
(2014) 07 DEL CK 0109
In the Delhi High Court
Case No : CUSAA 07/2014

Commissioner of Customs

APPELLANT

Vs

Ginni International Ltd.

RESPONDENT

Date of Decision : 07-07-2014

Acts Referred:

Customs Act, 1962 — Section 149

Citation : (2014) 307 ELT 466

Hon'ble Judges : Vibhu Bakhru, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Satish Kumar, Senior Standing Counsel, Advocate for the Appellant

Judgement

S. Ravindra Bhat, J.—The office report discloses that the assessee/respondent was served. There is, however, no appearance on its behalf.

2. Admit.

3. The following question of law arise:-

Did the Tribunal commit an error of law in holding that the respondent/assessee was entitled to the benefit of the DTA Scheme as claimed by it in the circumstances of the case?

4. The facts on record show that the respondent/assessee was a registered Export Oriented Unit (EOU). On 04.03.2008 it applied for obtaining of the no objection certificate and claimed that no tax liability existed on that day. It, therefore, sought to be converted into a Domestic Tariff Area (DTA) Unit. On 18.03.2008, the Revenue granted the "No objection Certificate" to enable the conversions sought and on 31.03.2008 the actual debonding took place. Thereafter, on 07.05.2008, the respondent/assessee sought for amendment of four shipping bills in respect of consignments exported on 07.03.2008, 11.03.2008 and 13.03.2008. It was contended that this was essential for it to claim benefits under DTA Scheme such as duty draw back etc. The claim was

rejected by the Revenue, through the order in original dated 27.06.2008. The Commissioner relied upon the terms of a circular issued by the Board Circular No. 4/04-Cus dated 16.01.2004, which stated that conversion of free shipping bills into Advance Licence/DEPB/DFRC shipping bills should not be allowed and that conversion should be only allowed where benefit of an Export Promotion Scheme by the Customer has been denied due to any dispute.

5. The assessee's appeal to the Tribunal succeeded; CESTAT by its order relied upon para 6.18 of the Foreign Trade Policy.

6. The learned counsel for the Revenue argues that the Tribunal fell into error in the present case in accepting the respondent's arguments. It was submitted while transcending from EOU regime to that of the DTA, the Revenue had no occasion to verify whether in fact the inputs in respect of which draw-back is sought to be claimed after amendment were in fact used. It was submitted that the verification at best undertaken before debonding and issuance of no objection certificate was as to the nature and quantity of goods. The learned counsel relied upon the ruling of this Court in *Terra Films Pvt. Ltd. Vs. Commissioner of Customs*, .

7. Before analysing the contentions of the Revenue, it would be useful to extract the relevant portions of the circular dated 16.01.2004 which were relied upon by the Commissioner in the present case:

As regards permitting conversion of free shipping bills into Advance Licence/DEPB/DFRC shipping bills is concerned, it is true over a period of time, with liberalization having been ushered in the Customs administration, clearance of goods is being permitted mostly on the basis of self-declaration made by the exporters on the shipping bills. Such self-assessment scheme necessarily casts the responsibility on the exporters to make up his mind at the time of filing shipping bills as to which export promotion incentive he likes to avail. With the introduction of the system of on-line assessment, such request for conversion at a later date creates difficulties and it is not advisable to encourage such conversion.

It is, therefore, clarified that conversion of free shipping bills into Advance Licence/DEPB/DFRC shipping bills should not be allowed. As regards permitting conversion of shipping bills from one export promotion scheme to another is concerned, it is clarified that such conversion should only be allowed where the benefit of an export promotion scheme claimed by the exporter has been denied by DGFT/MOC or customs due to any dispute. Such conversion may be permitted on merits by the Commissioner on case to case basis subject to the following conditions:

(a) The request for conversion is made by the exporter within one month of the denial/rejection of the benefit claimed.

(b) One the basis of available export documents etc., the fact of use of inputs is

satisfactorily proved in the resultant export product.

(c) The examination report and other endorsements made on the shipping bill/export documents prove the fact of export and the export product is clearly covered under relevant SION and or DEFB Schedule as the case may be.

(d) On the basis of shipping bill/export documents the exporter is fulfilling all conditions of the Export Promotion Scheme into which he is seeking conversion.

(e) The exporter has not availed benefit of the export promotion Scheme under which the goods were exported and no fraud/mis-declaration/manipulation/investigation is initiated against him in respect of such exports.

8. The Tribunal appears to have relied solely on para 6.18 of the Foreign Trade Policy which reads as follows:-

(e) Unit proposing to exit out of EOU scheme shall intimate DC and Customs and Central Excise authorities in writing. Unit shall assess duty liability arising out of debonding and submit details of such assessment to Customs and Central Excise authorities. Customs and Central Excise authorities shall confirm duty liabilities on priority basis, subject to the condition that the unit has achieved positive NFE, taking into consideration the depreciation allowed. After payment of duty and clearance of all dues, unit shall obtain "No Due Certificate" from Customs and Central Excise authorities. On the basis of "No Dues Certificate" so issued by the Customs and Central Excise authorities, unit shall apply to DC for final debonding.

In case there is no proceeding pending under FT (D & R) Act, DC shall issue final debonding order within a period of 7 working days. Between "No Dues Certificate" issued by Customs and Central Excise authorities and final debonding order by DC, unit shall not be entitled to claim any exemption for procurement of capital" goods or input Unit can, however, claim Advance Authorization/DEPB/Duty Drawback. Since the duty calculations and dues are disputed and take a long time, a BG/Bond/Installment processes backed by BG, shall be provided for expediting the exit process.

9. The reasoning of the Tribunal is that debonding of 100% EOU Unit requires fulfillment of procedural formalities before the final order is issued by the Development Commissioner. The CESTAT, therefore, proceeded on the assumption that since no objection certificate was issued and debonding order was made later, the revenue had in fact verified as to whether the exports took place. The sequitur according to the Tribunal was that the genuineness of the exports, the nature and quantum of goods, was undisputed. The Tribunal, therefore, was of the opinion that in these circumstances there was no further requirement of verification.

10. The Tribunal's reasoning in the present case appears to be flawed as is evident from this Court's ruling in M/s. Terra Films Pvt. Ltd. (supra). In that case too, the question which arose for consideration was whether the benefit claimed under the DTA or other schemes after migration of the assessee from the

existing EOU, could be granted. This Court had occasion to consider the Circular of 06.01.2004 and in addition proviso to Section 149 of the Customs Act. The Court held as follows:-

6. As per proviso of this Section 149, no amendment of a shipping bill was to be allowed after the export goods have been exported except on the basis of the documentary evidence, which was in existence at the time the goods were exported. The submission of the learned counsel for the appellant/exporter in this regard was that the exporter was in possession of all the documents at the time of export to show that it was entitled to claim under the DEPB/DECC cum drawback scheme. From the plain reading of Section 149, it may be seen that exporter could not claim amendment in routine and as a matter of right. The discretion vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house. Though this discretion was to be exercised judiciously, but it was qualified with the proviso that the amendment could be allowed only if it was based on the documentary evidence in existence at the time the goods were exported. The Commissioner in the remand case has rightly observed that the present case in fact relates to the request for conversion of shipping bills from one export promotion scheme into another and was not merely of an amendment in the shipping bill. The request was made for conversion from one scheme to another after the lapse of long period of more than one year. It was a case of request for "conversion" and not of "amendment" inasmuch by converting from one scheme to another, it was not only addition of word "cum" duty drawback, but change of entire status and character of the documents. Even if it was to be taken as a case of amendment, the proper officer may not be in possession of the documents sought to be amended after lapse of such a long period, particularly when the goods already stood exported. For enabling an exporter to draw the benefits of any scheme, not only physical verification of documents would be required, but as is noted by both the authorities below, the verification of the goods of export as also their examination by the Customs was necessarily required to be done. In the given factual circumstances, that was rightly held to be impossible. The Commissioner in the remand case rightly distinguished the cases cited on behalf of the exporter from the facts of the present. The finding of fact as arrived at by the Commissioner has been rightly upheld by the CESTAT.

11. It is, therefore, clear that the verification which preceded issue of no objection certificate and the final debonding order was with respect to the benefits that could have been availed by the assessee as an EOU Unit. At that stage, the authorities had no occasion to verify whether inputs had been sourced in a proper manner as to entitle the draw back or any other benefit that a DTA unit could legitimately claim. In that sense, the ruling of this court in M/s. Terra Films (supra) is decisive on the point. This Court is of the opinion that consequently the appeal has to succeed. Since the documents and materials which were apparently available when the exports were made, to substantiate the assessee's claim for DTA benefits have concededly not been gone into, it

would be appropriate that this aspect be duly considered by the Tribunal. Therefore, while setting aside the order of the Tribunal, the matter is remitted to the CESTAT for due consideration of the case on this aspect and render its decision after hearing the parties.

12. The appeal is allowed in the above terms without any order as to costs.