

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

F.No. 01/92/171/16/AM 18/ PC-VI/103-104 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. 37/21/040/00046/AM09-4725
dated 25/27.07.2017 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. 37/21/040/00046/AM09-4725 dated 25/27.07.2017 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 As per appeal submissions, 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. 3710000922 dated 17.12.2008 under the then Foreign Trade policy 2004-09 for import of non alloy steel melting scrap 2880 MT for the CIF value Rs. 43416000/- with the condition that the firm shall export 2400 MT Non-Alloy Steel Bars Thermo-mechanically treated reinforcing Bars also known as TMT Bars as per the details in the said license for an FOB Value of Rs. 51015380/- within 24 months i.e. by 17.12.2010. 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. 37/21/040/00046/AM09/4262 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 27.04.2017 and submitted some document. After scrutiny of the documents, the DC office issued a deficiency letter dated 27.1.2017. The DC office, after scrutiny, found that they have not removed the deficiency as mentioned in letter dated 12.06.2017. Hence the Development Commissioner as RA proceeded to adjudicate the matter and imposed a penalty of Rs. 5000000/- and payment of Custom duty + interest to the Custom Authority of Rs. 43416000/- vide Order-in-Original No. 37/21/040/00046/AM09-4725 dated 25/27.07.2017.

4. Aggrieved by the adjudication order dated 25/27.07.2017, the appellant firm has filed the present appeal stating the following:

4.1 Under advance license dated 17.12.2008, out of the permitted quantity of 2880 MT of non alloy steel melting scrap, it had only imported 2842.41 of the permitted quantity under Bill of Entry No. 131655 dated 31.12.2008 without payment of any duties of customs by virtue of the exemption granted under customs notifications governing the advance license 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., a unit located in SEZ, to fulfil the export obligation as prescribed under the license dated 17.12.2008;

4.2 The appellant made exports by way of supply to SEZ of 1321 MT against the stipulation of export obligation of 2400 MT and achieved the export obligation of 55%. The appellant is trying to locate the balance documents towards the fulfillment of the export obligation. A perusal of the copies of the Bills of Export alongwith the Export Promotion

copy duly authenticated by the Customs Appraising officer show that the export obligation to the tune of 1321 MT has been 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 license.

4.4 During the personal hearing granted by DC Office on 27.04.2017, the appellant requested for redemption of the said license.

4.5 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) They have fulfilled the export obligation to the extent of 55% and the advance authorization period has also expired, thus the Appellant wishes to close the case as per para 4.49 of HBP in case they are not able to trace the remaining documents for export.
- (vi) As an alternative, since the original documents have been lost due to reasons beyond its control, it is also ready to seek the same by following 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 license.

5. Comments from the office of the Development Commissioner, KASEZ have also been obtained on the appeal filed by the Unit. The Development Commissioner, KASEZ vide their letter dated 12.01.2018 has informed that the firm has not submitted the original Bill of Exports and Bank Certificate of Payments in respect of supplies made to SEZ. As per the working out of EO based on the statement of export submitted, there was excess imports and shortfall value wise also which were required to be regularised. This requirement was intimated to them vide letter dated 05/07.2017. These deficiencies still remain and not rectified. Hence, the Adjudicating Authority has finalised the SCN by issuance of Order-in-original dated 25.07.2017.

6. An opportunity of personal hearing was granted to the unit on 20.06.2018 in which Mr. Ashutosh Mishra, Advocate accompanied by Mr. Jitendra Wadhvani, Commercial Manager

appeared and represented the Unit before us. The representatives stated that the Appellant wishes to close the case as per para 4.49 of HBP in case they are not able to trace the remaining documents for export. Alternatively 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 HB P. 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. We have considered the Order-in-Original dated 25/27.07.2017 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. We have observed that:

(i) The appellant obtained an Advance Authorisation for import of 2880 MTs without any duty against export obligation of 2400 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 has fulfilled the export obligation to the extent of 55% by exporting of goods to a unit located in SEZ. The DC has contended that they did not submit original documents such as Bill of Export in evidence of fulfillment of export obligation.

(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. DC can consider those documents for EO consideration. If they would not be able to submit the photocopies of the documents, they wish to close the case as per para 4.49 of HBP.

(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. 01/92/171/16/AM18/ PC-VI/

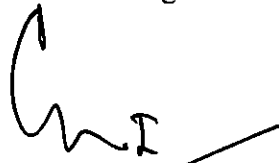
Dated: 5 .09. 2018

Order-in-Original No. 37/21/040/00046/AM09-4725 dated 25/27.07.2017 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 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 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, Shed no. 315, GIDC, Phase. II, Dared, Jamnagar-361004.

✓(2) Development Commissioner, SEZ, Kandla.



(Shobhit Gupta)

Dy. Director General of Foreign Trade