CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

CUSTOMS Appeal No. 11095 of 2018
(Arising out of Notification Order-VIII-48-69-EXP-AMD-MPSEZ-17-18dated 25.07.2017 passed by Commissioner of Customs -Mundra)

EASTMAN INTERNATIONAL **...Appellant**
B-xxx-2185/c-203/1, Phase-vii, Focal Point,
LUDHIANA-PUNJAB

VERSUS

C.C. MUNDRA **...Respondent**
OFFICE OF THE PRINCIPAL COMMISSIONERATE OF CUSTOMS,
PORT USER BULD., CUSTOM HOUSE MUNDRA,
KUTCH, GUJARAT-370421

APPEARANCE:
Shri Vikas Mehta, Consultant appeared for the Appellant
Shri Anand Kumar, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10171/2024

DATE OF HEARING: 05.10.2023
DATE OF DECISION: 17.01.2024

RAMESH NAIR

The issue involved in the present case is that whether the rejection of request of conversion of DFIA Shipping Bill to DBK on the ground of limitation as prescribed under Board Circular No. 36/2010-Cus dated 23.09.2010 is legal and correct or otherwise.

2. Shri Vikas Mehta, learned consultant, appearing on behalf of the appellant submits that though the appellant had applied for DFIA licence but the same was not issued and the DGFT had issued an NOC, therefore, there is no reason to reject the conversion of scheme in the shipping bill from DFIA to DBK. He submits that the appellant have been making continuous correspondence with the DGFT regarding issuance of NOC to apply for conversion of shipping bill from DFIA to DBK Scheme and after

receipt of NOC, the appellant had applied for conversion of shipping bill from DFIA Scheme to DBK Scheme, therefore, the same should not be rejected on the ground of time bar.

2.1 Without prejudice, he further submits that three month time prescribed by the Board Circular does not have legal sanctity and non-compliance of such timeline cannot be the reason of rejection of conversion of DFIA shipping bill to DBK shipping bill. In support he placed reliance on the Gujarat High Court judgment in the case of Principal Commissioner of Customs, Mundra vs Lykis Ltd. 2021 (377) ELT 646 (Guj.). He also placed reliance on the following judgments:

- VRA Cotton Mills P. Ltd. 2014 (309) ELT 100 (Tri. Amd.)
- Malabar Extrusions Pvt Ltd. 2023 (383) ELT 404 (Ker.)

3. Shri Anand Kumar, learned Superintendent (Authorized Representative) appearing for the Revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of records, we find that except the limitation, there is no other dispute about conversion of DFIA Scheme to DBK Scheme. Though the appellant had applied for DFIA Licence but the same was not issued and the DGFT had issued a NOC. On that basis the appellant approached the department for conversion of DFIA shipping bill to DBK Shipping bill. In this position, we do not find any lapse on the part of the appellant. As regard the limitation, we find that the limitation was provided by way of Circular. The Circular may be binding on the departmental officer but the same cannot be binding on the assessee. This issue has been considered by this Tribunal in the case of Lykis Limited vide Final Order No. A/10398/2020 dated 04.02.2020 wherein this Tribunal passed the following order.

"4. We have heard both the sides and perused the records. We find that the appellant has sought for the conversion of Drawback shipping bills to DFIA shipping bills, in terms of Section 149 of Customs Act 1962 which reads as under:-

> "149. Amendment of documents.—Save as otherwise provided in sections 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 shipping bill or bill of export shall be so authorized 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."

4.1 From the above Section, it is clear that no time limit is prescribed. We find that the request of the appellant for conversion was rejected on the sole ground of limitation as prescribed under Board Circular No. 36/2010-Cus. We find that since the time limit has not been prescribed under the act, the same cannot be fixed by way of the circular. Therefore, if at all there is a time limit by way of circular it is only procedural requirement. Therefore, on this ground of limitation, application could not have been rejected, particularly when circular prescribing time limit is without authority of any statutory provision, act and rules supported.

4.2 It is settled law that the time limit prescribed by the Board Circular is not binding as same is not statutory provision in terms of section 149 of the Customs Act 1962. We further find that in the identical case of Bectors Food Specialities Ltd (Supra) this Tribunal, Chandigarh after considering the Hon'ble Gujarat High court judgment in the case of Anil Sharma Vs. Union of India-2017 (350) ELT 322 (Guj.) held that the assessee was entitled for conversion of shipping bill from DBK Scheme to DFIA Scheme. We after going through the said decision find that the circumstances and reason for delay in filing request for conversion was almost identical in the present case. In the case cited of co-ordinate Bench of this Tribunal Mumbai dealing with the identical issue in the case of Parley product Pvt. Ltd (Supra) on the fact that the conversion of drawback shipping bill to DFIA shipping bill was after 2 years, wherein it was held that no time limit provided under section 149 of Customs Act 1962."

The aforesaid order has been challenged by the Revenue before the Hon'ble Gujarat High Court in the judgment reported at Lykis Limited 2021 (377) ELT 646 (Guj.) dealing with one of the specific issue of limitation of three months passed the following order.

"This appeal under Section 130 of the Customs Act, 1962 [for short *'the Act, 1962'*] is at the instance of the Revenue and is directed against the order passed by the Customs, Excise & Appellate Tribunal, Western Zonal Bench, Ahmedabad dated 4-2-2020 in the Customs Appeal No. 12215 of 2019 preferred by the respondent herein against the order of the Principal Commissioner, Customs, Mundra dated 24-7-2019, by which, the Tribunal allowed the appeal.

2. The Revenue has proposed the following questions of law for the consideration of this Court.

(i) Whether benefit of conversion from Drawback scheme to DFIA scheme can be allowed at any time for the clearances which had taken place almost four years back?

(ii) Whether the Tribunal was justified in holding that benefit of conversion from Drawback scheme to DFIA scheme can be allowed for exports made in past after the period of 3 months are over from the date of such export?

(iii) Whether the Tribunal is correct in holding that the Circular is only laying down a procedural guideline and the conditions mentioned therein are not required to be fulfilled by the exporter to take the advantage of the scheme?

(iv) Whether the Tribunal is justified in following the judgment of Mumbai Tribunal and not appreciating the law laid down by this Hon'ble Court?

3. We have heard Mr. Ankit Shah, the Learned Senior Standing Counsel appearing for the Revenue and Mr. Mihir Joshi, the Learned Senior Counsel appearing with Mr. Hardik Modh, the Learned Counsel appearing for the respondents.

4. It appears from the materials on record that the respondents herein preferred an application addressed to the Principal Commissioner Customs, Mundra for conversion of 204 shipping bills from Drawback Scheme to Duty Free Import Authorization (DFIA) Scheme. The request came to be rejected by the Principal Commissioner Customs on the ground that the same was time barred. The Principal Commissioner Customs took the view that such a request was made for conversion after three months from the date of the Let Expert Order (LEO) and if such a request is accepted, the same would be contrary to the Circular No. 36/2010-Cus., dated 23-9-2010.

5. In appeal by the respondents before the Tribunal, the Tribunal took notice of Section 149 of the Customs Act, 1962. The Tribunal noticed that no time limit has been prescribed under the statutory provision of Section 149 of the Act. In such circumstances, the Circular cannot prescribe particular time period, which is otherwise not provided in a statute. The Tribunal while allowing the appeal of the respondents herein observed as under :-

We have heard both the sides and perused "4. the records. We find that the appellant has sought for the conversion of Drawback shipping bills to DFIA shipping bills, in terms of Section 149 of Customs Act, 1962 which reads as under :-

> **Amendment of documents. "149.** - Save as otherwise provided in Sections 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 shipping bill or bill of export shall be so authorized 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 of the goods were cleared, deposited or exported, as the case may be."

From the above Section, it is clear that no 4.1 time limit is prescribed. We find that the request of the appellant for conversion was rejected on the sole ground of limitation as prescribed under Board Circular No. 36/2010-Cus. We find that since the time limit has not been prescribed under the Act, the same cannot be fixed by way of the circular. Therefore, if at all there is a time limit by way of circular, it is only procedural requirement. Therefore, on this ground of limitation, application could not have been rejected, particularly when circular prescribing time limit is without authority of any statutory provision, Act and rules supported.

It is settled law that the time limit 4.2 prescribed by the Board Circular is not binding as same is not statutory provision in terms of section 49 of the Customs Act, 1962. We further find that in the identical case of *Bectors Food Specialities Ltd.* (Supra) this Tribunal, Chandigarh after considering the Hon'ble Gujarat High Court judgment in the case of *Anil Sharma* v. *Union of India* - 2017 (350) E.L.T. 322 (Guj.) held that the assessee was entitled for conversion of shipping bill from DBK Scheme to DFIA Scheme. We after going through the said decision find that the circumstances and reason for delay in filing request for conversion was almost identical in the present case. In the case cited of co-ordinate Bench of this Tribunal Mumbai dealing with the identical issue in the case of *Parley Product Pvt. Ltd.* (supra) on the fact that the conversion of drawback shipping bill to DFIA shipping bill was after 2 years, wherein it was held that no time limit provided under section 149 of Customs Act, 1962.

As per our above discussion, we are of the 5. view that the appellant is legally entitled for conversion of Drawback Shipping Bills to DFIA Shipping Bills in respect of 184 Shipping Bills as per the list provided in appeal along with the appeal memo. The respondent Commissioner is directed to issue necessary certificate enabling appellant to get the DFIA licenses revalidated."

6. We are of the view that no error, not to speak of any error of law could be said to have been committed by the Tribunal in passing the impugned order. Section 149 is applicable at the relevant point of time. In fact, the questions as proposed by the Revenue cannot be termed as substantial questions of law as the issue is squarely covered by a decision of this Court in the case of *Inter Continental (India)* v. *Union of India* - 2003 (154) E.L.T. 37 and the same is also upheld by the Supreme Court; 2008 SCC Online SC 22 = 2008 (226) E.L.T. 16 (S.C.).

7. In the result, this appeal fails and is hereby dismissed.

Order in civil application :-

8.As the appeal has been dismissed, the connected Civil Application also would not survive. The same is disposed of accordingly."

The similar issue has been considered by this Tribunal in the case of VRA Cotton Mills Pvt. Ltd. (supra) wherein following has been observed:

"5. Hearing submissions made at length by both sides and perusing relevant case records. It is seen that there is no dispute on the facts of case. Appellant was issued DFIA. Appellant has exported 10 consignments of Raw Cotton of CTH 5201 under cover of DFIA Shipping Bills. Since Appellant could not fulfill export obligation, they requested DGFT, for cancellation of DFIA in terms of Para 4.28(e) of HBP Vol. I, 2009-14 and considering no imports made against said DFIA, DGFT New Delhi cancelled DFIA on 10-7-2013. After cancellation of the said DFIA, appellant requested the Commissioner of Customs (Prev), Jamnagar for conversion of Shipping Bill from DFIA to Drawback scheme on 20-7-2013, which has been rejected as request for such conversion is not made by exporter within three months from the date of Let Export Order (LEO).

6. The issue involved in this case is whether the appellant's application for conversion of Shipping Bills from DFIA to Drawback scheme needs to be allowed or otherwise, when such application filed on 20-7-2013 is made after the goods have been exported, no imports are made against such DFIA and cancellation of such DFIA on 10-7-2013 by DGFT.

7. The undisputed facts are that documents relating to the exports i.e. Invoice, Shipping Bills, Bills of lading and the Bank Realization Certificate clearly indicate that the goods were exported and said goods were described in documents as "Indian Raw Cotton Shankar-6 of CTH 5201". It is also undisputed that the appellant has exported the said goods and subsequently not imported any goods as per the DFIA, which has been cancelled by DGFT on 10-7-2013. Thus, there will be no imports under the said DFIA.

8. On this factual background, I have to consider the submissions made by both sides and I find that the submissions made on behalf of the Appellant needs to be accepted for more than one reason as under.

8.1 I find that DFIA in terms of Para 4.2.1 of Export-Import Policy, issued is to allow duty-free import of inputs, fuel, oil, energy sources, catalyst which are required for production of export product. Similarly, Para 4.2.6 shows that once export obligation has been fulfilled, request for transferability of Authorisation or inputs imported against it may be made before concerned authority. Once, transferability is endorsed, authorisation holder may transfer DFIA or duty-free inputs. Para 4.28(e) of HBP Vol. I, 2009-14 allows cancellation of DFIA when there is no imports made against exports and allows assessee to approach customs for conversion of Shipping Bill under Drawback scheme, for which no time limitation is provided by DGFT.

8.2 I find that Rule 12(1)(a) of Drawback Rules require an exporter to declare on the Shipping Bill, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to Drawback, and if so, at what rate or rates and make a declaration on the relevant Shipping Bill that a claim for Drawback is being made and in respect of duties paid on containers packing materials service tax, etc. no separate claim for rebate of duty has been made. The Commissioner is empowered to allow Drawback on Shipping Bills which may not contain any of these details. The provisions of Rule 12(1) of Customs & Central Excise Duties Drawback Rules, 1995 (Drawback Rules) and also proviso empowers the Commissioner to condone non-observance of provisions of Rule 12 and allow Drawback. This is nothing but an amendment or conversion of the Shipping Bill filed. The circular issued by the Board goes beyond the Rules. In fact Section 149 of Customs Act, 1962 clearly permits amendment of Shipping Bill without any such time limit even after export of goods. The section is reproduced below :

> "**Section 149 : Amendment of documents.** - Save as otherwise provided in Sections 30 and 41, the proper officer may, in his discretion, authorize 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 authorized 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."

8.3 Documents submitted by the appellant like contracts for exports, Test analysis reports by Cotton Association of India, Shipping Bills were signed & cleared by proper Customs officers and Bills of Lading, BRC for realisation of currency, etc. specifically indicate that the goods which were cleared for export were "Indian Raw Cotton Shankar-6 of CTH 5201". Perusal of the analytical certificate given by M/s. Cotton Association of India seems to corelate the goods in the shipping bills wherein the description was given as "Indian Raw Cotton Shankar-6 of CTH 5201".

8.4 Appellant's submission of non-observance of provisions of Rule 12(1) of Drawback Rules could also be treated beyond their control, when export, as claimed by appellant, was only to China on "quota basis" and when such quota for export to China had been exhausted by other such exporters, there was no possibility for appellant to export any other quantity to China. After exports against DFIA scheme, there was no import by the appellant. Since Appellant could not fulfill export obligation, Appellant requested DGFT for cancellation of DFIA in terms of Para 4.28(e) of HBP Vol. I, 2009-14 vide their request, dated 28-6-2013. Para 4.28(e) ibid is reproduced :

> (e) In case an exporter is unable to complete EO undertaken infull and he has not made any import under Authorisation, Authorisation holder will also have an option to get the Authorisation cancelled and apply for drawback after obtaining permission from Customs authorities for conversion of shipping bills to Drawback Shipping Bills.

Considering no imports made against said DFIA, DGFT, New Delhi cancelled DFIA No. 0510306798, dated 31-10-2011 in terms of Para 4.28(e) of HBP Vol.-I, 2009-14 vide their communication, dated 10-7-2013. Thus, in such facts, appellant could have applied for conversion only after getting cancellation of the said DFIA. The appellant applied for such conversion immediately on 20-7-2013, which is within 10 days of such cancellation of DFIA by DGFT.

8.5 I also find that Hon'ble High Court of Mumbai in the case of *Repro India Ltd.* - 2009 (235) E.L.T. 614 (Bom.) has specifically laid down in Para 8 which read that the intentions of the Government is not to export taxes but only to export the goods. In the case in hand, if the duty drawback is not allowed to the appellant, the appellant is perforce required to export the taxes, which gets included in the FOB value. In my view, this being not the intention, conversion of Shipping Bills from DFIA to Drawback Scheme needs to be allowed.

8.6 The provisions of Para 4.28(e) o f HBP Vol.-I, 2009-14, Rule 12 of Customs, Central Excise Duties and Service Tax Drawback Rules and Section 149 of the Customs Act, 1962 has not specifically prescribed any such time limitation of 3 months for applying for the conversion of Shipping Bill.

8.7I find that in the relied upon decisions on behalf of appellant, 2012 (281) E.L.T. 173 (Ker.) - *Leotex* v. *UOI*, the Hon'ble High Court has allowed conversion from DEPB to Drawback Scheme observing in Para 4 as under

> "Circular dated 23-9-2010 is not mandatory at all. In fact, the latest Circular dated 23-9-2010 shows that in view of the decisions of the Tribunal and this court on the question, the Government themselves had decided to liberalise the provision regarding even conversion from one scheme to another."

8.8 I find that in the relied upon decisions on behalf of appellant, 2013 (298) E.L.T. 123 (Tri.-Ahd.) - *Rajguru Impex (India) Ltd.* v. *CC*, this Bench has also allowed conversion from DFRC to DEPB scheme observing in Paras 9, 10 as under :-

> "Description of goods in Shipping Bill had to be taken as one covering goods which were exported - Since that description was exactly as mentioned in DEPB schedule, application for conversion had to be considered sympathetically, and allowed - It was more so as EXIM policy was designed to encourage exports and in facts of case liberal view was called for."

8.9 I find that in the relied upon decisions on behalf of appellant, 2013 (288) E.L.T. 265 (Tri.-Chennai) - *Diamond Engg. (Chennai) P. Ltd.* v. *CC*, Bench has allowed conversion from DEEC to DEPB observing as under :-

> EXIM - Shipping bill - Conversion from "Advance Licence to DEPB Scheme" - Request made after more than one year of export - Request rejected on the ground that Circular No. 36/2010-Cus., dated 23-9-2010 permitted conversion within three months from the date of 'Let Export' order and no documentary evidence produced by the exporter which existed at the time of export to support the request - *HELD :* Circular being beneficiary in nature, issued consequently to a number of Tribunal's decisions holding that amendment of shipping bill after export is governed by proviso to Section 149 of Customs Act, 1962, which prescribes no time-limit for such conversion and if the documentary evidence available at the time of export is produced such conversion needs to be allowed - Circular No. 36/2010-Cus., dated 23-9-2010 and Section 149 of Customs Act, 1962.

8.10 I find that in the relied upon decisions on behalf of appellant, 2010 (259) E.L.T. 295 (Tri.-Ahmd.) and recent Order No. A/10565/2014, dated 9-4-2014 in Appeal No. C/39/2012-DB in case of *Essar Oil Ltd*., Division Bench of this Court has also allowed conversion of Shipping Bill from Free scheme to Drawback scheme considering exports made, Rule 12(1) of Drawback Rules and Section 149 of the Customs Act, 1962.

> 9. Ld. Departmental Representative's reliance on the judgment of Hon'ble High Court in the case of *Commr. of Cus. (Seaport-Export), Chennai* v. *Suzlon Energy Ltd.* reported in 2013 (293) E.L.T. 3 (Mad.) may not carry the case of the Revenue any further for the reason that in the said case, conversion was sought from one export benefit scheme into another after importing the goods under DEEC & EPCG and conversion of Shipping Bills. I find that the Hon'ble High Court have perused the Circular No. 36 of 2010, dated 23-9-2010 and observed in Para 17 as under :-
>
> - "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"

I find that facts of the said case are totally different than the issue in hand. I find that on deeper perusal of the judgment, it transpires that supporting evidences were not in existence at time of export of goods. In view of this, I find that the Hon'ble High Court has taken a view in facts of the said case, which may be applicable in situation which is similar or identical case. For the case in hand, appellant's exports are not in any dispute as regards description, quality, quantity, value, BRC, etc., having no import against DFIA the substantial benefit on such exports now available need not be denied.

10. Division Bench of this Court has taken view that conversion can be allowed in such cases, I do not find any reason to deviate from such a view already taken. Accordingly, in view of the foregoing, I set aside the impugned order and direct lower authorities to convert DFIA Shipping Bills in this appeal to drawback shipping bills. I also make it clear that I have allowed only conversion into drawback Shipping Bills and eligibility of the appellant

> to the amount of drawback and its quantum, etc. would be decided in accordance with the law by the appropriate authorities of customs.
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> **11.** The impugned order is set aside and the appeal is allowed with consequential benefits of Drawback scheme as available in this case."

5. In view of the above settled legal position, we find that the rejection of the appellant's request for conversion of DFIA Scheme to DBK Scheme in shipping is absolutely illegal and incorrect. Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 17.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha