

(2024) 02 CESTAT CK 0034

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 52065 Of 2021

M/s Lovy International

APPELLANT

Vs

Commissioner Of Customs (Export) Inland Container Depot,
Tughlakabad New Delhi-110020

RESPONDENT

Date of Decision : 26-02-2024

Acts Referred:

Constitution Of India, 1950 — Article 14
Customs Act, 1962 — Section 30, 41, 149

Citation : (2024) 02 CESTAT CK 0034

Hon'ble Judges : Binu Tamta, Member (J); P.V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : Jyotika Sharma, Munshi Ram Dhania

Final Decision : Allowed

Judgement

Binu Tamta, Member (J)

1. Challenging the Order-in-Original No. 08-2021-LIMATULAYADEN-COMMR-2021 dated 04.10.2021, the appellant has preferred this appeal, being aggrieved by rejection of their application for conversion of Shipping Bills from Drawback (Scheme Code 19) to Drawback and ROSCTL (Rebate of State and Central Taxes and Levies) SB (Scheme Code 60).

2. Facts of the case are that the appellant had cleared two consignments of ? Ladies Readymade Garments, cotton bags and Jute Bags? falling under CTH 62 and 63 and a few items of metal bags and printed matters (picture) from ICD, Tughlakabad vide Shipping Bills Nos. 3900932 dated 18.07.2020 (Let Export Order dated 21.07.2020) and 6716621 dated 23.11.2020 (Let Export Order dated 26.11.2020). The case of the appellant is that due to clerical error on the part of their Customs Broker, the said Shipping Bills was filed under the Drawback Scheme (Code 19) in place of Drawback and ROSCTL Scheme (Code 60), though for claiming ROSCTL scheme, the appellant had marked ?Y?. The clerical error caused by the Customs Broker came to notice on 18.01.2021 while

filing for license with DGFT, it appears that the appellant sent the application (soft copy as well as hard copy) along with the supporting documents on 21.01.2021 to Centralise Export Assessment Cell at Mumbai erroneously in terms of the Public Notice No. 88/2017 dated 05.07.2017 issued by the Commissioner of Customs, NS-IV, JNCH, Nhava Sheva which provided that all such matters shall be dealt with by Centralise Export Assessment Cell situated at Mumbai. In response, the appellant received the communication on 06.03.2021 whereby they were advised to file the necessary application with the ICD, Tughlakabad being port of filing of Shipping Bills. The appellant then made an application vide e-mail dated 31.03.2021 along with all supporting documents to the Commissioner of Customs for conversion of Drawback to ROSCTL. After the Covid-19 pandemic was relaxed, the appellant on 11.07.2021 sent a hard copy of all documents. The petitioner attended the personal hearing on 03.09.2021 and also submitted another letter dated 06.09.2021 pointing out that the error came to the notice only on 18.01.2021, while filing for license with the DGFT. The Commissioner by the impugned order rejected the prayer on the ground that the appellant had made the request for amendment after a period of three months which was mandated by the CBEC Circular No. 36/2010-Cus. dated 23.09.2010. Being aggrieved, by the order-in-original dated 04.10.2021, the appellant has filed the present appeal before this Tribunal.

3. Ms. Jyotika Sharma, learned counsel for the appellant submitted that the CBEC Circular dated 23.09.2010 permitted the conversion in accordance with the provisions of Section 149 of the Act on case to case basis on merit provided the 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 the conversion was requested and since the appellant had duly submitted the said documents the goods were eligible for Drawback and ROSCTL Scheme in view of the Public Notice No. 58/2015-2020 dated 29.01.2020 and since they are entitled to the substantial benefit they could not be denied the same on account of mere procedural lapses. She also pointed out that no time limit has been prescribed under Section 149 of the Act and the circular in question prescribing the time limit of three months is without any authority of law. She relied on the decisions in support of her submission that Section 149 of the Act prescribes no limit for such conversion. Also, Shipping Bill No. 6716621 dated 23.11.2020 was within the period of three months in terms of the circular as Let Export Order was passed on 26.11.2020 and the request for conversion was made with the Mumbai Customs on 21.01.2021, though the said request was made before an inappropriate authority, however, the same needs to be excluded.

4. Shri Munshi Ram Dhanania, learned Authorised Representative for the Revenue reiterated the findings of the Commissioner in the impugned order and laid stress on the circular dated 23.09.2010 which specifically prescribed the time limit on three months for making application for amendment.

5. Having heard both sides and perused the records, we find that the issue

whether the period of time limit of three months prescribed in the circular is binding in view of the provisions of Section 149 of the Customs Act, is no longer res integra and has been considered in several decisions.

6. Before considering the issue, it is necessary to consider the background in which the appellant had sought amendment of the Shipping Bills. The Rebate of State and Central Taxes and Levies (ROSCTL) was introduced with effect from 07.03.2019 replacing the Merchandise Exports from India Scheme (MEIS) by virtue of the Public Notice No. 58/2015-2020 dated 29.01.2020, thereby up to 07.03.2019 the benefit of Drawback scheme was available along with MEIS Scheme and after the withdrawal of MEIS Scheme, the benefit of Drawback Scheme was available with ROSCTL, with effect from 07.03.2019. The benefit under the new ROSCTL Scheme was given in the form of duty credit scrips same as MEIS scrips. The submission of the learned counsel that there was a clerical error on the part of the Customs Broker whereby the shipping bills were filed under the Drawback Scheme (Code 19) instead of Drawback ROSCTL Scheme (Code 60) seems to be bona fide in view of the withdrawal of the earlier scheme and introduction of the new scheme on 29.01.2020 made applicable with effect from 07.03.2019. We find merit in the submission of the appellant that they learnt about this clerical error only when they filed for license with the DGFT on 18.01.2021 and, therefore, on 21.01.2021 they submitted the necessary application with supporting documents, which also appear to be made in great hurry and in absence of any assistance from the Customs Broker and they filed the same before the Commissioner of Customs, Nhava Sheva though the Shipping Bill was filed before the ICD, Tughlakabad and hence further delay took place. The appellant acted on the response received from the Cell at Mumbai and submitted on line application on 31.03.2021 on account of pandemic Covid-19 and once the situation normalised, the hard copy of the application was sent on 11.07.2021.

7. We now come to the issue on merits whether rejection of the amendment application on the ground of being time barred as prescribed in the circular is justified. Section 149 of the Act reads as under:

"149. Amendment of documents.

- Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the custom house to be amended:

Provided that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be."

The aforesaid provision of Section 149 has been the subject matter in various

decisions some of which relied on by the appellant are:

(i) K.G. Denim Ltd. Vs. Central Board of Excise & Customs – 2018 (361) ELT 521 (Mad.);

(ii) Leotex Vs. Union of India – 2012 (281) ELT 173 (Ker.);

(iii) Diamond Engg. (Chennai) P. Ltd. Vs. CC (Seaport-Export), Chennai – 2013 (288) ELT 265 (Tri.-Chennai);

(iv) Autotech Industries (India) Pvt. Ltd. Vs. Commissioner of Customs, Chennai-IV – 2022 (380) ELT 364 (Tri.-Mad.);

(v) M/s Gupta Enterprises Vs. Commissioner of Customs (Seaport-Export), CESTAT, Chennai – Final Order No. 40559-40561/2023.

8. We would also take note of the decision of the Hon'ble High Court of Madras in Visoka Engineering Pvt. Ltd. Vs. Commissioner of Customs, Chennai-IV – 2022-TIOL-227- CESTAT-MAD, wherein it was held that:

¶16.....

"24. The Hon'ble Jurisdictional High Court in case of Global Calcium Pvt Ltd Vs Commissioner of Customs, Chennai vide judgement dated 29.6.2017 In CMA No. 875 of 2017 observed as under.....

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27. The Commissioner has denied the request for conversion of shipping bills by resorting to the Board Circular... By this Circular, a period of three months 4 is prescribed to file the request for conversion/amendment. Section 149 does not prescribe any time limit for filing an application for amendment of document. No doubt that section 149 of the Customs Act, 1962 would prevail over the Board circular... We hold that request for conversion of Free Shipping Bill cannot be denied as time-barred by resorting to the Board Circular."

17. The Hon'ble High Court of Kerala in the case of Parayil Food Products Pvt Ltd Vs Union of India reported in 2020 (10) TMI 1141-Kerala High Court considered a similar issue and held as under:-

"8. For the purpose of issuance of No Objection, provisions of Section 149 of the Customs Act, 1962 envisage the complete procedure for issuance of no objection certificate, i.e. for the purpose of amendment of a bill of entry or a shipping bill only after fulfilling certain conditions in the proviso....

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10. It is trite law that circulars cannot assume the role of the Principal Act lest the provisions only a binding force. If at all the revenue is facing difficulties in excepting and processing applications for amendment of bills of lading, an amendment to the Principal Act can be suggested in accordance with the law and

tell the pendency of the same, an Ordinance can also be issued.... I am afraid the action of the respondent cannot be accepted, for, it is an utter violation of statutory provision of Section 149 of the Customs Act....”

9. In this regard, it is also relevant to take note of the decision of the Tribunal in *Man Industries (India) Ltd vs Commissioner of Customs*, (EP) 2006 (202) ELT 433 where it has been held that:

“the statutory right, as also the statutory obligation of the proper officer to amend the document after its presentation in the custom house cannot be curtailed or set to not by circulars of the board. The approach adopted by the respondent has the effect of inferring from and conferring upon the board circular, a status of a statute overruling the proviso to section 149 of the customs act, 1962, which is impermissible.”

The said decision of the Tribunal was upheld by the Bombay High Court as reported in 2007 (216) ELT 15 and the appeal filed by the department before the Apex Court was also dismissed 2015

(326) ELT A34 (SC), observing as under:

“After hearing learned counsel for the parties, we are convinced that what was sought was the amendment of documents only and would squarely be covered under section 149 of the Customs Act, 1962. The appeals are accordingly dismissed.”

Later when the Circular No. 36/2010 fell for consideration before the Bombay High Court in the case of *Pinnacle Life Science Pvt Ltd. Vs. Union of India*, 2022 (7) TMI 725 (Bom.), after examining the provisions of the Circular in the context of Section 149 of the Customs Act, it was held that time limit of three months as prescribed by paragraph 3(a) of Circular was illegal and without jurisdiction. The Division Bench of the Gujarat High Court in the case of *Mahalaxmi Rubitech Ltd vs Union of India C/SCA/21636/2019* had held that the impugned Circular to the extent it prescribes the time limits in para 3(a) was ultra vires the provisions of Article 14 of the Constitution of India as also Section 149 of the Customs Act, 1962.

10. From the aforesaid decisions, we find that it has been categorically held that the Department cannot reject the request for conversion on the basis of the Board's circular, when no time limit is prescribed under Section 149 of the Customs Act.

11. In the facts of the present case, we find that the export goods is not in dispute and therefore, the entitlement of the appellant to claim the benefit under the scheme is clearly admissible and the same cannot be denied on account of any procedural lapse as provided in the circular. We also find that the examination level of Drawback Scheme and that of Drawback along with ROSCTL Scheme is the same and therefore, there is no reason to deny the benefit of the scheme. Moreover, we find that the delay is not enormous inasmuch as the Let

Export Order was issued on 21.07.2020 and the application for amendment was made on 21.01.2021 which cannot be said to be an unreasonable delay so as to deny the benefit on merits. Insofar as the second Shipping Bill is concerned, the Let Export Order was issued on 26.11.2020 and the request for conversion was made on 21.01.2021 which was will within a period of three months. The error made by the appellant in making the application for conversion before the Commissioner, Nhava Sheva is concerned, the same needs to be ignored in terms of the response given by the Cell at Mumbai, the appellant had made the on line application on 31.03.2021. The learned counsel for the appellant submitted that the said period needs to be excluded as they had prosecuted the issue in good faith. Therefore, the delay if any, is not substantial to deny the benefit of the scheme to the appellant. We are conscious of the decision of the High Court of Delhi in Commissioner of Customs (Export) Vs. E.S. Lighting Technologies (P) Ltd. – 2020 (371) ELT 369 (Del.), where the Court observed that :

“ 6.....Merely because no time limitation is prescribed under Section 149 for the purpose of seeking amendment/conversion, does not follow that request in that regard could be made after passage of any length of time. The same could be made within a reasonable period. The conversion sought by the respondent was from free shipping bill to advance licence shipping bill. The petitioner could not have entertained the application for such conversion without examination of records. It was not fair to expect the Department to maintain, and be possessed of, the records after passage of five long years – when the respondent made its application for such conversion.”

In the present case neither the delay is enormous nor that more rigorous examination is required in conversion from Drawback to Drawback ROSCTL.

12. The appellant had justified the necessity of conversion as they had produced the documents in terms of the Section 149 of the Act which entitles an amendment in the Bill of Entry even after the imported goods have been cleared for home consumption except on the basis of documentary evidence which was in existence at the time the goods were cleared and in the present case it is not that such documents were not in existence at the time of export of goods. Circular was meant to liberalise the migration from one scheme of the Foreign Trade Policy to another and it could not have imposed rigid restrictions which are not contemplated in the parent statute and in the context of facilitative intent, is to be implemented in accordance with the spirit of liberalised approach to request for conversion from one scheme to another, (Haldiram Foods International Pvt. Ltd. Vs. Commissioner of Customs, Nagpur, Final Order No. 86108 of 2020 dated 16.12.2020).

13. The impugned order denying the amendment on the ground that the same has been made by the exporter beyond the period of three months from the date of Let Export Order in terms of the circular, deserves to be set aside. Accordingly, the appeal is allowed with consequential relief as per law.