

**Government of India
Ministry of Commerce and Industry
Directorate General of Foreign Trade
Udyog Bhavan, New Delhi**

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F. No. 01/92/180/59/AMH5/PC VI/27/338-339/

Date of Order : 16/02/2015

Date of dispatch : 17/02/2015

Name of the Appellant :

M/s Permishwer Creations (Pvt)Ltd., Plot No 52, 7th lane,
MIDC Marol, Andheri East, Mumbai-400093.

Order appealed against :

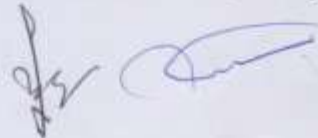
Order-in-Original No. 4-678/2005-100%EOU/10691 dated
04.10.2013 passed by the Development Commissioner,
NSEZ, Delhi.

Passed by :

(i) Shri Pravir Kumar, IAS, Director General of Foreign Trade
(ii) Dr. L.B. Singhal, ITS, Addl. Director General of Foreign Trade
(As Appellate Authority)

Order-in-appeal

1. M/s Permishwar Creations (Pvt.) Ltd. (herein after referred to the Appellant) has filed an appeal under section 15(1) of Foreign Trade (Development and Regulation) Act, 1992 as amended, against the order-in-original No.4-678/2005-100%EOU/10691 dated 04.10.2013 passed by the Development Commissioner, NSEZ, Delhi. The Adjudicating Authority, in his order-in-original, has observed that the applicant has mis-declared different status to different authorities with intent to avail undue benefits under different export promotion schemes. They have claimed deduction of profit income, derived from the operation of EOU, from payment of income tax under section 10 B of income tax act, which is available to EOUs only, on the profit derived from manufacture and export of goods by EOU. This claim of exemption from income-tax, as EOU, under Income Tax Act, disentitles them from duty draw back during the period 31.3.2006 to 31.3.2011. The unit has failed to discharge their obligations as an EOU after issue of LOP, as enumerated under chapter 6 of FTP/HBP, failed to maintain proper account and submit quarterly/annual performance report in the prescribed format as per Annexure to Appendix 14-I-F, has not achieved positive NFE in terms of Para 6.5 of FTP and has not followed the other provisions of FTP/HBP, rendering them liable for penal action under the provisions of Foreign Trade (Development and Regulation) Act, and Foreign Trade (Regulation) Rules. Accordingly, the adjudicating



authority has imposed a penalty of Rs.75 lakhs and suspended the IEC of the Unit for six months.

Brief facts of the case:

- 1.1 The appellant i.e. M/s Permeshwar Creations (Pvt.) Ltd. applied for conversion of its DTA unit at Plot C-19, Hosiery Complex, Phase - II, Noida - 201301 into 100% export oriented unit on 13.10.2005. The Development Commissioner granted a Letter of Permission (LOP) dated 31.3.2006 for manufacture and export of readymade garments, furnishing and accessories. The unit accepted the terms and conditions of the LOP vide their letter dated 10.04.2006. Accordingly, green card No. 242 was issued by the Office of Development Commissioner, NSEZ to the Unit. The unit, however, neither informed commencement of the production during the initial 3 year validity of LOP, nor submitted custom bonding licence issued by jurisdictional excise authorities. Unit vide its letter dated 22.9.2009 sought extension of LOP for one year which was considered by the DC and LOP was extended upto 31.3.2010. The Unit accepted the said extension of LOP and sought further extension for 2 more years on 29.03.2011. Since, the Unit had not given any intimation for commencement of project under custom bonding and did not submit any quarterly/annual performance report (QPR/APR), further extension of LoP was declined and the LoP was cancelled by DC vide letters dated 15.2.2011 and 25.2.2011 respectively.
- 1.2 The appellant appealed against cancellation of the LoP before the Board of Approval (BOA) in the Department of Commerce. The BOA in its 3rd meeting held on 12.06.2013 posted appeal for a personal hearing. However, no representative from the Unit appeared for personal hearing. The Board passed the following orders.

The BoA noted that no representative of the Unit has come for personal hearing. The Board deliberated on the issues of the cancellation of LOP of the Unit by DC NSEZ. After deliberation the Board directed DC NSEZ to give a fresh personal hearing to the Unit, considering all issues related to the matter and pass a speaking order within one month. The Unit may approach BoA if the Unit is not satisfied with the order of DC.



- 1.3 In pursuance of the above decision of BoA, a personal hearing was accorded to the applicant on 9.7.2013 before DC. The appellant was requested to submit written submission in their defence along with copy of Audited balance sheet and income tax return from the year 2005-2006 to 2011-12. However, no representative of the Unit appeared for personal hearing on the given date. Another personal hearing was accorded on 15.07.2013. Shri Daya Shankar, and Shri Vishal Singh appeared before DC and submitted letter dated 15.07.2013. However, they did not submit balance sheet as desired in the case.
- 1.4 Vide letter dated 15.07.2013, the appellant stated that they were surprised at the request to provide records of the income tax exemption availed by them from 2006 to 2011-2012 in the matter of extension of LoP . Income tax is an issue which falls under the jurisdiction of Ministry of Finance and extension of LoP is an issue which falls under the Ministry of Commerce.
- 1.5 The BoA was apprised with this fact and the BoA in its 4th meeting dated 30.08.2013 directed as under:

DC NSEZ apprised the BoA that personal hearing was accorded to the Unit on 9.7.2013, which was not attended by the Unit and another personal hearing was given on 15.7.2013. Two representatives of Unit appeared for the personal hearing but did not submit balance sheets of the Unit for the years 2005-06 to 2011-12, which are inevitably required for the decision on the operation of EOU and validity of LOP . The Unit has again being called for personal hearing. The Board directed DC, NSEZ for providing personal hearing and passing a speaking orders.

- 1.6 Accordingly, DC NSEZ passed the order- in- original dated 04.10.2013. The appellant then filed an appeal dated 17.2.2014 before the Appellate Committee in DoC. However, the Authority has now transferred this appal to DGFT being competent Authority under Section 15 (1) for FT(D&R) Act, 1992 for the purpose. Accordingly, a personal hearing was accorded on 21.11.2014 at 3.30 PM before the undersigned.



2. Shri Gayan Dev Sadh and Shri Yash Dev Sadh, Directors of the Company appeared for personal hearing on the given date and explained the case. During the course of hearing, attention of the appellant was drawn to para 1 of the order- in- original dated 4.10.2013. Accordingly, they were asked whether, in the compliance of the order, they had deposited penalty amount of Rs.75.00 lakhs and whether the appeal was made within the period prescribed i.e. 45 days of the receipt of the Order-in-Original? They stated that they had initially filed appeal before the Commerce Secretary in the month of Nov. 2013 itself. Therefore, the appeal was preferred within the time as per the provisions of the Act. However, they did not deposit the penalty amount as the Appellate Committee vide its letter dated 5.5.2014 demanded Bank guarantee of Rs. 1,00,000 which they had executed on 10.5.2014. Their attention was drawn to the provision of section 15 (1) (b) of FT(D&R) Act 1992. Accordingly, they were asked to pay a complete penalty amount for consideration of the appeal and their request to revoke IEC suspension order. On their request, the matter was posted for 5.12.2014 at 3.30 PM.
- 2.1 Shri Gayan Dev Sadh and Shri Yash Dev Sadh, Director of the Company along with their Counsel Shri Pradeep Jain, Advocate again appeared for personal hearing on 5.12.2014 and requested to reduce the pre-deposit penalty amount. Accordingly, they were given the option to (i) either execute bank guarantee for Rs. 37.50 lakh i.e. 50% of penalty amount or (ii) deposit cash amount of Rs.15 lakh i.e. 20% of total penalty amount. On the request of the appellant the matter was again posted for 11.12.2014 at 3.30 PM which was postponed for 16.12.2014. In the meanwhile the appellant submitted proof of deposition of Rs.15 lakhs through DD dated 8.12.2014 with request to return the BG of Rs.1 lakh which was executed earlier as per direction of Appellate Committee of DoC. Accordingly, BG of Rs one lakh was allowed to be returned.
- 2.2 Shri Gayan Dev Sadh and Shri Yash Dev Sadh, Director of the Company again appeared for personal hearing on 16.12.2014 and sought time for submission of Written Statement (WS) and requested to keep the IEC code suspension order in abeyance till the matter was decided. Accordingly, they were given time for filing Written Submission and it was ordered to keep the IEC suspension order in abeyance till 30.12.2014. They again appeared for personal hearing on 30.12.2014 and submitted Written Statement (WS) and requested to keep the IEC suspension order under



abeyance till the case is decided. Accordingly, their IEC suspension order was placed under abeyance till 15.02.2015.

3. In the defence, the appellant vide their letters dated 11.12.2014 and 27.12.2014 have submitted, inter-alia, as following:-

3.1 They have explained their case in detail in their appeal dated 17.02.2014 and reiterated the same during the personal hearing. They have put forward their Written Submissions, in brief, for consideration as under:

- a. The company was granted the Letter of Permission (LoP) on 31.03.2006, the initial validity of which was for a period of three years. The company sought further extension in this initial period in view of the recessionary trend in the global market which was granted to us till 31.3.2010. The company had also executed the legal agreement with the Hon. Development Commissioner. Having no improvements in the global market we sought further extension for another 2 years. However the Hon. D.C. did not grant further extension though para 6.6 of Foreign Trade Policy did provide for further extension in the initial period of 3 years and also cancelled the Letter of Permission (LoP) by its letter dated 15.02.2011 and dated 25.02.2011.
- b. The company did not start any manufacturing activities nor installed any machinery.
- c. Since the LoP was cancelled by the Ld. D.C., Excise authorities rejected their application for execution of B-17 bond and the warehousing facilities under the Customs and Central Act, on the ground that the unit is not an EOU (Since LoP was cancelled). The EOU can operate and avail the benefits allowed to EOU under the Foreign Trade Policy only after the unit has been declared a warehouse and is operating under Bond, without which no manufacturing activities nor imports/procurements of goods can be possible.
- d. It is submitted that the unit did not acquire the status of EOU in view of the fact that the (i) LoP was cancelled during the initial validity period itself (ii) B-17 bond and ware housing facilities were not permitted with the result no Duty free Imports or procurement of Indigenous inputs have been made. It would therefore be appreciated that there have been no violations under the Foreign Trade

(Development and Regulations) Act by the company, as has been held by the Ld. Development Commissioner, NSEZ.



- e. As explained in appeal, the company took exemption under Section 10B of the Income tax Act which was not entitled to them. Having realised the mistake, the same has been refunded to the Income tax authorities.
- f. As regards the availment of drawback, as explained in appeal, the company has a manufacturing unit at Vapi since 2004 and has been manufacturing and exporting goods. The duty drawback availed by the unit is in respect of exports of goods which have been manufactured in its Vapi (Gujarat) factory as also the job work undertaken from job workers. The company did not manufacture nor export any goods from the so called EOU.
- g. The company has put forward their submissions in detail in their appeal in reply to the allegations made in the Order of the Hon. Development Commissioner, NSEZ which may be considered.

3.2 Prayer:

- i. Set aside the order dated 4.10.2013 passed by the Ld. Development Commissioner.
- ii. Waive the penalty imposed;
- iii. Remove the name of the company from the defaulters' list
- iv. Pass any such orders as may deem fit.

4. Observations:

- 4.1 M/s Permishwar Creations (Pvt.) Ltd. applied for conversion of its DTA unit into 100% export oriented unit (EOU) on 13.10.2005. The Development Commissioner granted a Letter of Permission (LoP) dated 31.3.2006 for manufacture and export of readymade garments, furnishing and accessories. The unit accepted the terms and condition of the LOP vide its letter dated 10.04.2006. Subsequently green card No. 242 was issued to the Unit.
- 4.2 In terms of Para 6.6.1 (a) of FTP, on approval, a Letter of Permission (LoP) / Letter of Intent (LoI) shall be issued by DC / designated officer to EOU / EHTP / STP / BTP unit. LoP / LoI shall have an initial validity of 3 years, by which time unit should have commenced production. Its validity may be extended further up to 3 years by

at Noida *of*
 

competent authority. However, proposals for extension beyond six years shall be considered in exceptional circumstances, on a case-to-case basis by BoA. Once unit commences production, LoP / LoI issued shall be valid for a period of 5 years for its activities. This period may be extended further by DC for a period of 5 years at a time.

- 4.3 In terms of Para 6.6.1(c) of FTP, Unit shall execute an LUT with DC concerned. 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 the FT (D&R) Act and Rules and Orders made thereunder, without prejudice to action under any other law / rules and cancellation or revocation of LoP / LoI / IL.
- 4.4 In terms of Para 6.11 & 6.12 of FTP, EOU / EHTP / STP / BTP units shall be entitled to following benefits:
- (a) Reimbursement of Central Sales Tax (CST) on goods manufactured in India. Simple interest @ 6% per annum will be payable on delay in refund of CST, if the case is not settled within 30 days of receipt of complete application (as in paragraph 9.10.1 of HBP v1).
 - (b) Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.
 - (c) Reimbursement of duty paid on fuel procured from domestic oil companies / Depots of domestic oil Public Sector Undertakings as per drawback rate notified by DGFT from time to time. Re-imburement of additional duty of excise levied on fuel under the Finance Acts would also be admissible.
 - (d) CENVAT Credit on service tax paid.
 - (e) Exemption from Income Tax as per Section 10A and 10B of Income Tax Act.
 - (f) Exemption from industrial licensing for manufacture of items reserved for SSI sector.
 - (g) Export proceeds will be realized within 12 months.
 - (h) Units will be allowed to retain 100% of its export earning in the EEFC account.



- (i) Unit will not be required to furnish bank guarantee at the time of import or going for job work in DTA, where unit has (a) a turnover of Rs. 5 crores or above;(b) unit is in existence for at least three years.
- (i) 100% FDI investment permitted through automatic route similar to SEZ units etc.

4.5. We have examined complete facts of the case, including contents of the Order-in-Original, submissions made by the appellant at the time of appeal, during personal hearings and submissions made after the personal hearings and find as follows:

- (i) Unit will be entitled for the benefits as per its status on the date. It is not a matter of choice or option for the unit, whether to opt for benefits as an EOU unit or as a DTA unit. On a particular date, if it is an EOU, it will get benefit of EOU only. Similarly, if it is a DTA unit, it will get benefit of DTA unit only. It cannot claim benefit of either as an EOU or as a DTA unit, as per its own convenience and choice.
- (ii) In this case, Development Commissioner (DC) of, SEZ, Noida issued letter of permission to the appellant on 31st March, 2006 and the appellant accepted the terms and conditions of LoP vide its letter dtd.10th April,2006. This LoP was cancelled by DC vide its letter dated 15th February, 2011 and 25th February, 2011. Therefore, between 10.4.2006 and 15.2.2011, the unit was an EOU only and it was holding a valid LoP for the same. Based on the strength of valid LoP during 10th April, 2006 to 15th February, 2011, the appellant unit has also claimed income tax exemption as an EOU under Section 10 B of the Income Tax Act as follows:-

Financial year	Assessment year	Amount of deduction under Section 10 B (in Rupees)
2006-07	2007 - 08	9,09,192
2007-08	2008 - 09	10,06,115
2008-09	2009 - 10	10,62,821
2009-10	2010 - 11	58,40,776
2010 - 11	2011 - 12	51,35,625
2011 - 12	2012 - 13	Nil

- (iii) Appellant was holding valid LoP during 10th April, 2006 to 15th February, 2011. As per the conditions No.viii of LoP dated 31.3.2006, appellant was required to enter into legal agreement, in the format prescribed in Appendix 14-1-F of the Hand Book of Procedures Volume I, with the DC. As per Condition No.5 and 6 of LUT, as given in Appendix No.14-1-F of HBP Volume I, appellant was required to give Quarterly Performance Report (QPR) and Annual Performance Report (APR) to the DC in the format prescribed in Annexure II, III and IV of Appendix 14-1-F. However, appellant did not submit any QPR/APR during the entire period of validity of LoP. This clearly amounted to violation of terms and conditions of LoP. Para 6.6.1(c) of the FTP clearly provides that unit shall execute LUT with the DC concerned. Failure to abide by any of the terms and conditions of LoP shall render the unit liable to penal action under provisions of the FT(D&R) Act and rules and orders made there under, without prejudice to action under any other law/rules and cancellation or revocation of LoP.
- (iv) The appellant claims that it has another unit in DTA at Vapi, Gujarat. Goods manufactured and exported by DTA unit is eligible for exemption/remission of taxes and duties paid on inputs. The appellant has accepted that it ~~is~~ has claimed drawback on exports made from DTA unit in Vapi, Gujarat for the period 2006-07 and 2007-08 as follows:-

Financial Year	Amount of Duty Drawback (Rs.)
2006-07	4,73,74,964.00
2007-08	3,10,22,858.00

- (v) In this case, it is clear that the appellant has obtained LoP under Chapter 6 of the FTP, issued under Section 5 of FTDR Act for its NOIDA unit and on the strength of this LoP, it has claimed income tax exemption under Section 10 B of the Income Tax Act from the income tax authorities, against the exports made by DTA unit (at Vapi) of the appellant. Appellant vide its letter dated

27.12.2014 has admitted "the company did not manufacture nor export any goods from the so called EOU". It has further admitted in this letter "the company took exemption under Section 10B of the Income Tax Act which was not entitled to them". As such, the benefit of income tax exemption under Section 10 B was allowed only against manufacture and exports of goods by 100% EOU (at NOIDA) and not for exports made by DTA unit (AT Vapi) of the appellant.

- (vi) As per law, the exports made from DTA unit is not at all eligible for exemption from payment of Income tax under Section 10 B of Income tax Act, during this period.
- (vii) Hence, it is clearly established that the appellant has acted as an EOU, based on the strength of LoP, obtained by it from the DC office, under Chapter 6 of FTP. And, on the strength of this LoP, obtained exemption from income tax, under Section 10 B of the Income Tax Act, on entire exports profit of DTA unit. By doing so, it has clearly misused LoP issued under Chapter 6 of FTP. In addition, once it is claiming and acted as an EOU under one statute, it cannot say that it is an "EOU" for purpose of one statute and "Not an EOU" for another statute. If it has obtained LoP under FTP, issued under FT(D&R) Act and claimed income tax exemption under Income Tax Act, based on the strength of LOP issued under FTP, it cannot claim that it is not an EOU for the purpose of claiming duty drawback, under Duty Drawback Rules, issued by Department of Revenue, Ministry of Finance, for the same exports. It cannot be an "EOU" and "not an EOU" simultaneously. It is conclusively established from the detailed judgement given by the DC, as well as examination of the facts, that appellant has acted as an EOU and simultaneously availed income tax and duty drawback benefits. DC in his Order in para 2.8 and para 3.0 has explained this issue in detail by giving reference to various judgements of Hon'ble Supreme Court and other judgements.



- (viii) From the facts of the case, it is conclusively established that the appellant has acted as an EOU, based on the strength of LoP, obtained income tax exemption, concealed the facts to revenue authorities and claimed duty drawback benefits. It cannot simultaneously avail the benefits of income tax exemption under Section 10 B of the Income Tax Act as an EOU and benefit of duty drawback from the Department of Revenue authorities for the same exports. It has clearly violated Rule 7(n) of Foreign Trade (Regulation) Rules, 1993. It has also violated other conditions of LoP, as mentioned by DC in para 3.3 of his Order, hence, is liable for penal action in terms of Section 11(2) of the FTDR Act, 1992, as amended
- (ix) The appellant has exported goods on the strength of DTA unit and has claimed income tax exemption of Rs. 9,09,192, 10,06,115, 10,62,821, 58,40,776, 51,35,625 for the years 2006-07, 2007-08, 2008-09, 2009-10, 2010 - 11 respectively on the strength of LOP. It has also claimed the duty drawback amount of Rs.4,73,74,964.00 for the year 2006-07 and Rs.3,10,22,858.00 for the year 2007-08.
- (x) Since the amount of income tax exemption is calculated on profit of exports earning, the value of the goods exported, claimed under this LOP, would be much higher than these values. Section 11(2) of the FTDR Act empowers adjudicating authority to impose penalty upto five times the value of the goods in respect of which any contravention is made or attempted to be made. Hence, the adjudicating authority has rightly imposed a penalty of Rs.75 lakhs.

5. After examination of the complete facts of the case, including contents of the Order-in-Original, submissions made by the appellant at various stages and appellant's own admission vide its letter dated 27th December, 2014, it is conclusively established that appellant has misused the LoP, issued under Chapter 6 of FTP and has violated the conditions

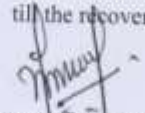
of LoP. We, therefore, in exercise of the powers vested in us, under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992, as amended in 2010, pass the following orders:


ORDER

F.No. 01/92/180/59/AM-15/PC-VI

Dated the 16th February, 2015.

- (i) Order-in-Original No. 4-678/2005-100%EOU/10691 dated 04.10.2013 passed by the Development Commissioner, NSEZ is upheld and the appeal filed by M/s Parmeshwar Creations (Pvt) Ltd. is rejected.
- (ii) The issue of availment of duty drawback and other duty implications may be looked into by the Department of Revenue authorities and action as considered appropriate may be taken by DoR authorities.
- (iii) Import Export Code Number of the appellant was suspended by the DC for a period of 6 months. We had put the suspension order of IEC in abeyance till 15.2.2015. As against penalty imposed of Rs.75 lakhs, appellant has already deposited penalty amount of Rs.15 lakhs. Suspension order of IEC is put in abeyance till 16.3.2015. Appellant is directed to deposit balance penalty amount of Rs.60 lakhs, within a period of one month, to the O/o Development Commissioner, NSEZ. In case, balance penalty amount is not deposited within one month from this order, DC, NSEZ shall put IEC of appellant under suspension till the recovery is made.


(Dr. D. B. Singhal)
Additional DGFT
16.2.2015


(Pravir Kumar)
Director General of Foreign Trade
16.2.2015

To

M/s Parmeshwar Creations (P) Ltd. (Regd. Office)
Plot No.52, 7th Lane, MIDC Marol
Andheri (E), Mumbai - 400093.

M/s Parmeshwar Creations (P) Ltd. (EOU)
C-19, Hoseiry Complex,
Phase - II, Noida.

Copy to:

1. Development Commissioner, SEZ, Noida.
2. Shri Ram Tirath, Director General (Export Promotion), Ministry of Finance, Department of Revenue, 1st Floor, Hotel Janpath, New Delhi- 110001.
3. Shri Rajiv Talwar, Joint Secretary (Drawback), Ministry of Finance, Department of Revenue, 4th Floor Room No. 1, Jeevan Deep Bldg. New Delhi.
4. The Commissioner of Customs, Central Excise & Service Tax, Noida, C-56/42, Renu Tower, Sector - 62, Noida-201307.
5. The Deputy Commissioner of Income Tax - 8(2), Room No.209, Aaykar Bhawan, M.K. Road, Mumbai-400 020.
6. The Under Secretary, EOU Section, Deptt. of Commerce, Udyog Bhawan, New Delhi.

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17/2/15

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o/c 17/02/2015

(Praveen Sharma)
Deputy Director General of Foreign Trade