

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

F.No. 01/92/171/28/AM 17/ PC-VII

Date of Order: 29.08.2018

Date of Dispatch: 29.08.2018

Name of the Appellant:

M/s Monarch Overseas,
Shed No. 315, GIDC, Phase-II,
Dared, Jamnagar- 361004

Order appealed against:

Order-in-Original No. KASEZ/100%EOU
/II/67/2005-06/7609 dated 05.09.2016
passed by the Development Commissioner,
Kandla, Special Economic Zone

Order-in-Appeal passed by:

Shri Alok Vardhan Chaturvedi, DGFT

Order-in-Appeal

M/s Monarch Overseas, Jamnagar (hereinafter referred to as 'the appellant'), an EOU unit, has filed an appeal dated 20.09.2016 u/s 15 of FT(D&R) Act against Order-in-Original No. KASEZ/100%EOU/II/67/2005-06/7609 dated 05.09.2016 passed by the Development Commissioner, Kandla Special Economic Zone.

2.0 Brief facts of the case:

2.1 The appellant was granted Letter of Permission (LoP) by the Development Commissioner, Kandla vide letter No. KASEZ/100%EOU/II/67/2005-06/517 dated 04.05.2006 to set up a unit and for manufacture and export of Brass Parts for Electrical & Electronic Apparatus for switching or protecting Electrical Circuits and Electrical insulating fitting of Brass and Battery terminal etc. subject to certain terms and conditions imposed therein. The unit started their commercial production under EOU Scheme w.e.f 07.07.2006. Hence, their LoP was initially valid upto 06-07-2011. The LoP was further extended for a period of five years upto 06-07-2016 and later further extended for a period of five years upto 06-07-2021.

2.2 The unit's export performance for the second five year block as on 31.03.2016 on the basis of their APR was reviewed and found that the unit was NFE negative to the tune of Rs. (-) 139.69 Lakhs.

2.3 As, the unit failed to achieve positive NFE in the 2nd block period during 2010-11 to 2015-16 to the tune of Rs. 139.69 lakh, a show cause notice dated 24.05.2016 was issued to the unit to show cause as to why their LoP dated 04.05.2006 should not be cancelled for non-fulfillment of conditions of LoP and why penalty should not be imposed upon them for violation of provisions of FTP.

2.4 The appellant in his reply dated 22.6.2016 stated that they have achieved positive Net Foreign Exchange (NFE) during first five year block. The appellant also stated that the review of their export performances for the second five year block as on 31.03.2016 on the basis of Annual Performance Reports (APR) as given in the Show Cause Notice reveals Incorrect NFE. Because as per the clause no. 20 Annexure -IV of the Annual Progress Report, amount of Imported RM/consumables etc./consumed during the year is required to be reported. The appellant further stated that above fact has not been considered while determining the Net Foreign Exchanges. On the basis of above facts, the correct figures of Net Foreign Exchange Earnings should be (-) 35.24 Lakhs. The appellant also stated that the Net result of the Net Foreign Exchange Earnings of both five years block period is not negative. This was happened because the managing partners of the unit were unable to transact the business due to their personal issues. Further, there was recession in the market which resulted in negative NFE.

2.5 On examination of the reply to the Show Cause Notice submitted by the unit along with full facts of the case and by granting personal hearing to the appellant, the Development Commissioner, Kandla SEZ, in exercise of powers vested under Rule 54 of SEZ Rules, 2006 imposed a penalty of Rs. 35 Lakhs (Thirty Five lakhs Rupees only) vide Order-in-original No. KASEZ/100%EOU/1167/2005-06/7609 dated 05.09.2016 with the following findings:

- ~~(i) The firm had failed to fulfill the stipulated Net Foreign Exchange Earnings (NFE) for the second five year block, thus contravening the provisions of the Foreign Trade Policy relating to EOUs, the relevant provisions in the Handbook of Procedures of the Foreign Trade Policy in force and also the conditions of LOP.~~
- (ii) As per Para 6.04 of FTP, 2015-2020, the NFE earnings shall be calculated cumulatively in blocks of five years. Moreover, the monitoring guidelines provided under Appendix 6F clearly stipulate that annual monitoring in the

cases of old units which have completed more than 5 years will be undertaken for only such number of years which fall in the second block of five years.

- (iii) Para 6.05 (c) of FTP, 2015- 20 prescribes that for failure to ensure positive NFE or to abide by any of the terms and conditions of LOP/LOI/IL/LUT shall render the unit liable to penal action under provisions of Foreign Trade (Development and Regulation) Act, as amended, and Rules and Orders made thereunder, without prejudice to action under any other law/rules and cancellation or revocation of LOP/LOI/IL.
- (iv) The arguments made in their written submission that on the basis of net result of both five years block period, the firm has achieved Net NFE to the tune of Rs. 300.74 lakhs is not tenable as the monitoring guidelines in this regard as mentioned above are very clear. Further the contention of the firm that DC office, while issuing Show Cause Notice, had taken value of imported raw materials instead of value of imported raw materials consumed is not correct as DC office had take only the imported raw materials consumed as per Clause No. 20 of Annexure -IV of Annual Progress Reports while issuing the Show Cause Notice dated 24.05.2016.

3. Aggrieved by the adjudication order dated 05.09.2016, the Unit has filed the present appeal, mainly on the following ground: -

- (i) The penalty order is bad in law as well as on facts and is passed without giving proper opportunity to be heard and ignoring the material facts.
- (ii) The Development Commissioner, KASEZ has erred and the order is passed without any basis and do not follow the principal of natural justice.
- (iii) The Development Commissioner, KASEZ has passed the order which is not as per the provisions of section 11 of FTP Act, 1992.
- (iv) The calculation of NEFE is wrong and has not considered the stock available with the unit and thus penalty levied on wrong figure does not survive.

4. Comments from the office of the Development Commissioner, KASEZ were also obtained on the appeal filed by the Unit. Comments furnished by office of the Development Commissioner, KASEZ vide their letter dated 20.03.2016 are as follows: -

- (i) The appellant was given proper opportunity of being heard. O-I-O No. 12/2016-17 dated 05.09.2016 discussed each and every issue raised by the Appellant in their reply to Show Cause Notice.
- (ii) The Appellant was required to achieve positive NFE in terms of Para 6.5 of Foreign Trade Policy, 2009-2014, but they failed to achieve positive NFE in the second Block period of their operation i.e. from 2011-12 to 2015-16 and have

achieved negative NFE of Rs. 139.69 lakhs and hence SCN dated 24.05.2016 was issued to the Appellant. The penalty was imposed as per the provisions of Foreign Trade (Development and Regulation) Act, 1992 and rules made there under. The penalty was imposed to act as deterrent for not achieving positive NFE, as per provision of FTP/HBP. This is the main parameter based on which performance of an EOU is measured.

(iii) The contention of the Appellant is not correct as the penalty imposed was as per the provisions of Foreign Trade (development and regulation) Act, 1992 and Rules made there under.

(iv) DC office had taken only the imported raw materials consumed as per Clause No. 20 of Annexure-IV of Annual Progress Reports while issuing the Show Cause Notice dated 24.05.2016 Annexure -A refers. As per para 6.5 of FTP, 2009-2014, the NFE earnings shall be calculated cumulatively in blocks of five years. Moreover, the monitoring guidelines provided under Appendix 14-I-G and Appendix 6F clearly stipulates that annual monitoring in the cases of old units which have completed more than 5 years will be undertaken for only such number of years which fall in the second block of five years. Hence, it is amply clear that the NFE shall be calculated in the block period of five years each and not cumulatively in blocks i.e. for a period of 10 years as claimed by the Appellant.

5. Personal hearing was afforded to the appellant on 22.03.2018. Mr. Jay Vithalani, Partner and Mr. Kamlesh Rathod, Partner of the firm appeared before me. The appellant vide letter dated 28.10.2017 submitted that in accordance with the directions received from DC office, the unit filed revised APR on 12.6.2015 showing the corrected figure of raw material consumed during 2012-13. The raw material consumed during the year was Rs. 87.87 lakh not Rs. 207.80 Lakh as taken by DC office. If NFE is calculated by taking corrected figure, it come Rs. 19.76 Lakh negative. They have therefore requested for waiver of penalty.

6. I have considered the submissions made by the appellant as well as comments furnished by DC, KASEZ, carefully. It is observed that that appellant has himself admitted that there was shortfall in achieving NEF of Rs. 35.24 lakh only instead of Rs. 139.69, as calculated by DC. There is no provision of regularisation of shortfall in NFE under FTP/HBP. Import under EOU scheme is allowed duty free subject to achievement of positive NFE. Therefore, it is up to the wisdom of DC to determine the quantum of fiscal penalty to be imposed after adjudicating the case. In the instant case penalty has been imposed after following the due procedure and affording personal hearing to the petitioner. We, therefore, do not find any reason of interfering in the order dated 05.09.2016 passed by DC, Kandla.

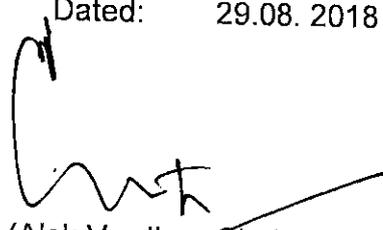
7. Therefore, in exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5th December 2014, I pass the following order:

Order

F.No. 01/92/171/28/AM17/ PC-VI

Dated: 29.08.2018

The appeal stands dismissed.


(Alok Vardhan Chaturvedi)
Director General of Foreign Trade

Copy To:

- (1) M/s Monarch Overseas, Shed no. 315, GIDC, Phase. II, Dared, Jamnagar- 361004.
- (2) Development Commissioner, SEZ, Kandla.


(Shobhit Gupta)

Dy. Director General of Foreign Trade