

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

F.No. 01/92/171/12/AM 18/PC-VI/109-110 Date of Order: 5 .09.2018

Date of Dispatch: 6 .09.2018

Name of the Appellant: M/s Nilkanth Concast Pvt. Ltd., Survey No. 281 & 284,
National Highway 8-A, Mithirohar, Gandhidham- Kutch,
Gujarat- 370410.

Order appealed against: Order-in-Original No. 37/21/040/00023/AM09-4590 dated
24.07.2017 passed by the Development Commissioner, Kandla
SEZ, Kutch, Gujarat.

Order-in-Appeal passed by: Shri Alok Vardhan Chaturvedi, DGFT
Shri J.V. Patil, Addl. DGFT

Order-in-Appeal

M/s Nilkanth Concast Pvt. Ltd, Kutch (hereinafter referred to as 'the appellant'), a DTA unit, has filed an appeal dated 09.09.2017 u/s 15 of FT(DR) Act, 1992 against Order-in-Original No. 37/21/040/00023/AM09- dated 24.07.2017 passed by the Development Commissioner, Kandla SEZ, Kutch, Gujarat .

2. 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 Development Commissioner, Special Economic Zones as Adjudicating Authorities. Hence, the present the appeal is before us.

3.0 Brief facts of the case are that:

3.1 M/s Nilkanth Concast Private Limited a DTA unit is engaged in the business of manufacturing TMT steel bars, sponge iron, angles & channels etc. For the same, it has set up a facility at Survey No. 281 & 284, National Highway 8-A, Mithirohar, Gandhidham- Kutch, Gujarat- 370410.

3.2 The appellant obtained an Advance Authorisation No. 3710000843 dated 18.07.2008 under the then Foreign Trade policy 2004-09 for import of 2400 MT non alloy steel melting scrap for the CIF value Rs. 51840000/- with the condition that the firm shall export Non-Alloy Steel Bars Thermo-mechanically treated reinforcing Bars also known as TMT Bars as per the details in the said Authorisation for and export quantity of 2000 MT an FOB Value of Rs. 57218000/- within 24 months i.e. by 18.07.2010. The Advance Authorisation was obtained for import of items under SION 514 of the Engineering Products.

3.3 In accordance with the condition stipulated in the Advance Authorisation /Bank Guarantee/LUT, the Appellant was supposed to fulfil the export obligation in terms of value and quantity and to submit the prescribed documents for discharge of export obligation and redemption. However, the same were not submitted despite letters from DC office. Hence, the DC office issued a Show Cause Notice F No. 37/21/040/00023/AM09/4226 dated 20.06.2016 to show cause why the appellant should not be declared a defaulter, placed in the denied Entry List and to impose a penalty under Section 11 (2) of FTDR Act, 1992, as also to suspend Appellant's IEC code under section 11 (7) of the FTDR Act, 1992.

3.4 The firm was given several opportunities of personal hearing. Finally they attended PH before the DC on 29.09.2016 and submitted some export document. After scrutiny of the documents, the DC office issued deficiency letter dated 27.01.2017. The DC office after scrutiny found that they have not removed the deficiency as mentioned in letter dated 27.01.2017. Hence, the Development Commissioner, proceeded to adjudicate the matter and imposed a penalty of Rs. 5000000/- and payment of Custom duty + interest to the Custom Authority of Rs. 51840000/-

4. Aggrieved by the adjudication order dated 24.07.2017, the appellant firm has filed the present appeal stating the following:

4.1 Under Advance Authorisation dated 18.07.2008, out of the permitted quantity of 2400 MT of non alloy steel melting scrap, it imported the entire permitted quantity without payment of any duties of customs by virtue of the exemption granted under customs notifications governing the Advance Authorisation scheme. The entire quantity of the imported non-alloy steel melting scrap was utilized by it in its factory for manufacturing TMT Bars. The TMT Bars so manufactured were then cleared to M/s Adani Power Limited, SEZ, to fulfill the export obligation as prescribed under the Authorisation dated 18.07.2008;

4.2 By the extended period upto 18.07.2011 to complete the export obligation, it had exported by way of supply to SEZ of 1963 MT to achieve the export obligation to the tune of 98.15% and accordingly Bills of Export alongwith the Export promotion copies were submitted. Since, it had made excess exports against the advance Authorisation no. 3710000950 dated 09.02.2009 to the tune of 58.976 MT, it was clubbed with the Authorisation dated 18.07.2008 to complete the shortfall of 37 MT in view of para 4.20 of the HBP and accordingly the Export obligation was fulfilled.

4.3 In the year 2010, the territory where Appellant's factory was severely hit by a cyclone and heavy rainfall, leaving a large part of the factory affected. As a result of such vast devastation caused to the factory as also to the office premises, many of the important papers and files pertaining to the business as also the customs were lost. One of the major files that was lost was pertaining to the said advance Authorisation dated 18.07.2008. Hence they were able to submit photocopies of the documents.

4.4 During the personal hearing granted by DC Office on 29.09.2016, the appellant requested for redemption of the said Authorisation since the export obligation prescribed therein had already been fulfilled. To support the same, it filed the relevant export document. Thereafter a deficiency letter dated 27.01.2017 was issued by DC office stating that the export made under Bill of Export 484 dated 13.01.2011 was after the expiry of EOP and that export made against Bill of Export no. DSEZ/6/09-10 dated 15.05.2009 was for advance Authorisation no. 3703001950 dated 09.02.2009 and not the Authorisation in question. Accordingly both bill of export were disallowed.

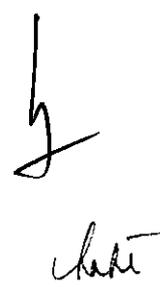
4.5 Against the above mentioned deficiency letter, it was clarified to the DC office during personal hearing that it had been granted an extension till 18.07.2011 and thus, the Bill of Export 484 was valid. Further with regard to Bill of Export no. DSEZ/6/09-10 dated 15.05.2009, it was clarified that by oversight and inadvertence, the IEC no. of the Appellant was noted as Advance Authorisation.

4.6 The appellant has filed the present appeal mainly on the following ground: -

- (i) The penalty order is completely illegal, ex-facie, baseless and deserves to be quashed and set aside in limine.
- (ii) The Respondent has gravely erred in holding that the Appellant has willfully defaulted towards non-fulfillment of the export obligation.
- (iii) It is a settled law that substantive benefit cannot be denied for a procedural lapse
- (iv) The Respondent has erred in holding that there has been a willful default on the part of the Appellant.
- (v) The impugned order has traversed beyond the scope of show cause notice in as much as it has held that on scrutiny of the documents submitted by the Appellant.
- (vi) As an alternative, since the original documents have been lost due to reasons beyond its control, it is also ready to follow the procedure prescribed under para 4.52 of the handbook of Procedures to get the requisite original copies and accordingly, seek the redemption of the said Authorisation.

5. Comments from the office of the Development Commissioner, KASEZ have also been obtained on the appeal filed by the Unit. Comments furnished by office of the Development Commissioner, KASEZ vide their letter dated 12.01.2018 are as follows: -

- (i) The firm was given adequate time and ample opportunities for production of documents in proof of EO fulfillment.



- (ii) The firm has still not submitted the original Bill of Exports. Some of the Bill of Exports were not related to this as communicated in the letter 27.1.2017.
- (iii) In case they have lost/misplaced the original documents, they should have gone for submission of duplicate copy of the documents after following the prescribed procedure.
- (iv) There is no evidence to suggest that subsequently they had applied for exports which were outside the EO period. Since, the required original documents were not forthcoming, the Adjudicating Authority had to issue the Order-in-original imposing the penalty.

6. An opportunity of personal hearing was granted to the unit on 16.05.2018 in which Mr. Ashutosh Mishra, Advocate accompanied by Mr. Jitendra Wadhvani, Commercial Manager appeared and represented the Unit before us. The appellant vide letter dated 06.05.2018 stated that since the original documents have been lost due to reasons beyond its control, it is ready to follow the procedure prescribed under para 4.52 of HBP. This para prescribes the following document in lieu of original documents for consideration of request for EODC against lost EP copy of the SBs and/or BRC and requested for quashing of the impugned order and waiver of penalty:

- (i) A duplicate / Customs Certified / Self-attested copy of the shipping Bill in lieu of the original; Duplicate / Bank certified copy of BRC in lieu of original;
- (ii) An application fee equivalent to 1% of duty saved amount. However, no fee shall be charged when such document is lost by Government agencies and a documentary proof to this effect is submitted;
- (iii) Self declaration by exporter about loss of document and an undertaking to surrender it immediately to concerned Regional Authority, if found subsequently;
- (iv) An indemnity bond by exporter to the effect that he would indemnify Government for financial loss, if any, on account of duty free import entitlement availed / allowed against lost Shipping Bills / BRC.

7. The Order-in-Original dated 24.07.2017 passed by DC, KASEZ, appeal preferred by the Unit and oral submissions made by its representatives, report/comments of office of the DC, KASEZ and all other aspects relevant to the case were considered. We have observed that:

(i) The appellant obtained an Advance Authorisation for import of 2400 MTs without any duty against export obligation of 2000 MTs Non-Alloy Steel Bars Thermo-mechanically treated reinforcing Bars also known as TMT Bars. The Authorisation was obtained under the relevant SION applicable under the duty exemption scheme. As per the appellant, he exported by way of supply to SEZ of 1963 MT to achieve the export obligation to the tune of 98.15%. Since, it had made excess exports against the advance Authorisation no. 3710000950 dated 09.02.2009 to the tune of 58.976 MT, it was clubbed with the Authorisation dated 18.07.20108 to complete the shortfall of 37 MT in view of para 4.20 of the HBP and accordingly the Export obligation was fulfilled. The DC has contended that they did not submit original Bill of Export in evidence of fulfillment of export obligation. Certain bill of export were not related to the Advance Authorisation or beyond the EO period.

(ii) The appellant has submitted that due to cyclone/heavy rainfall, some of the documents were lost. In the appeal, has requested that the HBP provide acceptance of photocopy of shipping bill under affidavit and fee equivalent to 1% of duty saved amount and would like to avail the same.

(iii) The firm has photo copies of Bill of Export and other documents. He intends to approach the DC under Para 4.52 of HBP. The duty exemption scheme allows import of duty free materials with time bound obligation to fulfill exports and compliance of the procedure to evidence such fulfillment. The firm in this case should have maintained discipline and complied with the procedures. Several opportunities as recorded in the order were given by the DC. It has taken long time since obtaining the authorization. They did not even plead/request for the said procedure for duplicate before the DC which they are pleading in the Appeal. However in the interest of justice it is felt that one more opportunity can be given to the appellant. In that context we are not going into the merits of documentation and compliance of the scheme. It is needless to mention that firm has to comply and satisfy with the conditions given in the relevant SION, Duty Exemption Scheme and that the supplies to SEZ including the payment in foreign exchange for SEZ unit as applicable for and which DC would have to verify in all respects.

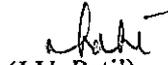
8. In view of the above, in exercise of the powers vested in us under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, we pass the following order:

Order

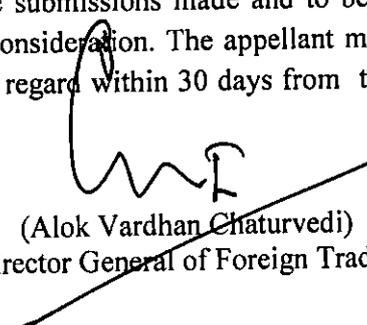
F.No. 01/92/171/12/AM18/ PC-VI/

Dated: 5.09.2018

Order-in-Original No. 37/21/040/00023/AM09-4590 dated 24.07.2017 passed by the Development Commissioner, Kandla SEZ, Kutch, Gujarat is set aside and the case remanded back to the DC for de novo consideration of the case based on the submissions made and to be made by appellant and taking all the provisions of the scheme into consideration. The appellant may submit the relevant submissions, if any, it intends to the DC in this regard within 30 days from the date of issue of the order.


(J.V. Patil)

Addl. Director General of Foreign Trade


(Alok Vardhan Chaturvedi)
Director General of Foreign Trade

Copy To:

- (1) M/s Nilkanth Concast Pvt. Ltd., Survey No. 281 & 284, National Highway 8-A, Mithirohar, Gandhidham- Kutch, Gujarat- 370410.
- (2) Development Commissioner, SEZ, Kandla.


(Shobhit Gupta)
Dy. Director General of Foreign Trade