
(2011) 04 DEL CK 0153
In the Delhi High Court
Case No : CUSAA No. 14 of 2010

Terra Films Pvt. Ltd.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 06-04-2011

Acts Referred:

Customs Act, 1962 — Section 130, 149, 30, 41

Citation : (2011) 185 ECR 169 : (2011) 268 ELT 443

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Sandeep Jha, for the Appellant; Mukesh Anand and Jayendra, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—This is an appeal u/s 130 of the Customs Act, 1962 (hereinafter referred to as "the Act") against the order of Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT") dated 11.11.2009.

2. The facts leading to the filing of the present appeal need to be mentioned in brief. The Appellant is a manufacturer of c-extruded multilayer film having their factory in specified area of Himachal Pradesh and availing exemption from customs duty. It exported commodities under 7 shipping bills during the period of September 2004 to April 2005. In the shipping bills, they had mentioned about the scheme under which exports were made as "DEPB/DEEC". The goods stood exported to the destination under this scheme. After a lapse of considerable period, the exporter/Appellant vide its letter dated 27th January, 2006 followed by some more letters requested for permission to amend their DEEC/DEPB shipping bills into those DEEC/DEPB cum drawback scheme. As per the Board Circular No. 4/2004-Cus. Dated 16th January, 2004 of CEBC, the Commissioner of Customs rejected the exporter's request for conversion of shipping bill from one export promotion scheme to another. Being aggrieved by the Commissioner's order rejecting their request, the exporter filed an appeal before

the CESTAT. The CESTAT vide its order of 1st November, 2007 remanded the matter back to the Commissioner of Customs to examine the claim of the Appellant as set out before CESTAT for amendment of the shipping bills u/s 149 of the Act in accordance with law. While remanding the case, the CESTAT also noted that the said circular does not mention a statutory provision for denying any conversion of shipping bills. CESTAT also noted that in any event the claim of the exporter was for amendment u/s 149 and the same was required to be examined accordingly. On remand, the Commissioner re-examined the entire issue-both from the point of view of Circular as well as u/s 149 of the Act. Personal hearing was also given to the exporter, who maintained their case to be covered u/s 149 of the Act. The Commissioner after detailed discussion, rejected the request of the exporter for amendment of the shipping bills from DEPB/DEEC into those of drawback scheme. While rejecting the request of the exporter, the Commissioner vide his order dated 6th May, 2008 reasoned as under:

10. As per the proviso to Section 149, amendment of shipping bill can be allowed after export goods have been exported only on the basis of documentary evidence which was in existence at the time the goods were exported. It is thus clear that amendment of shipping bill is not to be allowed in a routine manner after the export goods have been exported. It is observed that the exporter have in this context relied upon the decisions of Hon''ble CESTAT in the cases of Hero Cycles Ltd. v. Commissioner of Customs [2004 (173) E.L.T. 342 (Tri-Del)], 2004 (91) ECC 701 , 2005 (179) ELT 39 I, however, observe that the facts and circumstances in the cases decided by the Hon''ble CESTAT and relied upon by the exporter, are different from and not comparable to the facts and circumstances of the instant case. In all the cases relied upon by the exporter, the Hon''ble CESTAT allowed conversion/amendment u/s 149 only on the basis of documentary evidence which were in existence at the time goods were exported if the benefit of export promotion scheme could not be claimed and availed of by the exporter due to some bonafide omission/mistake/error that occurred at the time of filling of shipping bills and exportation of goods. In the instant case, however, no such situation exists, as is evident from the fact of the case detailed here-in-above. I therefore, find that the ratio of the decision of Hon''ble CESTAT relied upon and cited by the exporter is not applicable in the instant case. Accordingly, I do not find it feasible to accede to the request of the exporter for amendment/conversion of the shipping bills u/s 149 of the Customs Act, 1962.

3. Against order of 6th May, 2008 of the Commissioner, exporter preferred appeal before the CESTAT which came to be dismissed vide the impugned order dated 11th November, 2009. The CESTAT while agreeing with the findings of the Commissioner, recorded the following reasons:

It is to be observed that Importer/exporter cannot claim amendment as a matter of right. The word used namely, "proper office may", "in his discretion, authorize any document" to be amended indicate that the power to be exercised is only discretionary power. Commissioner has refused to exercise the discretion in

favour for the Appellant, he has relied on the guidelines prescribed by the Board vide Circular No. 4/2004 dated 16.01.2004 issued vide F. No. 609/176/02/DBK. He has held that the Appellant does not come under the guidelines issued by the Board. In fact, he has held that it amounts to "conversion of shipping bills" and not merely of amendment. One reason for not acceding to the request was that the goods have been already exported. The apprehension of the learned SDR that in respect of the goods already exported during the year 2004 and 2005, to cause verification to fix the brand rate under the drawback rules is physically impossible deserves to be taken into account. In view of the above, the order of the Commissioner in not acceding to the request for amendment of shipping bills in terms of Section 149 cannot be held to be arbitrary. No case has been made out for exercise of discretion by the Tribunal in the light of the fact that as revealed from the records, none of the consignments have been subject to Customs verification at the time of export.

4. We have heard the learned Counsel for the exporter and learned Counsel for the Department and perused the record. From the facts as noted above, it is seen to be admitted case that it was after a considerable period of time, i.e., more than one year after the export of goods, the exporter filed application in January 2006 requesting for amendment of the said shipping bills. The ground given by the exporter for such request was that there had been a mistake in the documentation as they being new exporter were not aware of the procedure. In fact, similar submission was made before us also for the exporter. The guidelines/instructions which were contained in the Board's circular No. 4/2004 dated 16th January, 2004 being applicable at the relevant time were applied and the request for amendment was rejected by the Commissioner. The Board's circular dated 16th January, 2004 envisages as under:

(A) 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.

(B) 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.
- e. 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.

5. From the above, it may be seen that as per Clause B of the circular that the conversion of free shipping bills into Advance Licence/DEPB/DFRC shipping bills should not be allowed in routine. As regards permitting conversion of shipping bills from one export promotion scheme to another, this clause envisages that such conversion to be allowed only where the benefit of export promotion scheme claimed by the exporter has been denied by DGFT/MOC or Customs due to any dispute. However, in such a case, conversion may be permitted by the Commissioner on case-to-case basis, subject to conditions enumerated in sub Clauses (a) to (e). Even under Clause A, the request for conversion from one scheme to another was not to be done ordinarily in routine. It was primarily for the reason that such conversion at a later date created difficulties. There is no dispute with regard to submissions as made by the learned Counsel for the exporter/Appellant that the circular could not override the scope of the Section 149 of the Act and cannot be generalised in every case of amendment of shipping bills. By submitting these arguments, the learned Counsel tried to emphasise that the request of exporter for conversion of the shipping bills from one scheme to another was that of amendment u/s 149 of the Act and not only confined to conversion within the scope of the aforesaid circular. In fact, the matter was remanded by the CESTAT to the Commissioner on such submission made by the exporter before the CESTAT. Section 149 of the Act under which the exporter submits the amendment to be permissible reads as under:

Section 149. Amendment of documents-save as otherwise provided in Section 30 and 41, the proper officer may, in his discretion, authorize any document after it has been presented in the customs house to be amended.

Provided that no amendment of a bill of entry or a shipping bill of export shall be 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.

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.

7. We do not see any perversity or illegality in the discretion exercised by the Commissioner in rejecting the request of the exporter of conversion/amendment from one scheme to the other after a lapse of more than one year. There is no reason to interfere in the findings of the fact arrived at by the CESTAT. Since, there is no question of law involved, the appeal is dismissed. No orders as to costs. Ordered accordingly.