

Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi
Policy - VI
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F.No.01/92/171/37/AM-16/PC-VI

Date of Order : 29/05/2015

Date of Dispatch: 01/06/2015

Name of the Appellant: M/s. Entraco Metals Pvt. Limited,
A-36/2 Vice Area, MIDC, Satpur, Nashik-422007

Order appealed against: No. SEEPZ/28/EOU/4/2000-01/5613 dated 12.05.2014
passed by Development Commissioner, SEEPZ-SEZ,
Mumbai.

Order-in-Appeal passed by: Shri Pravir Kumar, DGFT
Dr. L.B. Singhal, Addl. DGFT

ORDER-IN-APPEAL

M/s. Entraco Metals Pvt. Limited, Nashik (hereinafter referred to as 'the appellant') filed an appeal on 26th June, 2014 against Order-in-Original No. SEEPZ/28/EOU/4/2000-01/5613 dated 12.05.2014 passed by Development Commissioner, SEEPZ-SEZ, Mumbai.

2. Vide Notification No.101/(RE-2013)/2009-2014, dated 5th December, 2014, the Central Government has authorised the Director General of Foreign Trade aided by one Addl. Director General of Foreign Trade to function as Appellate Authority against the order passed by the Development Commissioner as Adjudicating Authority. Hence, the appeal is before us.

3. M/s. Entraco Metals Private Limited was issued the Letter of Permission bearing No.PER/12(2001)EOB/12/2001 dated 09.04.2001, as amended, for setting up an EOU for manufacture and export of Cobalt Powder subject to the fulfilment of conditions stipulated there under. The Letter of Permission dated 09.04.2001 was further extended till 2006-07. Appellant executed the Legal Undertaking on 05.05.2001.

4. The Appellant was granted the permission for advance Domestic Tariff Area (DTA) sale of Rs.100 lakh vide permission letter No.SEPPZ/EOU/28/4/2000-01/156 dated 19.2.2002 subject to the condition that if they fail to adjust the advance DTA sale, 100% applicable duties will be recovered and penal action would be initiated under the provisions of Foreign Trade (Development & Regulation) Act. Accordingly, the Bond for advance DTA sale dated 19.12.2001 was executed by appellant stating that in case they were unable to comply with the terms and conditions as stipulated in advance DTA sale permission, they undertake to pay the difference between the amount of duties paid on the advance DTA sale and full duties applicable on such goods, along with 18% interest from the date of sale to the

date on which payment is made, within 7 days of receiving such demand from the office of the Development Commissioner.

5. However, as per the terms and conditions of the permission granted for the advance DTA sale & the bond executed by the appellant, they failed to pay the applicable duty on account of non adjustment of the advance DTA sale.

6. In view of the aforesaid, appellant was issued the Show Cause Notice (SCN) bearing No.SEEPZ/28/EOU/4/2000-01/6016 dated 11.8.2006 for (i) Non-implementation of the project (ii) Non-submission of the QPR/APR/non-intimation of commencement of production in terms of para 6 of Letter Undertaking (LUT) & (iii) Non-adjustment of advance DTA sale of Rs.100 lakhs granted vide letter dated 19.2.2002. Appellant was thereby called upon by show cause notice to show cause as to why the penal action should not be initiated against it under section 11(2) of the FTD&R, Act, 1992.

7. The appellant submitted the reply vide its letter dated 05.09.2006 & thereby denied the statements and averments made in the said SCN. The unit was granted an opportunity of the personal hearing on 6.9.2006, 24.1.2013 and 16.4.2013. Subsequently, on 24.6.2013, the appellant agreed to comply with the requirement of payment of duty in respect of payment of unadjusted advance DTA sale of Rs. 22.79 lakhs. Accordingly, vide letter dated 24.6.2013, the appellant was called upon to pay the duty on account of the unadjusted DTA sale of Rs.22.79 lakhs to the Jurisdiction Central Excise Authority and furnish the proof of payment. However, the same was not complied with.

8. The Office of the Assistant Commissioner of the Central Excise & Customs, Nashik vide their letter dated 14.10.2013 intimated to SEEPZ-SEZ that vide letter dated 21.8.2013 they had called upon the appellant to pay the duty on account of the non adjustment of the advance DTA sale. In response thereto, the Appellant in its reply vide its letter No.EMPL/13-14/EOU.020 dated 23.8.2013 stated that advance DTA sale had already been adjusted against export made by them and 'No Dues Certificate' had been issued by their Office and as such there was no question of paying differential duty.

9. Appellant was further granted an opportunity of personal hearing on 28th March, 2014, wherein Mr. Rajesh Nashikkar, Director appeared and reiterated the submissions made in earlier PH & written reply. He made the submission that as they had already agreed to pay the duty for unadjusted advance DTA sale of Rs.22.79 lakhs, they had visited the Office of the Assistant Commissioner of Central Excise, Nashik to pay the duty amount but the same was not accepted by the Office of the Central Excise as 'No Dues Certificate' had already been issued to the Appellant.

10. DC, SEEPZ heard the Appellant and after careful consideration of the facts of the case and the submissions made by the unit during the course of PHs held on various dates and on the basis of the material available on record, observed as follows:-

(a) The Appellant has claimed to have commenced production on 28.9.2006. However, it was noted from the production and sale details that the Appellant has been making the export and DTA sale from the year 2001-02. The unit has given the misleading statements regarding the date of production. In view of the aforesaid, the DC, SEEPZ

decided to take the date of production as the date when the first export was made during the period 2001-02.

(b) The DTA sale of Rs.22.79 lakhs was to be adjusted by 19.2.2004 i.e. two year from the date of permission dated 19.2.2002. However, as the permission for utilization was extended till 31.3.2005, the DTA sale was to be adjusted by 31.3.2005. In this case, since no export has been made after 19.2.2002, till 31.3.2005, the advance DTA sale cannot be adjusted. The Appellant claimed to have adjusted the advance DTA sale against the physical export during the period 01.04.2005 to 31.3.2006. However, as per the legal and factual position, the DTA sale cannot be adjusted against the export made after 01.04.2005. Hence, the Appellant is liable to pay the duty on account of the non adjustment of advance DTA sale.

(c) It was further observed by DC, SEEPZ that the appellant in its reply dated 23.8.2013 to the letter F.No.T&RR/Entraco Metal /2013 dated 21.8.2013 issued by the Assistant Commissioner of Central Excise & Customs, claimed to have adjusted the advance DTA sale against the export, and claimed that they are not liable to pay the duty of unadjusted advance DTA sale; whereas before DC on 28.3.2014, the appellant claimed that the office of the Central Excise is not accepting the duty as 'No Dues Certificate' has already been issued to them. From the above, it is apparent that the appellant is making misleading statements before the different authorities.

11. In view of the aforesaid facts and circumstances, DC, SEEPZ vide Order dated 12.5.2014 imposed a fiscal penalty of Rs. One lakhs for non payment of duty against the unadjusted advance DTA sale and for making misleading statement with further direction to the appellant to pay the duty on unadjusted advance DTA sale amounting to Rs.22.79 lakhs to the Jurisdictional Central Excise Authority.

12. The appellant has filed the present appeal against the Order-in-Original dated 12.5.2014 passed by the Development Commissioner, SEEPZ, SEZ, Mumbai. Opportunity of Personal Hearing was granted to the appellant on 22.5.2015. Sh. Rajesh Nasikkar, Director of the firm and Sh. Venkatesh Vishwanath Iyer, Consultant appeared in personal hearing on behalf of M/s. Entraco Metals Pvt. Limited. Sh. Ajay Deshmukh, Senior Authorised Officer from the office of the DC, SEEPZ, SEZ was also present. In the beginning of the PH, appellant was informed that they have to pre-deposit penalty amount as per Section 15 of the FT(D&R) Act. Appellant agreed and stated that they will deposit the same before 29th May, 2015. We have received an e-mail dated 27th May, 2015 from the appellant, enclosing a copy of the Demand Draft No.957616 of Rs.1 lakh, City Bank in the name of Pay and Accounts Officer, SEEPZ-SEZ and stated that same has been deposited with Development Commissioner, SEEPZ. Development Commissioner, SEEPZ may verify the same at its end.

13. In the PH, representatives of the firms explained that they have adjusted advance DTA sale by way of exports and that they are not required to pay any duty. They also stated that date of commercial production has to be taken as 28.9.2006 and not 2001-2002. They have submitted detailed justification on this issue by way of written submissions given along with appeal as well as at the time of PH. They have stated that they have not contravened any provisions of Export/Import Policy as well as para 6.8 of the Foreign Trade Policy.

14. We have examined complete facts of the case including written submissions made along with the appeal and at the time of the PH as well as the oral submissions made during PH and find as follows:

(a) From the facts of the case, it is clear that appellant has affected exports of Rs.7.52 lakhs in the year 2001-2002 and sale of Rs.73.02 lakhs in the year 2005-2006. These facts are clearly admitted by the appellant at para no.6, page no.9 of the written submissions made along with the appeal. These facts clearly establish that date of commencement of production cannot be 28.9.2006. Hence, Development Commissioner is right in holding that commercial production has started in the year 2001-2002. We, therefore, do not find any merit in the appellant's contention that date of commencement of production should be taken as 28.9.2006.

(b) Advance DTA sale permission has been granted on 19.2.2002. As per the guidelines given in Appendix 14(f) of Handbook of Procedures, Export Import Policy, 2002-2007, the advance DTA sale is to be adjusted within a maximum period of 2 years. Hence, the DTA sale of Rs.22.79 lakhs should have been adjusted by 19.2.2004. Since the permission for utilization was extended upto 31st March, 2005, advance DTA sale should have been adjusted by 31.3.2005. From the facts of the case, it is clear that advance DTA sale has not been adjusted, by way of exports, by 31.3.2005. Exports affected in the year 2005-2006 cannot be taken into account for adjustment of advance DTA sale, affected under permission dated 19.2.2002.

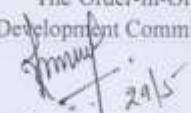
15. In view of the above stated facts, in exercise of the powers vested in us under section 15 of the FT(D&R) Act, 1992 (as amended in 2010), we pass the following order:


ORDER

F.No.01/92/171/37/AM-16/PC-VI

Date of Order: /05/2015


The Order-in-Original No. SEEPZ/28/EQU/4/2000-01/5613 dated 12.05.2014 passed by Development Commissioner, SEEPZ-SEZ, Mumbai is upheld and the appeal is dismissed.


(Dr. Lalit B. Singhal)
Addl. Director General of Foreign Trade


(Pravir Kumar)
Director General of Foreign Trade

To
M/s. Entraco Metals Pvt. Limited,
A-36/2 Vice Area, MIDC, Satpur, Nashik-422007

Copy to: Development Commissioner, SEEPZ-SEZ, Mumbai.


(Pradeep Kumar)
Dy. Director General of Foreign Trade
Tel. 23061562/232 (Ext.)