unbranded HSD and to Rs. 3.75 per litre on branded HSD. But, during all these periods, the Additional Duty @ Rs. 2 per litre was continued on both varieties.

(iii) The adjudicating authority did not consider levy of Rs. 2 per litre on HSD of both varieties

(iv) As per Para 8.3.1(iii) (b) of HBP 2009-2014, TED is refunded on the basis of duty paid certificates issued by the concerned domestic oil PSU in the form given in Annexure I to ANF8. The appellant has stated that it has submitted the required certificates from IOC along with the TED refund claim.

**4.2 On the issue of TED refund of Rs. 28,53,357/- granted on HSD:**

(i) HSD so procured was used for fabricating the components for construction of dry dock which has been considered as capital goods by the adjudicating authority in its impugned order.

(ii) HSD procured by the Appellant was used in construction of the dry dock by its contractor E Complex Private Limited for which the payment was made by the contractor as per agreement.

Thereafter, adjustment for that was made in the Books of Account. But it does not disentitle the appellant for claiming the TED refund.

#### **4.3 On the issue of wrong issuance of DEPB scrip:**

The application for claim of DEPB was filed by the appellant and the same was accepted by the DC office. Before granting the DEPB, at no point of time, the DC office asked for EP copy of the shipping bill. Original EP copy was submitted vide its letter dated 4.12.2014. Since the EP copy was produced and accepted by the Respondent, the audit objection does not survive.

5. Comments from the office of the Development Commissioner, KASEZ have also been obtained on the appeal which has been received. The DC has, inter alia, stated that:

#### **5.1 On the issue of TED refund Rs.85,94,320/- granted on HSD:**

(i) all the goods were received after the period 01.03.2008. Hence Central Excise Notification No. 4/2008 CE dated 01.03.2008 (when intended for sale with a brand name) will be applicable for the claims of the unit. Thus in this case, rate @ 6% plus Rs. 1.25 per litre (when intended for sale with brand name) is applicable.

(ii) Vide notification No. 14/2009-CE dated 07.07.2009, basic duty of central excise was revised to Rs. 1.60 per litre on all unbranded HSD and Rs. 2.75 per litre on branded HSD. Vide notification No. 10/2010-CE dated 27.02.2010, the basic duty was again revised to Rs. 2.60 per litre on unbranded HSD and to Rs. 3.75 per litre on branded HSD. During all these periods, there was no mention of additional duty @ Rs. 2 per litre on this item with central excise tariff 2710 1930. It may be effective from 01.03.1999 but succeeded by the above mentioned excise notifications.

#### **5.2 On the issue of TED refund of Rs. 28,53,357/- granted on HSD:**

HSD was supplied to the agency E complex Pvt. Ltd., by the EOU and the payments to IOCL, Rajkot was made to the agency. The EOU unit engaged an agreement with the agency E Complex Pvt. Ltd. for construction of Dry Dock at Pipavav for which the HSD has been procured. Based on the journal entry passed by the EOU in their books in favour of E Complex Pvt. Ltd., the unit claimed refund which was inadmissible since the 100% EOU did not pay directly to IOCL, Rajkot and the fuel HSD was not received directly by the 100% EOU.

#### **5.3 On the issue of DEPB scrip:**

The unit did not submit Export Promotion copy at the time of issuance of DEPB license but submitted it later after issuance of demand notice, which is not acceptable. Thus, there was incorrect grant of DEPB of Rs. 15,95,503/-.



6. I have considered the Order-in-Original dated 05.12.2017 passed by DC, KASEZ, appeal preferred by the appellant and oral/written submissions made by its representatives, report/comments of office of the DC, KASEZ and all other aspects relevant to the case. I observe the following:

- (i) On the issue of TED refund Rs.85,94,320/- granted on HSD, the issue needs to be settled on the basis of duties applicable at the time of procurement of HSD. Contention of the appellant that both varieties of HSD also attracted Additional Duty at Rs. 2 per litre with effect from 1.3.1999 and continued during all these periods as per the Second Schedule of the Finance Act, 1999 needs to be examined by the adjudicating authority.
- (ii) On the issue of TED refund of Rs. 28,53,357/- granted on HSD, it is noted that as per para 3) of page -5- of the adjudicating order dated 5.12.2017, the adjudicating authority concluded the following:

*"..... In this regard it is stated that the raw material was not utilized by the agency/EOU in production of goods meant for export/export services. Since the HSD purchased on which TED refund paid was neither a raw material nor a capital goods, therefore, the TED was inadmissible."*

Whereas in its comments dated 15/10/2018 and 19/20.06.2019, the adjudicating authority stated that the refund was irregular because the HSD was neither received nor payments have been made directly by the EOU.

The reasons now quoted by the adjudicating authority for treating this claim as irregular are at variance with that quoted in the adjudication order. Since the adjudicating authority has otherwise admitted TED refund claims against HSD and has also admitted Dry Dock as a capital good, this issue also needs a relook.

- (iii) On the issue of DEPB scrip, it is noted that the office of DC issued DEPB scrip to the appellant without asking for the EP copy of the shipping bill. Later on the appellant also submitted EP copy of the said shipping bill vide its letter dated 4.12.2014. In such a situation recalling the DEPB does not seem to be appropriate.
- (iv) It is also observed that the adjudicating authority issued show cause notice under section 9,13 and 14 of the FT (DR) Act whereas, in the adjudication order, demand for the amount of the refunds paid and the DEPB issued was made under section 11 of the act. Section 11 deals with imposition of penalty for some specific

contraventions. Section 11 does not deal with recalling the refunds or calling back an issued DEPB.

- (v) Penalty of Rs. 11,00,000/- has been imposed for delaying the refund. Normally interest is charged on the delayed payments. The adjudication authority needs to mention clearly as to under which section of the FT (DR) Act such contravention attracts penalty.

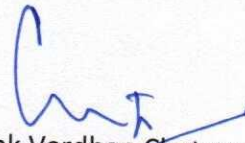
7. In view of the above, in exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5<sup>th</sup> December 2014, I pass the following order:

**Order**

F.No. 01/92/171/33/AM18/ PC-VI


Dated: 19 .08. 2019

Order-in-Original No.KASEZ/ACCTS/CRA/01/13-14(Vol.III)/9521 passed by the Development Commissioner, KASEZ, Gandhidham, Gujrat is set aside and the matter is remanded back to the adjudicating authority for de-novo consideration.

  
(Alok Vardhan Chaturvedi)  
Director General of Foreign Trade

**Copy To:**

- (1) Reliance Naval & Engineering Ltd.Pipavav Port, Post Uchhaiya, Via- Rajula, Amreli, Gujarat- 365560.
- (2) Development Commissioner, SEZ, Kandla.
- (3) DGFT's website

  
(Shobhit Gupta)  
Dy. Director General of Foreign Trade