

(2013) 03 MAD CK 0023

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 2566 of 2012

Commr. of Cus. (Seaport-Export)

APPELLANT

Vs

Suzlon Energy Ltd.

RESPONDENT

Date of Decision : 14-03-2013

Acts Referred:

Customs Act, 1962 — Section 149

Citation : (2013) 293 ELT 3 : (2014) 26 GSTR 435

Hon'ble Judges : R. Banumathi, J;K. Ravichandrabaabu, J

Bench : Division Bench

Advocate : P. Mahaadevan, for the Appellant; K.S. Venkatagiri for Lakshmi Kumaran, Counsels, for the Respondent

Judgement

R. Banumathi, J.—Whether conversion of Shipping Bills from Drawback and EPCG Scheme to EPCG Drawback and DEEC Scheme

could be allowed u/s 149 of Customs Act is the question falling for consideration in this appeal preferred by the Department. The appeal was

admitted on the following substantial questions of law:-

1. Whether conversion of Shipping Bills without any proof for rejection of their request for allowing the benefit on export promotion scheme by

DGFT, is appropriate in terms of Circular No. 4/2004 dated 16-1-2004?

2. Whether the conversion of the Shipping Bills can be allowed u/s 149 of Customs Act, 1962 as the said Section deals with amendment only?

3. In this case, the request made by the party for addition of DEEC Scheme to their Shipping Bills, would not it amount to reassessment of the

Shipping Bills? If so whether re-assessment of the Shipping Bills can be dealt under the provision of Section 149 of the Customs Act, 1962?

1st Respondent-M/s. Suzlon Energy Limited is engaged in manufacture of export

of Wind Operated Electricity Generator and parts thereof. 1st

Respondent had been importing raw material required for the manufacture of export production viz., blades for rotor 2100 KW Model Suzlon

Branch Wind Operated Electricity Generators under Advance Licence (Advance Authorisation) No. 3110034801/2/03/00, dated 8-8-2008

issued by the Joint Directorate General of Foreign Trade, Pune after executing a bond with Customs Department for fulfilment of export obligation

within the stipulated time. The export goods in question were indeed manufactured using exempted materials used for manufacture of export

product in the above referred Advance Licence and few other items. 1st Respondent filed five Shipping Bills bearing Nos. 3681452, dated 17-3-

2010; 3681453, dated 17-3-2010; 3686416 dated 21-3-2010; 3686417, dated 21-3-2010 and 3687396, dated 22-3-2010 under ""Drawback

and EPCG Scheme"" (Scheme Code 44) for export of Wind Operated Electricity Generator - Blades for rotor 2100 KW and completed the

export. Later, 1st Respondent vide letter dated 5-4-2010 stated that while preparing the Shipping Bills for the above exports, the Scheme code

was mistakenly selected as ""44"" i.e. Drawback and EPCG Scheme instead of ""71"" EPCG, Drawback and DEEC Scheme and requested for

issuance of "No Objection Certificate" for converting the aforesaid Shipping Bills to the Scheme ""EPCG, Drawback and DEEC Scheme. In

support of their claim, 1st Respondent submitted documents viz., E.P. copy and Exchange Control copy of original Shipping Bills, Bill of Lading,

Mate Receipt, Invoice and Packing list, copy of DEEC licence, branches list, registration of Licence and check list. In their written submission

dated 5-7-2010, the 1st Respondent inter alia submitted that their request is not exactly falling under the category of conversion of the Shipping Bill

and that it is only for rectification of the error in the Scheme code. 1st Respondent's request was rejected vide Order-in-Original No.

13774/2010, dated 9-12-2010 by the Commissioner of Customs (Exports) as the 1st Respondent has not produced any letter from DGFT/MOC

or Customs rejecting their request for allowing the benefit on an export promotion scheme which were prescribed in Circular No. 4/2004 dated

16-1-2004.

2. Aggrieved by the said order, 1st Respondent preferred appeal before Customs,

Excise and Service Tax Appellate Tribunal (for short

CESTAT"). By the order dated 30-5-2011, CESTAT allowed the request for conversion claimed by the 1st Respondent stating that u/s 149 of

Customs Act, conversion is possible on the documents in existence at the time of export and the Shipping Bills in question are supported by a

Certificate from the Chartered Engineer and there is also an endorsement in the Chartered Engineer's Certificate with export particulars viz.,

Shipping Bill Nos. etc. Being aggrieved by the order of CESTAT, the Department has preferred this appeal.

3. Mr, P. Mahaadevan, learned counsel for Appellant submitted that conversion of Scheme of Shipping Bills are to be considered in terms of

Board's Circular No. 4/2004, dated 16-1-2004 and the Board's Circular clearly stated that the promotion of conversion of Shipping Bills from

one export promotion scheme to another scheme is concerned, conversion could be allowed where benefit of export promotion scheme claimed

by the exporter has been denied by DGFT/MOC or Customs and that 1st Respondent has not produced any evidence for rejection as mentioned

in Para 3.2 of Board's Circular No. 4/2004, dated 16-1-2004. Learned counsel further submitted that Tribunal ought to have considered that this

is not the rectification of error in the Scheme code. But it is the request for conversion of Scheme of the Shipping Bills from ""Drawback & EPCG

[Code No. 44] to ""Drawback EPCG and DEEC"" [Code No. 71]. It was submitted that conversion of Scheme of the Shipping Bills are to be

considered in terms of Board's Circular No. 4/2004, dated 16-1-2004 and Tribunal was not right in invoking Section 149 of Customs Act for

conversion of the Scheme.

4. Mr. Lakshmi Kumaran, learned counsel for 1st Respondent submitted that request of 1st Respondent was not exactly falling under category of

conversion of Shipping Bills from one Scheme to another; but is a case of simple clerical error and requesting addition of words ""Advance

Licence"" along with EPCG Drawback and would not amount to making request for conversion of Shipping Bills in one export scheme to another

and if it is so assumed, conversion/addition should be permitted under the provision of Section 149 of Customs Act. Drawing our attention to the

Circular No. 36/2010, dated 23-9-2010, learned counsel submitted that the

rigour of Circular No. 4/2004, dated 16-1-2004 has been

superseded and it is no longer required for exporter to produce evidence for rejection as mentioned in Para 3.2 of Board's Circular No. 4/2004,

dated 16-1-2004. Submitting that application was only for amendment of the Shipping Bills which is covered by the statutory provision u/s 149 of

Customs Act, the learned counsel placed reliance upon 2007 (215) E.L.T. 385 [Mahindra & Mahindra Limited v. CC (Imports), Nava Sheva]

and 2008 (224) E.L.T. 415 [Amritsar Swadeshi Textile Co. (P) Ltd. v. CC, Bangalore].

5. 1st Respondent filed five Shipping Bills bearing Nos. 3681452 dated 17-3-2010; 3681453, dated 17-3-2010; 3686416, dated 21-3-2010;

3686417, dated 21-3-2010 and 3687396, dated 22-3-2010 under Drawback & EPCG Scheme [Scheme Code 44] for export of Wind

Operated Electricity Generator - Blades for rotor 2100 K.W. and completed the export. 1st Respondent vide letter dated 5-4-2010 requested for

issuance of "No Objection Certificate" for converting the aforesaid Shipping Bills under ""Drawback & EPCG Scheme"" (Scheme Code 44) to

Scheme ""EPCG Drawback and Advance Licence"" (Scheme Code 71).

6. Conversion of Shipping Bills from one export promotion scheme to another are to be considered in terms of Section 149 of Customs Act read

with Board's Circular No. 4/2004 dated 16-1-2004. As per Para 3.2 of Board's Circular, conversion of Shipping Bills from one export

promotion scheme to another only be allowed where the benefit of export promotion scheme claimed by the exporters has been denied by

DGFT/MOC or Customs due to any dispute. While seeking conversion of the above said five Shipping Bills from EPCG Drawback scheme to

EPCG Drawback and DEEC scheme, the 1st Respondent had not produced any letter from DGFT/MOC or Customs showing rejection of their

request for allowing the benefit of export promotion scheme.

7. Para 3.2 of Circular No. 4/2004, dated 16-1-2004 reads as follows:-

As regards permitting conversion of free shipping bills in to 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. On the basis of available export documents etc., the fact of use of inputs is satisfactorily provided 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 DEPB 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. The exporter has not availed benefit for the export promotion Scheme under which the goods were exported and no

fraud/misdeclaration/manipulation/investigation is initiated against him in respect of such exports.

8. According to Department, examination of export goods would reveal whether the goods purported to be exported factually tally in actuality with

the Shipping Bill and Invoice etc. Then the aspect of nexus with imported goods has to be thoroughly examined along with the other aspects. The

description of the export goods can be checked only on a proper examination of the goods and whether all these parameters are satisfied or not

could be checked only when the Shipping Bill is filed by mentioning the Scheme. Contention of Department is that it is not a simple amendment of

the Shipping Bills, but conversion of Shipping Bills from one Scheme to another

Scheme which has revenue implication.

9. Learned counsel for 1st Respondent projected the case as if, it is only seeking for an amendment u/s 149 of Customs Act and not seeking for

conversion from one Scheme to another. By making such submission, the learned counsel further contended that Section 149 of Customs Act

permits such amendment even after the goods left the country.

10. We are unable to appreciate such contention of the learned counsel for 1st Respondent. While we peruse the letter dated 5-4-2010 of 1st

Respondent seeking issuance of "No Objection Certificate" towards "EPCG Drawback and Advance Licence Scheme" instead of "Drawback and

concessional duty EPCG", it is clear that the exporter (1st Respondent) is certainly shifting its claim for benefit from one Scheme to another for

which he is seeking "no objection" from the department. In effect, it is nothing but seeking permission to convert from one Scheme to another and it

is not an amendment simpliciter in pursuant to the mistaken application of Code while entering in the Shipping Bills. Only if it is simple amendment,

Section 149 of Customs Act could be pressed into service. On the other hand, if it is a conversion of one Scheme to another, certainly, relevant

Board's Circular which governs the procedure for which conversion will come into operation and the exporter is bound by such Circular. At the

relevant point of time, admittedly, the Circular No. 4/2004 of 2004, dated 16-1-2004 was holding the field and the relevant Paragraph has already

been extracted supra.

11. 1st Respondent imported Capital Goods (Machineries) under Export Promotion Capital Goods and Raw Materials under Duty Entitlement

Certificate. For the imports made under EPCG (Concessional Duty Scheme), the exporters have to export goods for five times of CIF value of the

imported goods. With regard to the goods imported under Exemption Scheme (DEEC), the importers have to manufacture the final export product

out of the imported goods and export within a stipulated period. In the present case, the 1st Respondent availed benefit under both EPCG Scheme

and DEEC Scheme. According to Department since the 1st Respondent availed the benefit under both Schemes, the 1st Respondent is obligated

to manufacture the final product of the export goods using the raw materials imported under DEEC Scheme in the machineries imported under

EPCG Scheme. If the export obligation is not fulfilled within the stipulated period the importer is liable to pay the applicable duty with interest.

12. 1st Respondent had filed all the five Shipping Bills in dispute under Drawback cum EPCG (Code No. 44) in the year 2010. By letter dated 5-

4-2010, the 1st Respondent requested the Customs Department for conversion to Drawback EPCG cum DEEC Scheme (Code No. 71).

According to Department in the case of DEEC export, the exporter has to file DEEC declaration to the effect what are the raw materials used in

the manufacture of the final export product, whether it is imported/indigenous. At the time of examination of the goods materials given in the

declaration will be verified.

13. It is purely a matter of fact as to whether the exporter is entitled to the benefit of Scheme to which he wants to convert his claim. It is for the

Authorities concerned to look into those facts and thereafter permit conversion or deny. In the present case, the materials given in the declaration

has not been verified, since Shipping Bills were not filed under DEEC Scheme and the same cannot be verified at this stage, since the materials are

not available. According to Department, if the request of the exporter is considered, the revenue loss for the Department is Rs. 1,15,79,730/-. It

was further stated that the revenue implication on pro rata basis for nine numbers of DEEC portion pertaining to the raw materials used in the

manufacture of the final export product amounts to Rs. 1,15,79,730/- without interest at the rate of 15% as per DGFT PN 9/2002. Learned

counsel for Department submitted that 1st Respondent is yet to submit the documents to JDGFT for obtaining the Export Obligation Discharge

Certificate (EODC) on the entire quantity of imported DEEC raw material used in the manufacture of the final product.

14. Learned counsel for 1st Respondent submitted that the Commissioner of Customs (Exports) rejected the request of the 1st Respondent for

conversion of Shipping Bills on the only ground that ""exporter while seeking conversion of five Shipping Bills, have not produced any letter from

DGFT/MOC/Customs rejecting their request for allowing the benefit on an export scheme"". Learned counsel further submitted that there is no

finding by the Commissioner of Customs that the materials were not used or that 1st Respondent was not eligible for the Scheme at all. It was

submitted that the only ground on which the request for rejection rejected was that 1st Respondent has not filed the order rejecting the request for

allowing the benefit of the export scheme.

15. The above contention does not merit acceptance. As pointed out earlier only to claim benefit under Drawback EPCG scheme and DEEC

scheme, the exporter has to file DEEC declaration to the effect what are the raw materials used in the manufacture of the final product. At the time

of examination of the goods materials given in the declaration will be verified. In the present case, the same was not verified since Shipping Bills

were not filed under DEEC scheme. Therefore, it is not open to the 1st Respondent to contend that there was no finding by the Commissioner of

Customs that the materials were not used in the manufacture of the final export product.

16. No doubt, the learned counsel appearing for the 1st Respondent placed subsequent Circular No. 36/2010, dated 23-9-2010 to contend that

Circular No. 4/2004, dated 16-1-2004 has been superseded and the conditions imposed in the earlier Circular is diluted in the later Circular. We

have perused the Circular No. 36/2010, dated 23-9-2010. No doubt, the issue has been considered by the Board in detail and it is stated therein

that conversion should be permitted in accordance with the provision of Section 149 of Customs Act, 1962 on a case to case basis on merits

provided the Commissioner of Customs is satisfied on the basis of documentary evidence which was in existence at the time the goods were

exported and that the goods were eligible for the export promotion scheme to which conversion has been requested, even though, Circular No.

36/2010 had in fact dilutes the earlier Circular No. 4/2004, the Board is very particular and categorical in stating that Circular No. 36/2010 shall

be applicable only to Shipping Bills filed on or after the date of issuance of the said Circular viz., Circular No. 36/2010, dated 23-9-2010.

However, it is further stated in the Circular that till such time as EDI system is modified to allow conversion of Shipping Bill in the EDI system,

conversion may be allowed manually. Thus from the reading of Circular No. 36/2010, dated 23-9-2010, it is seen that the same is applicable only

for the Shipping Bills filed on or after the date of issuance of the said Circular. In this case, the 1st Respondent had filed the Bill of Entry on 17-3-

2010, 21-3-2010 and 22-3-2010 respectively, admittedly, prior to the issuance of the said Circular No. 36/2010, dated 23-9-2010. Therefore,

in our considered view, the learned counsel for 1st Respondent cannot rely on Circular No. 36/2010, dated 23-9-2010.

17. A similar issue was considered by the Division Bench of Delhi High Court in the matter of Terra Films Pvt. Ltd. Vs. Commissioner of

Customs, . In the above decision, the Delhi High Court has considered the scope of Section 149 of Customs Act and found that the discretion

vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house has to be though

exercised judicially, 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. It is further observed therein that the request was made for conversion from one Scheme to another

is a case of request for conversion and not of an amendment inasmuch as by converting from one Scheme to another, it was not only addition of

certain word, but change of entire status and character of the documents. Thus, the Delhi High Court observed that the Proper Officer may not be

in a possession of the documents sought to be amended 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 also verification of the goods of export and their

examination by the Customs was necessarily required to be done. By observing so, the Delhi High Court upheld the rejection of the request of the

exporter seeking for conversion of the Shipping Bill from one Scheme to another. We are in full agreement with the reasonings given by the Delhi

High Court in the above said case and by following the said decision Terra Films Pvt. Ltd. Vs. Commissioner of Customs, we find that the 1st

Respondent's claim seeking conversion is not maintainable and the same has been rightly rejected by the Commissioner of Customs. The Tribunal

has not gone into any of these aspect in detail, even though it happens to be a final fact finding authority. It has simply allowed the conversion by

resorting to the provision u/s 149 of Customs Act as if, it is a simple request for amendment. Therefore, we find that the order passed by the

Tribunal cannot be sustained and accordingly, the same is set aside and the appeal filed by the Department is allowed. The questions of law raised

in the appeal are answered in favour of the Department. No costs.