

(2019) 04 DEL CK 0140

In the Delhi High Court

Case No : Civil Writ Petition No. 11728 Of 2016, Civil Miscellaneous No. 46168 Of 2016

Morgan Tectronics Ltd

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 22-04-2019

Acts Referred:

Special Economic Zones Rules, 2006 — Rule 27(10), 54, 74
Foreign Trade (Development & Regulation) Act, 1992 — Section 11
Special Economic Zones Act, 2005 — Section 5

Citation : (2019) 04 DEL CK 0140

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Rupesh Kumar, Gaurang Kanth, Biji Rajesh, Eshita Baruah

Final Decision : Disposed Off

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition impugning the minutes of a meeting dated 06.01.2016 (hereafter "the impugned minutes") passed by respondent no.3 (the Unit Approval Committee, NOIDA Special Economic Zone). By way of the impugned minutes, the Letter of Approval (LoA) issued to the petitioner was cancelled. The said impugned minutes were further affirmed by respondent no.2 (Board of Approval, Department of Commerce - hereafter "BoA") in its meeting dated 09.11.2016 and the appeal preferred by the petitioner was rejected.

2. The petitioner disputes that it has persistently violated the provisions of the Special Economic Zones Act, 2005 or the Rules made thereunder. It claims that the Unit Approval Committee (UAC) as well as the BoA had taken an adverse view with regard to certain bills of entry and the penalty of Rs. 50 lakhs paid by the petitioner in respect of certain bills of entry. The petitioner claims that the penalty was paid without prejudice and without admitting any default. More

importantly, the petitioner has succeeded before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) and the said amount is now required to be returned to the petitioner. The petitioner further claims that the UAC had also failed to appreciate that the petitioner was permitted trading activities. It is also contended that the petitioner had achieved positive foreign exchange inflow. However, since the records had been seized, the petitioner was handicapped from establishing the foregoing.

3. Initially, it was contended that the Development Commissioner of the SEZ was a member of the UAC of Noida SEZ, which had taken the decision to cancel the LOA issued to the petitioner and also one of the members of the BoA, which had heard the appeal against the order of the UAC. In this context, it is averred in the petition that the decision of the BoA was vitiated. However, at the stage of final arguments, the learned counsel for the petitioner did not press this ground.

Factual Background

4. In the year 1991, the petitioner applied to the Ministry of Commerce for grant of a license for setting up an industrial unit in the Noida Export Processing Zone (NEPZ) for the manufacture of Colour Televisions. Pursuant to this, a Letter of Approval (LoA) dated 31.07.1991 was issued to the petitioner granting the aforesaid license to the petitioner.

5. During the course of next twelve years, the LoA was amended three times: first, in the year 1992, permitting broad banding of Black & White Television sets along with the coloured T.V. sets; second, in the year 1995, permitting the manufacturing of Small Electronics Calculators, Colour TV Chassis without picture tube & cabinet, Audio Systems, Electronic Toys & Emergency Lights, Telephone Sets and Ceiling Fans; and third, in the year 2003, vide a letter dated 30.06.2003, permitting the petitioner to undertake manufacturing of Consumer Electronic Hardware items, Loader with Lens for VCD player and trading activities.

6. Thereafter, in 2017, the validity of the LoA was extended for a period of five years. It was again extended in the year 2012 for a further period of five years - that is, up to 31.03.2017 - subject to the following conditions:

"1. You shall achieve Positive Net Foreign Exchange (NFE) as prescribed in the SEZ Rules, 2006 for the period you operate as a unit in the NSEZ failing which you shall be liable for penal action under the FT(D&R) Act, 1992.

2. You shall abide by the provisions of Special Economic Zones Act, 2005 and rules and orders/instructions made there under.

3. You shall execute revised Bond cum Legal Undertaking in the form "H" of SEZ Rules, 2006 within 15 days from the date of the issue of this permission.

4. All other terms and conditions of LOA dated 31/07/91 (or as amended from time to time) will remain unchanged.

5. You will ensure that the details of this permission/letter are incorporated /

updated in your unit details/database on SEZONLINESYSTEM within SEVEN days from the date of issue of this letter.

6. You shall submit acceptance of terms & conditions of this permission to the Development Commissioner, NSEZ immediately."

7. The petitioner executed a Bond-cum-Legal Undertaking (Bond-cum-LU) in pursuance of the aforesaid conditions. The said Bond was jointly accepted by the Development Commissioner, Noida SEZ and the Specified Officer.

8. On 05.01.2016, the BoA sent a communication informing the petitioner that a meeting was scheduled on 06.01.2016 for personal hearing and calling upon the promoters/officials of the petitioner to be present in the said meeting. The petitioner replied to the said communication requesting for an adjournment of the meeting on account of being "pre-occupied for some urgent work".

9. The meeting took place on 06.01.2016 as scheduled and the Unit Approval Committee (UAC) found that the petitioner had not been manufacturing items and undertaking trading activities in terms of the letter dated 30.06.2003 (whereby the LoA was amended), and has been "regularly indulging in mis-declaration of goods in Bills of Entry" . It was observed that the petitioner has not been performing its export obligations but has been working only as a channel for domestic importers, by importing the goods and selling them entirely in the domestic market. The UAC also held that the petitioner unit has not achieved positive NFE and has failed to abide by the terms & conditions of the LOA/Bond-cum-LU.

10. In this view, the UAC, inter alia, arrived to the conclusion that the petitioner has violated the conditions of LoA and Bond-cum-LU, and has further acted in contravention of the provisions of Special Economic Zone Act, 2005 and the Rules framed thereunder (SEZ Rules, 2006).

11. Pursuant to the aforesaid decision, a show cause notice dated 14.01.2016 was issued calling upon the petitioner to show cause as to why the LOA issued to it should not be cancelled for "persistently contravening the provisions of SEZ Act/ SEZ Rules and terms & conditions of LOA/Bond-cum-LUT and as to why penalty should not be imposed on the unit in terms of Rule 54 of SEZ Rules, 2006 read with Section 11 of the Foreign Trade (Development & Regulation) Act, 1992." In furtherance of the aforesaid, the UAC further suspended the LoA issued to the petitioner with immediate effect in order to prevent the petitioner from committing further violations.

12. The petitioner filed its reply to the aforesaid notice by a letter dated 04.02.2016, denying the alleged violations made by the petitioner and further stating that an amount of Rs. 50 Lakhs has been deposited by the petitioner as customs duty and not towards any penalty/fine/liability emerging out of the investigation.

13. Thereafter, the UAC in its meeting dated 10.02.2016, inter alia, observed

that the petitioner has violated the provisions of SEZ Act/SEZ Rules and terms & conditions of LOA/Bond-cum-LU. The relevant extract of the minutes of the meeting of the Approval Committee of Noida SEZ is set out as under:

"10. The Committee on the basis of the above facts and with respect to written submissions of the unit contained in their letter dated 04/02/2016 and admission by Shri P V Khullar came to the following conclusion:

i) The unit has been persistently violating the provisions of SEZ Act/SEZ Rules and terms & conditions of LOA/Bond-cum-LUT.

ii) The- unit has admitted the mis-declaration of goods covered under the Bills of Entry - a) BE No. NSEZ0008568 dated 05/10/2015, b] BE No. NSEZ0008527 dated 03/10/2015 as explained in Para 3 and 8 above.

iii) The unit has deposited an amount of Rs. 50. Lakhs (Rs. 35 Lakh vide challan No.730468 dated 20/10/2015 and Rs. 15 Lakhs vide, challan No. 730467 dated 20/10/2015] towards their duty/penalty/fine liability emerging as the outcome of investigation against the said three Bills of Entry.

iv) The unit had also requested to Special Intelligence & Investigation Branch (SIIB) to decide the matter on merits and stated that he did not want any Show Cause Notice of personal hearing.

11. The Committee further observed that Rule 27(10) of SEZ Rules, 2006 provides that the assessment of imports by a unit shall be on the basis of self declaration and not subject to routine examination. Hence, the import clearance is on self declaration basis and trust is imposed on the SEZ unit that it gives correct declaration and files correct Bill of Entries. The unit has persistently violated the rule & persistently mis-declared the goods in Bill of Entries."

14. In view of the aforesaid observations, the UAC, decided to cancel the LoA and further called upon the petitioner to complete the exit formalities under Rule 74 of the SEZ Rules, 2006.

15. The aforesaid decision was communicated to the petitioner by a letter dated 23.02.2016. The petitioner was further called upon to furnish requisite details for the determination of duty liability.

16. Thereafter, the petitioner filed an application under the Right to Information Act, 2005, inter alia, seeking the information as to whether its reply dated 04.02.2016 sent in response to the show cause notice dated 14.01.2016, was forwarded to the members of the UAC before the meeting held on 10.02.2016. The petitioner received a reply dated 08.03.2016 to the aforesaid application stating that the agenda presented by the Petitioner was placed before the UAC in its meeting held on 10.02.2016 and after due deliberations, the decision was taken by a general consensus of the members, taking into consideration the Petitioner's written submission, oral submissions and other material available on record.

17. On 18.03.2016, the petitioner filed an appeal against the minutes of the meeting dated 10.02.2016 before respondent no.3 (the Board of Approval) under the SEZ Rules, 2006. The said appeal was dismissed of by an order dated 09.11.2016, whereby it was held that no case had been made out by the petitioner for the appeal.

Reasons and Conclusion

18. One of the principal grounds urged in the petition to assail the decision of the Board of Approval (BoA) is that the BoA also included the Development Commissioner of NOIDA SEZ as a Member. In this context, it is averred in the petition that the impugned decision of the BoA was vitiated on account of bias. However, at the stage of final arguments, learned counsel for the petitioner did not press this issue and, therefore, it is not necessary to consider the same.

19. The Unit Approval Committee (UAC) had taken note of the a letter dated 23.10.2015 sent by the Asstt. Commissioner (SIIB) to Specified Officer(Customs) NOIDA SEZ, inter alia, mentioning certain instances of import against three Bills of Entry (BoE NSEZ008568 dated 05.10.2015; BoE NSEZ0008457 dated 30.09.2015; and BoE NSEZ0008527 dated 03.10.2015), which were concluded as cases of mis-declaration by the petitioner. It was also pointed out that the petitioner had deposited Rs. 50,00,000/- as duty/penalty/fine against the BoAs dated 30.09.2015 and 03.10.2015. It was also noted that search and seizure operations were conducted by SIIB and goods imported against BoE no. 8667 dated 07.10.2015 were found to be mis-declared.

20. In view of the information the UAC, inter alia, concluded that activities of the petitioner were not in accordance with the object of the SEZ described under Section 5 of SEZ Act, 2005; the petitioner had indulged in wrongful activities and has been persistently violating the provisions of the SEZ Act, 2005, the rules made thereunder, and the terms of the LoA; the petitioner had admitted to mis-declaration of goods and had paid the penalty of Rs. 50 Lakhs; and the petitioner has been mainly trading in DTA and there has been hardly any physical exports.

21. In view of its conclusions the UAC had directed suspension of the LoA and thereafter, cancelled the LoA in its meeting held on 10.02.2016.

22. The petitioner"s appeal against the decision of the UAC was rejected by the BoA at its meeting held on 09.11.2016.

23. A plain reading of the impugned decision of the BoA indicates that the petitioner"s appeal had been rejected on the ground that the petitioner had not furnished details of import, export and sales in the domestic tariff area in the prescribed format. It is also observed thatthe petitioner had failed to provide details of Free Foreign Exchange received from overseas and, therefore, it was not possible to ascertain the Net Foreign Exchange (NFE) position. The BoA also noted the observations of the UAC. The impugned decision of the BoA is set out below:-

"M/s Morgan Tectronics Ltd. (MTL) has preferred an appeal against the order dated 23.02.2016 passed by the DC, NSEZ/UAC which was placed before the 07thBoA meeting held on 28th April, 2016. It was decided by the BoA that the appellant should furnish the statement in r/o NFE within a week regarding clearances figures for physical export and trading activity separately.

Accordingly, M/s Morgan Tectronics Ltd. vide its letter dated 4.5.2016 had furnished the statement/inputs in connection with physical export/DTA Sale/NFE for the consideration of Department which was forwarded to DC, NSEZ for verification. DC NSEZ vide his letter dated 2.6.2016 informed that the M/s MTL has not furnished the details of import, export and DTA sale by them in the prescribed format. M/s MTL has informed that their records had been seized by the DRI, Delhi and they will submit the details whenever they will get back the records.

DC, NSEZ further stated that since the unit has failed to provide the said documents i.e., details of EEFC Account of DTA Buyer or Free Foreign Exchange received from overseas, NFE position cannot be determined. Further, details of payment received from EEFC Account or from overseas buyer should be through normal banking channel and that can be provided by the unit. Thus, the contention of the unit that it is unable to provide the details of EEFC account etc. as the same has been seized by DRI, is untenable.

Further, the following observations of the UAC were noted:-

(i) The unit has been persistently violating the provisions of SEZ Act/SEZ Rules and terms & conditions of LoA/Bon-cum-LUT.

(ii) The unit has admitted the mis-declaration of goods covered under the Bills of Entry-a) BE No.NSEZ0008568 dated 05.10.2015, b) BE No.NSEZ0008527 dated 03.10.2015 as explained in Para 3 and 8 above.

(iii) The unit has deposited an amount of Rs.59 Lakhs (Rs.35 lakh vide challan NO.730468 dated 20.10.2015 and Rs.15 lakhs vide Challan No.730467 dated 20.10.2015 towards their duty/penalty/fine liability emerging as the outcome of Investigation against the said three Bills of Entry.

(iv) The unit had also requested to Special Intelligence & Investigation Branch (SIIB) to decide the matter on merits and stated that he did not want any Show Cause Notice or personal hearing.

DC, NSEZ stated that many cases have been registered by different revenue agencies against the M/s Morgan Tectronics Ltd. at DRI, Lucknow Zonal Unit and NSEZ, Customs and DRI, HQ, New Delhi.

In view of the above, after detailed deliberations, the BoA observed that no grounds have been made for the appeal and hence rejected the appeal."

24. As is apparent from the above, the petitioner's explanation that its records had been seized by the DRI and, therefore, they were not in a position to submit

the same, was not accepted by the BoA. The BoA held that the details of payments received from EFFC account or from overseas buyers would be through normal banking channels and the same could be provided by the petitioner.

25. It is contended on behalf of the petitioner that LoA had been extended from time to time as the petitioner had been regularly achieving a positive Net Foreign Exchange position. It is contended that the petitioner was unable to provide the requisite details at the material time as its records had been seized, however, is now in a position to provide the same.

26. It is also noticed that the BoA had also taken an adverse view regarding the mis-declaration of goods covered under certain Bills of Entry (BoE NSEZ008568 dated 05.10.2015 and BoE NSEZ0008527 dated 03.10.2015). It had also noticed that the petitioner had paid an aggregate sum of Rs. 50 lakhs towards duty/penalty/fine as a result of the investigation carried out against the specified Bills of Entry.

27. The petitioner asserts that it had paid the penalty/fine without prejudice to its rights. Further, it has prevailed before the Central Excise and Service Tax Appellate Tribunal (CESTAT) and the said amount is now required to be refunded to the petitioner. Clearly, if the petitioner has succeeded in establishing that it was not liable to pay the duty/penalty/fine as imposed, no adverse view taken on that ground can be sustained.

28. In the aforesaid circumstances, this Court considers it apposite that the BoA re-examine the petitioner's contention in the light of the decision rendered by the CESTAT. It would also be apposite for the BoA to consider the petitioner's contention that it had in fact achieved a positive NFE if the petitioner places the necessary documents to establish the same.

29. In view of the above, the impugned order is set aside and the matter is remanded to the BoA to consider the petitioner's appeal afresh. The petitioner is also at liberty to file further documents in support of its claim that it had achieved positive NFE, within a period of two weeks from today.

30. The petition is disposed of in the aforesaid terms. The pending application is also disposed of.