2013 (2) ECS (28) (Mad- HC)

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated: 14.03.2013

Coram:
THE HONOURABLE MRS. JUSTICE R. BANUMATHI
And
THE HONOURABLE MR. JUSTICE K. RAVICHANDRABAABU

Civil Miscellaneous Appeal No. 2566 of 2012

The Commissioner of Customs (Seaport - Export)
Chennai …Appellant

Vs.

M/s Suzlon Energy Limited …Respondent

'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 [2011 (268) E L T 443 (Del), we find that the 1st Respondent's claims 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 under Section 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 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.' [Para 19]

Cases Cited

M/s Terra Films Pvt. Ltd. v. Commissioner of Customs [2011 (268) E L T 443 (Del).

Appeal is filed under Section 35 G of Central Excise Act, 1944 against the order of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Final Order No. 597 of 2011 dated 30.05.2011.

For Appellant : Mr. P. Mahaadevan
For Respondent No.1 : Mr. K. S. Venkatagiri for M/s. Lakshmi Kumaran

JUDGMENT

> **"Thus, the Delhi High Court observed that the Proper Officer may not be in a possession of the documents sought to be amended particular, 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." [Para 18]**

R. BANUMATHI, J

1. Whether conversion f Shipping Bills from Drawback and EPCG Scheme to EPCG Drawback and DEEC Scheme could be allowed under Section 149 of Customs Act s 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 16.01.2004.

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

    3. In the 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?

2. 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 Authoristion) No. 3110034801/2/03/00 dated 08.08.2008 issued by the Joint Directorate General of Foreign Trade, Pune after executing a bond with Customs Department for fulfillment of export obligation within the stipulated time. The export goods in question were in deed 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 dt. 17.3.2010; 3681453 dt. 17.03.2010; 3686416 dt 21.03.2010; 368417 dt 21.03.2010 and 3687396 dt 22.03.2010 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 05.04.2010 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 05.07.2010, the 1st Respondent interalia 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. 13774/10 dated 09.12.2010 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 16.01.2004.

3. Aggrieved by the said order, 1st Respondent preferred appeal before Customs, Excise and Service Tax Appellate Tribunal (for short "CESTAT"). By the order dated 30.05.2011, CESTAT allowed the request for conversion claimed by the 1st Respondent stating that under Section 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.

4. 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 16.2004. Learned counsel further submitted that Tribunal ought to have considered that this no 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.

5. 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 23.09.2010, 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 mention 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 under Section 149 of Customs Act, the learned counsel placed reliance upon 2007 (215) ELT 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].

6. 1st Respondent filed five Shipping Bills bearing Nos. 3681452 dt. 17.03.2010; 3681453 dt 17.03.2010; 3686416 dt 21.03.2010; 3686417 dt 21.03.2010 and 3687396 dt 22.03.2010 under Drawback & EPCG Scheme [Scheme Code 44] for export of Wind Operated Electricity Generator Blades for rotor 2100 KW and

completed the export. 1st Respondent vide letter dated 05.04.2010. requested for issuance of 'No Objection Certifcate' for converting the aforesaid Shipping Bills under "Drawback & EPCG Scheme" (Scheme Code 44) to Scheme "EPCG Drawback & Advance Licence" (Scheme Code 71).

7. Conversion of Shipping Bills from one export promotion scheme to another are to be considered in term f Section 149 of Customs Act read with Board's Circular No. 4/2004 dated 16.01.2004. 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.

8. Para 3.2 of Circular No. 4/2004 dated 16.1.2004 read as follows :-

> "As regards permitting conversion of free shipping bills in to Advance Licence/DEPB/DFRCshipping 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 the 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 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.

a. On the basis of available export documents etc., the fact of use of inputs is satisfactorily provided in the resultant export product.

b. 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.

c. 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."

9. 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 is it not a simple amendment of the Shipping Bills, but conversion of Shipping Bills from one Scheme to another Scheme which has revenue implication.

10. Learned counsel for 1st Respondent projected the case as if, it is only seeking for an amendment under Section 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.

11. We are unable to appreciate such contention of the learned counsel for 1st Respondent. While we peruse the letter dated 05.04.2010 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 of 2004 dated 16.1.2004 was holding the field and the relevant Paragraph has already been extracted supra.

12. 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.

13. 1st Respondent had filed all the five Shipping Bills in dispute under Drawback cum EPCG (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.

14. 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 prorate 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 materials used in the manufacture of the final product.

15. 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.

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

17. No doubt, the learned counsel appearing for the 1st Respondent placed subsequent Circular No. 36 of 2010 dated 23.9.2010 to contend that Circular No. 4 of 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 of 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 to 2010 had in fact dilutes the earlier Circular No. 4 of 2004, the Board is very particular and categorical in stating that Circular No 36 of 2010 shall be applicable only to Shipping Bills filed on or after the date of issuance of the said Circular viz. Circular No. 36 of 2010 dated 23.09.2010. 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 of 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 of 2010 dated 23.09.2010. therefore, in our considered view, the learned counsel for 1st Respondent cannot rely on Circular No. 36 of 2010 dated 23.9.2010.

18. A similar issue was considered by the Division Bench of Delhi High Court in the matter of M/s Terra Films Pvt. Ltd. v. Commissioner of Customs [2011 (268) ELT 443 (Del). 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 particular, 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.

19. 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 [2011 (268) E L T 443 (Del), 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 under Section 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.