CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86895 OF 2016

[Arising out of Order-in-Original No: CAO No. 01/16-17/ADJ (X), ACC dated 24th May 2016 passed by the Commissioner of Customs, Mumbai.]

M/s Seco Tools India Pvt Ltd

GAT no. 582, Pune-Nagar Road,
Koregaon Bhima,
Tal.Shirur, Dist. Pune ...***Appellant***

versus

Commissioner of Customs (Export)

Air Cargo Complex, Sahar,
Andheri (E), Mumbai ***...Respondent***

APPEARANCE:
Shri Ashok Naval, Consultant for the appellant
Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A /85916/2022

DATE OF HEARING: 26/04/2022
DATE OF DECISION: 29/09/2022

PER: C J MATHEW

The dispute in this appeal of M/s Seco Tools India (P) Ltd has its genesis in a request of theirs, by letter dated 19th March 2016, for re-designating 275 nos. shipping bills, filed between 22nd

September 2009 and 30th August 2011, as that of exports towards discharge of obligation against licence nos. 3110038884/17.06.2009 (112 nos.), 3110042884/15.04.2010 (108 nos.) and 3110045365/03.11.2010 (55 nos.) issued to them under 'advance authorisation' scheme in the Foreign Trade Policy (FTP)[1]. In the said application, preferred under section 149 of Customs Act, 1962, it was intimated that, having incorporated the details of the corresponding authorizations in the shipping bills, they had overlooked the categorization of the shipping bills at the top of the page as 'free shipping bills' until the export obligation had been discharged and the licencing authority (Joint Director General of Foreign Trade, Pune) had pointed this out as deficiency impending the redemption thereof.

2. The request was denied for not adhering to circular no. 36/2010-Customs dated 23rd September 2010 of the Central Board of Excise & Customs (CBEC) which restricted conversions only to certain classes of bills in which the subjective satisfaction intended by section 149 of Customs Act, 1962 could be elicited from documentary evidence available at the time of export and only if sought for within three months from the date of 'let export order (LEO)' endorsed in the shipping bills.

3. Learned Consultant appearing for the appellant contends that the limitation prescribed in the said circular is in excess of authority of law as section 149 of Customs Act, 1962, which

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1 FTP

provides for amendments to documents, does not contemplate such restriction. It was also pointed out that delay is not attributable to them as it was abundant caution on the part of the authority under the Foreign Trade Policy (FTP) competent to grant of redemption which had prompted the request for conversion as the supporting documents unquestionably evinced that exports were made under scheme of 'advance authorisation' in the Foreign Trade Policy (FTP). Reliance was placed on the decision of the Tribunal in ***VRA Cotton Mills Pvt Ltd VS. Commissioner of Customs, Jamnagar***[2] and in ***Diamond Engineering (Chennai) P Ltd VS. Commissioner of Customs (Seaport-Export), Chennai***[3] which was affirmed by the Hon'ble High Court of Madras in ***Diamond Engineering Chennai Pvt Ltd vs. CESTAT***[4] and of the Hon'ble High Court of Madras in ***Visoka Engineering Pvt Ltd vs. Commissioner of Customs, Chennai-IV***[5] 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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> *xxxx*
>
> *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*

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2 [2014 (309) ELT 100 (Tri-Ahmd)]
3 [2013 (288) ELT 265 (Tri-Chennai)]
4 [2019-TIOL-991-HC-MAD-CUS)]
5 [2022-TIOL-227-CESTAT-MAD]

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.…

xxxx

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.…" '

4. Learned Authorised Representative placed reliance on the decision of the Hon'ble High Court of Delhi in ***Commissioner of***

Customs (Export) vs. ES Lighting Technologies (P) Ltd[6] wherein it has been held that

> *'6. Having perused the impugned order and the decision is relied upon by Mr Bansal and having consider the facts of the case, we are of the view that the Tribunal was not justified in adopting the approach that it did. 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.'*

5. Reliance was also placed by him on the decisions of the Hon'ble High Court of Madras in ***Commissioner of Customs (Seaport-Export), Chennai vs. Suzlon Energy Ltd***[7], of the Hon'ble High Court of Delhi in ***Terra Films Pvt Ltd vs. Commissioner of Customs***[8] and of the Hon'ble High Court of Gujarat in ***Anil Sharma vs. Union of India***[9].

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6 [2020 (371) ELT 369 (Del)]
7 [2013 (293) ELT 3 (Mad)]
8 [2011 (268) ELT 443 (Del)]
9 [2017 (350) ELT 332 (Guj)]

6. From the narration, it would appear that the shipping bills had been filed with all particulars including the 'advance authorisations' in fulfilment of which the exports were intended and it was merely the absence of any reference to the said scheme of the Foreign Trade Policy in the heading of the shipping bills which, by recourse to section 149 of Customs Act, 1962, was sought to be rectified in the application of the appellants herein addressed to the jurisdictional Commissioner of Customs and which, in turn, was prompted by the notice issued to the appellants herein by the authority empowered under the Foreign Trade Policy (FTP) for remedial action. Besides being a justification for the elapse of time in seeking recourse to section 149 of Customs Act, 1962, the stage in the sequencing offers a clearer perspective of the consequence, if any, of acceptance of the request for amendment. This is an aspect that, of necessity, is to be addressed by us as, even though the ostensible ground for rejection was the threshold bar of limitation prescribed in the impugned circular of Central Board of Excise & Customs (CBEC), the discussion in the impugned order did venture to consider the examination norms that exports against 'free shipping bills' are relieved of.

7. Requests for conversion of 'shipping bills' fall into five broad categories: from 'free' to 'drawback', 'free' to 'scheme', 'scheme' to 'drawback'. 'drawback' to 'scheme', and 'scheme' to 'scheme' and it is common ground that 'free shipping bills' are not burdened by norms of examination while all others are. The impugned order

also does not purport to deny request for conversion from 'free' to 'drawback' which is entirely an 'in house' disposal; for the several schemes in the Foreign Trade Policy, access, as well as exit, vests in the licencing authority with customs formations concerned with episodic imports and exports in accordance with section 47 and section 50 of Customs Act, 1962 respectively that are aggregated only for closure by redemption. It is at this stage that the authentication of exports claimed to have been effected for discharge of obligation is sought for from customs authorities by the licencing authority. Consequently, it is in the administration of schemes in the Foreign Trade Policy (FTP) that the oversight of consignment-wise transaction is supplemented by authentication of the instrument-wise aggregation of shipments which should have no bearing as a decision arising from section 149 of Customs Act, 1962. By dwelling on the consequence of amendment, which lies within the remit of the licencing authority, instead of the justification for discarding the request for amendment in each of the shipping bills, it appears to us that the framework within which amending enablement is to be exercised has been exceeded.

8. From a plain reading of the statutory empowerment for

> '***..... 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 or 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.'*

in section 149 of Customs Act, 1962, it is seen that the principal provision pertains to documents that have been presented in a customs house in relation to any procedure under Customs Act, 1962; such documents may affect the contents of forms for entry prescribed under Customs Act, 1962 which is impliedly permissible, as a consequence, subject to the restriction embodied in the *proviso*. Any amendment, upon authorisation by the 'proper officer', would have to be incorporated by the person who filed the document(s). The *proviso* applies specifically to contents of bills of entry and shipping bills in which changes are to reflect only the documents existing at the time of clearance for home consumption/deposit in warehouse or clearance for export, as the case may be. Therefore, denial by recourse to a finding other than on the specific amendment requested by an importer/exporter would be tantamount to traversing beyond the framework of statutory empowerment.

9. Doubtlessly, the physical characteristics of goods covered by bill of entry/shipping bill can be authenticated only in consonance with the report of examination, if any, but that is not the request made by the appellant herein or the cause of rejection adverted by the competent authority. The plea is for alteration of

the category of the bills to that of the scheme of export which the appellant claims to have been operating under. A finding on the inappropriateness of the request made by the appellant has not been rendered in the impugned order.

10. The sole ground remaining in the dispute is the bar of limitation imposed by circular no. 36/2010-Cus dated 23rd September 2010 of Central Board of Excise & Customs (CBEC) on which the impugned order has based the refusal to consider the application sought under section 149 of Customs Act, 1962 in support of which Learned Authorised Representative placed reliance on judgements.

11. Though the Hon'ble High Court of Delhi, in ***ES Lighting Technologies (P) Ltd***, held that

> *'6….. Merely because no time limit is prescribed under Section 149 for the purpose of seeking amendment/conversion, it does not follow that a request in that regard could be made after passage of any length of time. The same could be made within a reasonable period. …It is not fair to fair to expect the Department to maintain, and be possessed of, the records after passage of five long years - …'*

it was on the factual submission made on behalf of Revenue about non-availability of relevant documents. The reasonableness of elapse of time favoured in the judgement is, therefore, not to be perceived as endorsement of the time limit specified in the impugned circular and reliance thereof is evident misconstruing

on the part of the adjudicating authority. The decision of the Hon'ble High Court of Madras in ***Suzlon Energy Ltd*** holding that

> *'11. …..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 mistake and 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 CAP 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 of 2004, dated 16-1-2004 was holding the field and the relevant Paragraph has already been extracted supra.'*

relates to shipping bills filed before circular no. 36/2010-Cus dated 23rd September 2010 of Central Board of Excise & Customs (CBEC) came into existence with the governing instruction at that point of time pertaining specifically to conversion of bills from one scheme to another that required consideration by the competent authority only upon rejection of redemption under one of the schemes communicated by the licensing authority. Such is not the issue in the present dispute which is solely on the propriety of determining limitation that is not contemplated in the statutory provision.

12. In ***Terra Films Pvt Ltd***, the decision of the Hon'ble High Court of Delhi pertained to circular no. 4/2004 dated 16th January 2004 of Central Board of Excise & Customs (CBEC) and it was held that

> *'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 if under Clause A, the request for conversion from one scheme to another was not to be done ordinarily in routine.…'*

with reference to instructions on conversion in the context of the *proviso* in section 149 of Customs Act, 1962 on the evidence sufficing for permitting amendment and not on the issue of time limit which is the crux of the present dispute. Consequently, the decisions cited by Learned Authorised Representative are on facts and submissions that are distinct from the issue of limitation that has been invoked to reject the application for amendment at the threshold. In those decisions, the Tribunal, in addition to considering the causes for seeking amendments, did also examine the potential consequences thereof that, during the relevant time, were governed by instructions of Central Board of Excise & Customs (CBEC) on the permissible scope for seeking coverage under schemes of the Foreign Trade Policy. Though the present dispute did venture to speculate upon the scale of examination, it

appears to us that the final disposal of the request was hinged entirely upon the period of limitation prescribed in the relied upon instructions.

13. The decision of the Tribunal in ***Haldiram Foods International Pvt Ltd vs. Commissioner of Customs, Nagpur***[10] disposing of appeal no. C/86048/2020 against order-in-original no. F.No. VIII(Cus) 25-159/Cus.Hqrs/2019 dated 29th October 2020 of Commissioner of Customs, Nagpur, after considering a catena of decisions, including those relied upon by Learned Authorised Representative before us here, and the series of circulars held that

> *'9. From a plain reading of*
>
> > *'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 customs house to be amended;*
> >
> > *PROVIDED that no amendment of a bill of entry or shipping bill or bill of export shall be so 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 in the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be.'*
>
> *in Customs Act, 1962, it is seen that amendments of documents can be facilitated at any time after their*

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10 **Final order no. A/86108/2020 dated 16.12.2020**

presentation in the custom house. The seemingly 'open-ended' jurisdiction for amendment of documents is, nonetheless, constrained within the discretion vested in the 'proper officer' to permit that. Clearly, it is not a right to have the amendments incorporated and the applicant is, therefore, obliged to justify the necessity, in terms of consequential detriment, for invoking the provision. Concomitantly, it devolves on the 'proper officer' to place the applicant on notice of any want that may impede such permission or of any doubts that may be brought to bear on grant of the application and to further issue a reasoned order in the event of rejection. The deployment of the expression 'document' and the appending of proviso is calculatedly significant. Though not one of the enumerations in section 2 of Customs Act, 1962, 'document' is found scattered within several operative provisions, especially in the context of entries, as prescribed, and of assessment, connoting the evidence in support of the contents in the entry under section 46 and section 50 of Customs Act, 1962. Having been specifically defined, and being forms designed for assessment and clearance, 'bill of entry' and 'shipping bill' are not documents as intended in section 149 of Customs Act, 1962; indeed, the distinguishment accorded to these by the proviso argues the special dichotomy of the prescription for making the entry from the documents evincing the entry. This cleaving appears to have been intended to justify further limitation on the generality of empowerment to permit amendments in disposal of requests pertaining to bills of entry/shipping bills by freezing the moment of clearance/exportation as the touchstone. The distinction is attributable to source; 'documents' belong to the importer/exporter and the freedom to amend those is to be unabridged save of such content the amendment of which may be detrimental to

the interests of the State while bills of entry/shipping bills, being prescriptions of the State, may be allowed for amending by importer/exporter only for conformity with the factum pertaining to export/import. The rationale for distinguishing the approach to making changes in shipping bills and the ultimate consequence of shifting between schemes cannot be more blindingly apparent.

10.From our discussion supra on the legal provisions and judicial pronouncements, it emerges that amendments sought under section 149 of Customs Act, 1962 may be permitted in 'documents' subject to justification including the reasonableness of the time within which such alteration is sought to be incorporated and in bills of entry/ shipping bills alterations are to be denied only to the extent of not mirroring the facts at the time of clearance/exportation. Implicitly, the ascertainability of the facts, and not mere elapse of time which was not considered for specifying in the legislation, is to be the factor in determining limitation. Elaboration of unavoidability of the change is a pre-requisite for exercise of discretion by the proper officer who may deny the amendment only upon sufficient reason after considering the submissions of the applicant to counter the proposal for rejection. Any circumscribing or circumvention of this essence is not a correct exercise of discretion vested in the proper officer.

11.The request of the appellant herein has been denied for non-compliance with the circular cited in the impugned order. Appellant had been compelled to forgo coverage, and inconsistent with the law as it now appears, under a scheme in the Foreign Trade Policy that may have entitled them to post-exportation import of specified goods without payment of duty and it is only by

the requested amendment that the Directorate General of Foreign Trade could consider extending that privilege to them. Approval of the request would exclude them from the reimbursement, contractually stipulated, in section 75 of Customs Act, 1962 and, therefore, entails recourse to section 149 of Customs Act, 1962. Further enablement for privileges flowing from a scheme, devised under the authority of Foreign Trade (Development & Regulation) Act, 1992, would emanate from the flexibility intended by circular no. 36/2010-Cus dated 23rd September 2010of Central Board of Excise & Customs.

12.The imperative of implementing schemes of export promotion under the Foreign Trade Policy even at the cost of foregoing revenue mandates facilitation that may seemingly be in conflict with the remit of the taxing authority; a post-exportation conferment of that escapement is even less likely to facilitated and circular no.36/2010-Cus dated 23rd September 2010 is but a pathway to the larger objectives of governance. It is moot, therefore, if the intent of the circular is to be perceived in its letter, as held by the 'proper officer', rather than in its spirit as claimed by the appellant. To deduce the propriety of either alternative, we turn to the legislative authority for such prescriptions as well as the chronological evolving of a uniform approach to guiding such facilitation. Circular no. 36/2010-Cus dated 23rd September 2010 was preceded by circular no. 4/2004-Cus dated 16th January 2004 of Central Board of Excise & Customs which it also superseded. The impetus for the original circular was the disadvantage at which an exporter was placed on disallowance of eligibility for a particular scheme by the Director General of Foreign Trade and consequent inability to seek the privileges of

another scheme owing to the absence of any authority that customs formations could take recourse to. Several years later, the facility of migration, contingent only upon such rejection, was, upon representation by the exporting community, considered to be ripe for availment as a commercial option to be exercised by the exporter. The timeframe of one month, in the first of the circulars, kicking in from rejection by the Directorate General of Foreign Trade, could no longer be the benchmark and a longer span of three months from the date of 'let export order (LEO)' was considered to suffice for the exercise of such option. Hence, it is apparent that the more recent circular was intended to liberalise the migration from one scheme of the Foreign Trade Policy to another. The other conditions in both the circulars were intended to ensure that it was indeed eligible goods that had been exported. Neither of the circulars claim to draw sustenance from any statutory enablement under Customs Act, 1962 and are, therefore, to be construed as guidance for trade facilitation on the part of the field formations under Central Board of Excise & Customs.

13.Central Board of Excise & Customs is, under section 151A of Customs Act, 1962, empowered to issue 'orders, instructions and directions' to officers of Customs who are required to observe and follow these; however, even when the superseding circular was communicated, such empowerment was limited to 'uniformity in the classification of goods or with respect to the levy of duty thereon' and it was only with effect from 8th April 2011 that such 'orders, instructions and directions' could encompass

> *'….implementation of any other provisions of this Act or of any other law for the time being in force,*

insofar as they relate to any provision, restriction or procedure for import or export of goods…'

In the absence of such authority, which could be construed as empowerment to enforce restricted applicability, the impugned circular, as well as its predecessor, could not have imposed rigid restrictions that 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. The Tribunal, in re Parle Products Pvt Ltd, also acknowledged this conclusion thus

'5.6 We find strong force in the contentions raised by learned Counsel for the appellant that Hon'ble High Court of Kerala in the case of Leotex (supra) in para 4 has held that the Board itself had decided to liberalise the provision regarding conversion from one scheme to another, there should not be any reason to allow the same.

Consequently, the bar of limitation could be invoked only in the absence of any mitigating circumstances offered up in response to clarification sought by the 'proper officer' from the appellant for an appropriate decision. We are unable to perceive any such considered resolution of the request preferred by the appellant to the Commissioner of Customs.

14.It is evident that the impugned order is bereft of a comprehensive appreciation of the schema of amendment to, and conversion of, shipping bills, as elaborated in our discussions supra. The cryptic, and even peremptory, disposal of the request, without conforming to the reasonableness and judiciousness, mandated by section 149 of Customs Act, 1962 and

disregarding the spirit in which the guidance was offered in the circular of Central Board of Excise & Customs, is not an outcome of responsible discharge of authority devolving upon the Commissioner of Customs. The applicant was not informed of the deficiencies, if any, that precluded them from being eligible for conversion; nor were they afforded an opportunity to demonstrate that their eligibility for coverage under the intended scheme was unimpeachable.

15. Considering the limited, and unacceptable, ground on which the application was rejected, we are unable to decide on the claim of eligibility for conversion. It would, therefore, be appropriate that the impugned order is set aside for the application to be returned to the Commissioner of Customs and, in the light of our observations, for fresh determination of eligibility for conversion.'

According to the appellant, the intent of the impugned exports as being in discharge of obligation under the 'advance authorisation scheme' of the Foreign Trade Policy is evident from the shipping bills and it is merely the title of the said bills that is stated to require alteration for enabling the appellant herein to remedy the defect pointed out by the licensing authority under the Foreign Trade Policy. Any further processing of their claim before the licensing authority arises under the Foreign Trade (Development & Regulation) Act, 1992 which, even if envisaging clearance from customs authorities for a decision on the closure of the said authorizations is, yet, an event of the future with no relevance on the request made before the competent authority under section

149 of Customs Act, 1962 and should not have been a criterion for deciding upon the said request.

15. In view of the settled position, elaborated in ***Haldiram Foods International Pvt Ltd***, on the irrelevance of the deadline stipulated in the circular of Central Board of Excise & Customs (CBEC) relied upon in the impugned order, we set aside the rejection of the applications for amendment and direct the original authority to decide the matter afresh within the framework of section 149 of Customs Act, 1962 on the propriety of the changes sought for in the shipping bills. Appeal is, accordingly, disposed off.

(Order pronounced in the open court on 29/09/2022)

(JUSTICE DILIP GUPTA)
President

(C J MATHEW)
Member (Technical)

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