

Government of India  
Ministry of Commerce & Industry  
Directorate General of Foreign Trade  
Udyog Bhawan, New Delhi -110011  
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F.No. 01/92/171/25/AM16/ PC-V/12,13,14

Date of Order: 24.04.2019

Date of Dispatch: 24.04.2019

Name of the Appellant:

Afcan Impex Pvt. Ltd.  
Plot No. 241 to 243 & 251- B, Sector-IV,  
Kandla Special Economic Zone, Gandhidham,  
Gujarat-370230

IEC Number

3703002158

Order appealed against:

Order-in-Original No. 01/2013-14 dated  
23.09.2013 passed by the Development  
Commissioner, Kandla SEZ, Gujarat

Order-in-Appeal passed by:

Shri Alok Vardhan Chaturvedi, DGFT

**Order-in-Appeal**

Afcan Impex Pvt. Ltd. (hereinafter referred to as 'the appellant'), a SEZ unit, preferred the present appeal on 08.11.13 against the above said order before the Appellate Committee, Department of Commerce, New Delhi. The appeal was transferred to DGFT vide DoC's O.M. No. 12013/01/2013-ADJ/AC dated 17.9.2014 in view of DGFT's Notification No. 21 dated 13.06.2013.

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, Special Economic Zones as Adjudicating Authorities. Hence, the present the appeal.

3.0 Brief facts of the case are that:

3.1 The appellant was issued a Letter of Approval No. KASEZ/IA/1916/2003-04/1999 on 4.6.2003, as amended, by DC, KESEZ to set up a SEZ Unit for the manufacture and export of all types of Shoddy synthetics yarn, Shoddy Woollen Yarn, Blankets and processing of used clothing. The appellant unit executed a legal undertaking as required under the Letter of Approval with regard to fulfilment of conditions mentioned therein and commenced Commercial production under SEZ Scheme w.e.f. 20.3.2005.

3.2 During review of the performance for the block period of five years from 1.4.2005 to 31.03.2010, it was observed that the appellant unit made exports to the extent of Rs. 626.35 Lakh (both physical and deemed exports) as against a total import of Rs. 741.33 Lakh. Thus the appellant unit failed to achieve the positive NFE by Rs. 114.98 Lakh.

3.3 Accordingly, a notice was issued to the appellant on 27.12.2010 to show cause as to why action should not be taken against it for imposition of penalty under Section 11 of the Foreign Trade (D&R) Act, for not achieving the positive NFE during the said block period.

3.4 It was stated by the appellant pleaded that its imported goods were damaged due to heavy rain and hence had to incur heavy loss during 2008-09. It also submitted an undertaking on non-judicial stamp paper before the DC that it would export goods worth of value to neutralize the negative NFE and achieve positive NFE by the end of December, 2011.

3.5 After considering the submissions, the adjudicating authority vide order dated 2.7.2012 imposed a penalty of Rs. 1,14,98,000/- vide O-in-O dated 1/2012-13 dated 02.07.2012. The appellant preferred an appeal against the aforementioned Order before the Appellate Committee in DoC which after examination of the case remanded it back to the DC, KASEZ vide Appellate Order no. 12013/22/2012-ADJ/AC dated 12.03.2013 for reconsideration on the following issues:-

- a) Why an extension of three months was given to achieve positive NFE (Net Foreign Exchange)?
- b) If time was extended and the unit had achieved the shortfall then why penalty was imposed?
- c) Whether there is a case for imposition of penalty? If yes, then quantum may be decided.

3.6 During the De-novo proceedings, DC, KASEZ found that the appellant submitted an undertaking dated 13.09.2011 before the then Adjudicating Authority to make good the negative NFE by making exports before 31.12.2011 ( not by end of October, 2011 as stated during the Personal Hearing). It also undertook to accept whatever restrictions or financial penalty, if any, is imposed by the Development Commissioner at the end of adjudication proceedings.

3.7 However it was observed that:

- (a) No extension was granted to the appellant for achieving positive NFE for the block period of 01.04.2005 to 31.03.2010. Further, the appellant also did not submit any corroborative evidence in support of its contention that the then Adjudicating Authority granted three months time to it for achieving positive NFE for the block period ended on 31.03.2010.
- (b) The appellant failed to achieve positive NFE by Rs. 1.14 Crores for the block period ended on 31.03.2010 and this fact was accepted by the appellant.

3.8 Taking a lenient view, DC, vide order-in-original dated 23.09.2013, reduced the amount of penalty from Rs. 1,14,98,000/- to Rs. 17.10 Lakh.

4.0 Present proceedings:

A personal hearing was granted on 12.03.2019. Mr. Kishor B. Kapdi, Managing Director appearing on behalf of the appellant stated the following:

- (a) It submitted an undertaking on 07.09.2011 to the DC for allowing import and export clearance. The request of the appellant was considered and the DC, vide letter dated 08.09.2011, allowed to export and import on the following conditions:-
  - (i) No transaction to DTA will be allowed as undertaken.
  - (ii) The party would pay an amount of Rs. 2.28 Crore to the DC, Kandla within 2 working days in the matter of adjudication process.

However, this was subject to the final decision in the matter of negative NFE for which the show cause notice was under process of adjudication. Hence, the representative stated that the DC office vide above letter clubbed the issue of negative NFE and DTA clearance with the adjudication proceedings.

- (b) Since, the basic raw material import cycle is 45 days and only 40 days were left till October 2011 for achievement of NFE, it requested the DC to allow three month period to achieve NFE during the personal hearing held on 07.09.2011. The appellant was orally informed by the DC to provide undertaking for achievement of NFE in the period ending on 31.12.2011. Accordingly, the appellant submitted the undertaking and extension of three month period was allowed.\
- (c) It is evident from the noting of the office of DC that it was allowed the extension of three months in the same manner as given by the DC to Shivam Scrap Recycling Pvt. Ltd. Earlier.
- (d) The appellate committee in its order dated 12.03.2013 has raised questions about the quantum of penalty imposed by the adjudicating authority. The penalty should be minimum in quantum as per provisions of the SEZ Act, 2006 and may be zero after achievement of NFE in the extended period as done in the case of Shivam Scrap Recycling Pvt. Ltd.

5.0 Comments from the office of the Development Commissioner, Kandla, SEZ, were also obtained. The DC, inter-alia, stated that :

- (a) the appellant has mingled two different issues i.e. reply of SCN and permission for DTA clearance. The appellant requested for permission for DTA clearance which was granted vide letter dated 08.9.2011 with the conditions mentioned therein.
- (b) there is nothing on record which can confirm that three month's extension had been granted to the appellant for achievement of positive NFE. the circumstances of the case of Shivam Scrap Recycling Pvt. Ltd. are entirely different from the case under consideration. The decision taken in a case cannot be quoted as a rule.
- (c) it is a fit case for imposition of penalty as the appellant failed to fulfil the stipulated NFE and contravened condition No. 2(ii) of the original LOA, condition No. 1 of the Legal Undertaking.
- (d) Keeping in mind the observations made by the Appellate Committee, losses incurred by the appellant during 2008-09 due to heavy rain and also the percentage of shortfall in NFE, the adjudicating authority has taken a lenient view and reduced the penalty to Rs. 17.10 Lakh only.

6.0 I have considered the Adjudication Order dated 23.09.2013 passed by DC, KASEZ, oral/written submissions made by the appellant, comments of office of the DC, KASEZ and all other aspects relevant to the case. It is noted that the appellant was required to achieve positive net foreign exchange in terms of conditions stipulated in LOA/LUT and SEZ Rules. However, the appellant failed to achieve the same. Earlier the appellate Committee remanded the matter back to look into certain aspects including the question of extension of period for three months for achievement of stipulated NFE. I have perused letter dated 8.9.2011 and found that the said letter was issued to the appellant to allow it to carry out its activity of export and import, which were suspended, with certain conditions mentioned therein. I have also perused the note sheet page 38 of DC's file as referred by the appellant, it is noted that on that note sheet, the case of achievement of positive NFE was examined for allowing clearance of goods in DTA. As regards the quantum of penalty, the DC during re-adjudication proceedings has taken a lenient view and reduced the penalty to Rs. 17.10. Lakh.

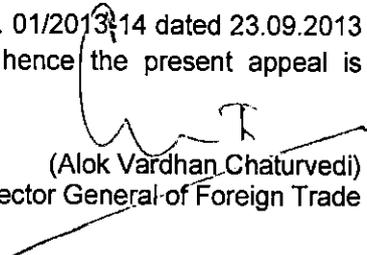
7.0 In view of the above, in exercise of the powers vested in me under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010) read with Notification No. 101 (RE-2013)/2009-2014, dated the 5<sup>th</sup> December 2014, I pass the following order:

**Order**

F.No. 01/92/171/25/AM 16/ PC-VII

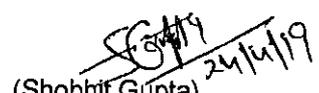
Dated: 24 .04. 2019

There is no ground to interfere in the Order-in-Original No. 01/2013/14 dated 23.09.2013 passed by the Development Commissioner, Kandla,SEZ and hence the present appeal is dismissed.

  
(Alok Vardhan Chaturvedi)  
Director General of Foreign Trade

**Copy To:**

- ✓(1) Afcan Impex Pvt. Ltd., Plot No. 241 to 243 & 251- B, Sector-IV, Kandla Special Economic Zone, Gandhidham, Gujarat-370230.
- ✓(2) Afcan Impex Pvt. Ltd., Afcan Impex Pvt. Ltd., 83-C, Mittal Towers, Nariman Point, Mumbai – 400 021
- ✓(3) Development Commissioner, Kandla SEZ with an advice to make recoveries.
- (4) DGFT's web site

  
(Shobhit Gupta)

Dy. Director General of Foreign Trade