CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, BANGALORE

REGIONAL BENCH - COURT NO. 2

Customs Appeal No. 20477 of 2021

[Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-173/2020-21 dated 26/02/2021 passed by the Commissioner of Customs (Appeals) Cochin]

Philips Carbon Black Limited
31, Netaji Subhas Road
Kolkata – 700 001 **.................Appellant(s)**

VERSUS

Commissioner of Customs
Cochin
Custom House, Willingdon Island,
Cochin - 682 009 **..........Respondent(s)**

Appearance:

Mr. Aravind Baheti, CA for the Appellant
Mr. K. A. Jathin, Authorized Representative for the Respondent

Coram:

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21249 / 2023

Date of Hearing: 20.04.2023
Date of Decision: 18.08.2023

Per: Pullela Nageswara Rao

M/s Phillips Carbon Black Ltd, appellant, aggrieved by the order of Commissioner of Customs (Appeals), Cochin, Kerala, filed this appeal.

2. The facts briefly stated are the appellant is engaged in the manufacture of different grades of carbon black at its multiple

manufacturing facilities located in different regions of the country. They have a manufacturing facility at Kochi for the Southern region. The essential raw material required for manufacture of Carbon Black is Carbon Black Feed Stock (CBFS). The CBFS required for the operations are sourced through imports as well as from indigenous sources. The appellant had, inter alia, imported CBFS without payment of import duties including IGST availing the benefit of Notification No. 79/2017-Cus dated 13.10.2017, under the Advance Authorization scheme on the basis of the Advance Authorization No. 0210207855 dated 13.09.2017. In order to fulfil the corresponding export obligation attached to the advance authorization referred above, the appellant had, inter alia attached 26 shipping bills of different dates with the Advance Authorization No. 0210207855 dated 13.09.2017. While the fulfilment of export obligation attached to the advance authorization was in progress, the appellant received a communication dated 6th July 2018 from the Directorate of Revenue Intelligence (DRI) with respect to the said advance authorization alleging violation of the pre-import condition in the matter of fulfilment of export obligation, wherever export obligation of the final product was undertaken prior to imports. The appellant substituted the 26 shipping bills and tagged additional exports against the advance authorization and the Advance Authorization has been redeemed by the office of the Regional Licensing Authority, vide redemption letter dated 25th July 2019.

3. Since the exports made under the 26 shipping bills were not counted towards the fulfilment of export obligation against the above advance authorization, no export benefit was availed and the appellant through letter dated 4th January 2019 requested the customs for conversion of these 26 shipping bills from Advance Authorization scheme to Duty Drawback scheme. However, the adjudicating authority rejected the request for conversion of shipping bills on the ground of the request being time barred based on condition 3(a) of CBIC Circular No. 36/2010 dated 23rd September 2010, which specifies that request for conversion has to be made by the exporter within 3(three) months from the date of Let Export Order (LEO).

4. Aggrieved with the order dated 27.06.2019, the appellant filed an appeal before the Commissioner (Appeals), who has passed the impugned order upholding the order-in-original. Aggrieved by the impugned order the present appeal is filed.

5. The appellant in the appeal challenges, the legality, correctness and propriety of the impugned order on the following grounds that;

5.1 They having not claimed any export benefits in respect of the shipping bills in dispute could not have been deprived of the export incentives available, otherwise. The stated policy of the Government is not to export taxes and duties. Further to promote exports and give fillip to the exporters, various duty exemption/remission schemes have been prescribed by the government of India from time to time and Advance

Authorization is one such duty exemption scheme, which permits import of inputs required for manufacture of export goods without payment of customs duty with corresponding export obligation, whereas a duty drawback scheme is a duty replenishment scheme aimed at neutralizing the duty incidence suffered on the inputs. Therefore, both the schemes are alternate export promotion schemes; that both export promotion schemes, namely duty drawback scheme and advance authorization scheme or prevalent at the time, the exports were undertaken and the All Industry Rate (AAR) of Duty Drawback was also available for their product in terms of Notification No. 89/2017-Customs (NT) dated 21.09.2017. In the instant case, export of goods, vide the 26 shipping bills remains undisputed. Since such exports have not been counted/considered for the purpose of discharge of export obligation attached to the Advance Authorization, they as an exporter are entitled for the duty drawback scheme; their request for conversion of shipping bills from Advance Authorization scheme to All Industry Rate of Duty Drawback scheme could not have been rejected on the pretext of want of documentary evidence at the time of export; under Rule 3 of the Drawback Rules, a drawback is allowed on the export of goods at such amount or at such rates, as may be determined by the Central Government, such rates are called All Industry Rate (AIR). While allowing All Industry Rate of drawback, no verification of the exported goods is required and hence no verification is undertaken also by the custom authorities. In the present case, no verification or examination of the goods exported vide the shipping bills was required because the claim of drawback was at All Industry Rate, which is the common and general rate fixed by the Central Government for all exporters of such goods in the country. Given that the export of goods is not in dispute, the calculation of drawback at All Industry Rate is only arithmetical exercise on the value already assessed by the customs officers, which could have been done on the basis of the documentary evidence, that is the export documents like shipping bill and export invoice, which was in existence when the goods were cleared for export,

5.2 The appellant cited the decision of the Hon'ble Gujarat High Court in the case of Mahalaxmi Rub Tech Ltd., reported as 2021 (3) TMI 240, wherein the Hon'ble High court, inter alia, has held that the request of conversion of free shipping bills to All India Rate of Duty Drawback can be allowed on the basis of the documentary evidence in existence at the time the goods were cleared for export. Hence the rejection of the appellants request for conversion of the shipping bill from Advance Authorisation scheme to Duty Drawback scheme for lack of documentary evidence deserve to be quashed as no additional documentary evidence is required for claiming All Industry Rate of Duty Drawback.

6. The appellant further submits that Section 149 of the Customs Act, 1962 reads as under. "*Save as otherwise provided in Section 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 the bill of entry or shipping bill or bill of export shall be so authorized to be amended after the imported goods have been cleared from home consumption or deposited in 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".

It may be noted that Section 149 as extracted above, does not refer to any time limit for amendment of, inter alia, the shipping bill, save and except that the amendment has been sought on the basis of documentary evidence, which should be in existence at the time with the goods were exported.

6.1 The appellant has cited the following judicial precedents, where, conversion of shipping bills from one export promotion scheme to other even beyond the period of one year was allowed.

i) Pinnacle Life Science Pvt. Ltd. Vs. UOI & Others – 2022 (7) TMI 725 – Bombay HC

ii) Pr. Commr. of Customs, Mundra Vs. Lykis Ltd. – 2021 (377) E.L.T. 646 (Guj.)

iii) Mahalaxmi Rub Tech Limited Vs. Union of India – 2021 (3) TMI 240-Gujarat HC

iv) Diamond Engineering (Chennai) Pvt. Ltd. versus CC (Seaport), Chennai reported in 2013 (288) ELT 265 (Tri.-Chennai)

iiv) Chamundi Textiles (Silk Mills) Ltd. Vs. CC, Bangalore –

2021 (8) TMI 991-CESTAT BANGALORE

iiiv) Tamil Nadu Textile Corp. Ltd. Vs. CCE, Coimbatore – 2009 (246) ELT 586 (Tri.-Chennai)

Further, Para 3(a) of the Circular 36/2010 dated 23 September 2010 inserting a time limit of 3(three) months for the purpose of Section 149 of the Customs Act,1962 has already been quashed by the Hon'ble Gujarat High Court in the Mahalaxmi case being ultravirus of Section 149 and article 14/19(1)(g) of Constitution of India.Therefore, rejection of request for conversion on the ground of the same being time barred is ex-facie contrary to law and settled legal position in this regard.

7. The appellant further submitted that; impugned order travelled beyond the order-in-original dated 27 June 2019 in so far as it seeks to deny the benefit of conversion for lack of documentary evidence, which was not at all the subject matter of dispute at any prior stage; the order passed by the adjudicating authority is the foundation for the appeal filed before the appellate authority, and therefore the order of the appellate Authority cannot travel beyond the allegations and charges, which have been disclosed in the order of the adjudication authority and that the reading of the impugned order along with order-in- original dated 27 June 2019, disclose that the appellate authority has clearly travelled beyond the scope of order-in-original. In the present case, the impugned order rejected the conversion of shipping bills on the pretext of time bar and lack of documentary evidence at the time the goods were cleared and exported as per Section 149 of the

Customs Act, 1962, whereas the order-in-original rejected the conversion only on the short ground of time bar; the appellant authority cannot pass an order on the basis, which was never canvassed by the revenue in the previous order and which the appellant was never required to meet. Reliance in this regard is placed on the judgement of the Hon'ble Apex Court in the case of Rickett & Colman of India Ltd., Vs. Commissioner of Central Excise reported in 1996 (88) E.L.T. 641 (S.C.).

8. Heard both parties. The learned Chartered Accountant for the appellant has reiterated the submissions made in the appeal. The learned Authorized Representative (AR) for the Revenue reiterated the findings in the impugned order and he cited the case of **Indian oil Corporation Ltd., Vs. Commissioner of Customs**, reported as 2023 (4) TMI 836-CESTAT NEW DELHI, wherein the request for conversion of DEEC shipping bills to Duty Drawback scheme has been rejected on the grounds of delay in filing the application for conversion and lack of documentary evidence.

9. I find that in this case the appellant sought conversion of 26 shipping bills from Advanced authorization scheme to Duty Drawback scheme, which was rejected by the original authority only on the ground of limitation as the application for conversion was filed after 3(three) months as prescribed in Circular No. 36/2010 dated 23.09.2010. The Commissioner (Appeals) has upheld the order of the original authority on the point of time limit and has also considered the point of non-

fulfillment of the condition of proviso to Sec 149 of the Custom Act, 1962 i.e., *Provided that no amendment of the bill of entry or shipping bill or bill of export shall be so authorized to be amended after the imported goods have been cleared from home consumption or deposited in 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 appellant contends that the Commissioner(appeals) has taken a ground, which was not canvassed by Revenue in the prior proceedings in the case and hence not legally tenable and cited the decision of the Hon'ble Apex Court in the case of Reckitt & Colman of India Ltd., Vs. Collector of Central Excise, wherein it is held that:-

3. "It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed".

10. I find that in this case the impugned 26 shipping bills are dated between 23.01.2018 to 03.04.2018 and the exported

goods are factory stuffed and self-sealed, hence no examination was done by the Custom at the port. I find an endorsement "This consignment was not opened for physical examination by the Customs" and "factory sealed" on all the copies of the 26 Shipping Bills submitted by the appellant along with the appeal memorandum before this Tribunal. The procedure to be followed by the exporters in the GST regime for factory stuffing is as per the Circular No.26/2017 dated 01.07.2017, as amended. The appellant is a manufacturer exporter. As per the procedure prescribed in the Circular No.26/2017, the factory stuffed containers are self-sealed by the exporter and are brought to the respective port of export and Customs at the port only check whether the seals are intact and thereafter give "Let Export Order" (LEO) for loading on board the vessel and shipment of the containers.

11. The appellant has contended that no Customs examination is required in case of Duty Drawback Shipping bills, since the Duty drawback is paid as a percentage of the value of the exported goods as per the All Industry Rate (AIR) fixed for that product. The requirement of Proviso to Section 149 is that inter alia, amendment to the Shipping bill can be allowed only on the basis of documentary evidence, which was in existence at the time, the goods were exported. The documentary evidence that was available in this case at the time of export are namely Shipping bill, export invoices, Advance Authorization.

12. As regards the conversion of shipping bills Central Board for Indirect Taxes and Customs has issued Circular No.36/2010 dated 23.09.2010, wherein the requirements for conversion of shipping bill are prescribed, the Circular is as under:-

Subject : Conversion of free shipping bills to export promotion scheme shipping bills and conversion of shipping bills from one scheme to another - Regarding.

I am directed to invite attention to the Board's circular No. 4/2004-Cus., dated 16-1-2004 which debars conversion of free shipping bills to Advance License/DFRC/DEPB shipping bills and allows conversion of shipping bills from one export promotion scheme to another only where the benefit of an export promotion scheme claimed by the exporter has been denied by the DGFT/MoC&I or Customs due to any dispute.

2. It has been represented to the Board that the norms for allowing conversion of shipping bills may be relaxed and the Commissioners should be allowed to consider requests for conversion of shipping bills from free to export promotion scheme and from one export promotion scheme to another on a case to case basis depending on the merits of the case. It has also come to notice of the Board that the Tribunals in a series of judgments have held that amendment to shipping bill after export of goods is governed by the proviso to section 149 of the Customs Act, 1962 and if the requirements of the said proviso are satisfied, conversion of shipping bill should be allowed. The conversion of the shipping bill from one scheme to another cannot be linked with denial of benefit of one scheme by DGFT/MoC&I or Customs due to some dispute as no such condition for amendment of shipping bill has been provided in section 149 of Customs Act, 1962.

3. The issue has been re-examined in light of the above. It is clarified that Commissioner of Customs may allow conversion of *shipping bills from schemes involving more rigorous examination to schemes involving less rigorous examination (for example, from Advance Authorization/DFIA scheme to Drawback/DEPB scheme) or within the schemes involving same level of examination (for example from Drawback scheme to DEPB scheme or vice versa) irrespective of whether the benefit of an export promotion scheme claimed by the exporter was denied to him by DGFT/DOC or Customs due to any dispute or not. The conversion may be permitted in accordance with the provisions of section 149 of the 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, that the goods were eligible for the export promotion scheme to which conversion has been requested. Conversion of shipping bills shall also be subject to conditions as may be specified by the DGFT/MOC. The conversion may be allowed subject to the following further conditions :*

(a) The request for conversion is made by the exporter within three months from the date of the Let Export Order (LEO).

(b) On the basis of available export documents etc., the fact of use of inputs is satisfactorily proved 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 or DEPB/Drawback Schedule as the case may be.

(d) On the basis of S/Bill/export documents, the exporter has fulfilled all conditions of the export promotion scheme to which he is seeking conversion.

(e) The exporter has not availed benefit of the export promotion scheme under which the goods were exported and no

fraud/ misdeclaration/manipulation has been noticed or investigation initiated against him in respect of such exports.

4. Free shipping bills (shipping bills not filed under any export promotion scheme) are subject to 'nil' examination norms. Conversion of free shipping bills into EP scheme shipping bills (advance authorization, DFIA, DEPB, reward schemes etc.) should not be allowed. However, the Commissioner may allow All Industry Rate of duty drawback on goods exported under free shipping bill, without conversion of such free shipping bill to Drawback Scheme shipping bill, in terms of the proviso to rule 12(1) (a) of the Customs, Central Excise and Service Tax Drawback Rules, 1995.

5. Due care may be taken while allowing conversion to ensure that the exporter does not take benefit of both the schemes i.e. the scheme to which conversion is sought and the scheme from which conversion is sought. Whenever conversion of a shipping bill is allowed, the same should be informed to DGFT so that they may also ensure that the exporter does not take benefit of both the schemes.

6. This circular supersedes the Board circular No. 4/2004-Cus., dated 16-1-2004 and the earlier circulars issued in the past on this issue. This circular shall be applicable only to shipping bills filed on or after the date of issuance of this circular. Till such time as EDI system is modified to allow conversion of shipping bill in the EDI system, conversion may be allowed manually.

7. A suitable Public Notice for information of the Trade and Standing Order for guidance of the staff may be issued. Difficulties faced, if any in implementation of the directions may be brought to the notice of the Board.

13. I find that Circular No.36/2010 is not amended after the amendment to Section 149 inserting the words *[in such form and manner, within such time, subject to such restrictions and*

conditions, as may be prescribed] by Act 23 of 2019, S.80. However, a Notification No. 11/2022-Customs (NT) 22.02.2022 under section 157 read with section 149 of the Customs Act 1962, was issued by the Board "Shipping Bill (Post export conversion in relation to instrument based scheme) Regulations, 2022", after the introduction of GST and after the issue of Circular No 26/2017 dated 01.07.2017, which prescribes the procedure for factory stuffing and self-sealing of the containers.

14. The learned Authorised Representative for the Revenue has cited the case of **Indian oil Corporation Ltd., Vs. Commissioner of Customs**, 2023 (4) TMI 836-CESTAT NEW DELH. I find that in this case the period of exports was during December, 2010 to May, 2011 and the exported goods were Aviation Turbine Fuel (ATF). The rejection of conversion of the shipping bills from DEEC shipping bills to Draw Back shipping bills was upheld by the Tribunal on the grounds on time bar, non-presentation of relevant documents and by following the decision in Terra Films Pvt. Ltd. Vs. Commissioner of Customs – 2011 (268) E.L.T 443 (Del.). I find that in the case of Terra Films the conversion sought is from DEEC/DEPB shipping bills to DEEC/DEPB cum Drawback scheme involving fixation of Brand Rate. Hence the facts are distinguishable from this case.

15. I find that in this case the appellant has sought conversion from Advance Authorization Scheme to Duty Drawback Scheme after appellant received a communication dated 6th July 2018 from the Directorate of Revenue Intelligence (DRI) with respect

to the said Advance Authorization alleging violation of the pre-import condition in the matter of fulfilment of export obligation, wherever export obligation of the final product was undertaken prior to imports. The appellant has filed the application on 04.01.2019 for conversion of these shipping bills, which were disputed by DRI as ineligible for accounting them towards the fulfilment of the export obligation of the Advance Authorization No. 0210207855 dated 13.09.2017. I find that as regards the time limit of 3(three) months prescribed in Circular No. 36/2010-Cus dated 23.09.2010, there are catena of decisions, which have held that there is no time limit prescribed in Section 149, hence it is not tenable. However, after the amendment to Section 149, Notification No. 11/2022-Customs (NT) 22.02.2022, effective for the exports made on or after 22.02.2022, was issued prescribing a time limit of one year extendable by another 6(six) months each by Commissioner and Chief Commissioner, respectively.

16. As regards the documentary evidence, I find that in this case the appellant has exported the goods under the impugned 26 shipping bills against the Advanced Authorisation No. 0210207855 dated 13.09.2017 and filed for redemption of the Advanced Authorisation, that is when they received the communication from DRI. It is not possible for the appellant to have foreseen such a situation that these 26 shipping bills cannot be considered for redemption of the Advanced Authorisation. The appellant has substituted the impugned 26 Shipping Bills with the eligible Shipping bills and the Advance Authorisation was redeemed by DGFT. Thereafter the appellant

sought conversion of the 26 Shipping bills filed and exports made under Advanced Authorisation to Duty Drawback shipping bills. The requirement of mentioning on the impugned 26 Shipping Bills that the goods are being exported under Duty Drawback scheme and the rate of Duty Drawback would not have been possible in these circumstances. Further, Circular No.36/2010 permits the conversion from one scheme to another scheme. Further the requirement and the examination rigors for various schemes are different and relevant Circulars were issued in this regard from time to time. However, after the introduction of GST from 01.07.2017, Circular No.27/2017 dated 01.07.2017 was issued whereby most of the exports by Manufacturer/Merchant exporters are factory stuffed/stuffed at the premises of the merchant exporter and are self-sealed, hence there is on examination by the customs at the factory/premises or at the port of shipment, therefore the necessary documentary evidence that will be available is Shipping bill, export invoice and the scheme document i.e., DEBP/DEEC/Advance Authorisation and the mention of the scheme on the shipping bill. However, when a conversion of shipping bill is sought the mention of the scheme on the Shipping Bill against which the export had taken place would be different from the scheme to which the conversion is sought. I find that Circular No. 36/2010 dated 23.09.2010 has been issued superseding the earlier Circular No. 4/2004 dated 16.08.2004, inter-alia to allow conversion also in cases, where there is a no dispute with DGFT/MOC/Customs.

17. Further, I find that the impugned order of Learned Commissioner (Appeals) has travelled beyond the point on which the original adjudicating authority has adjudicated.

18. In view of the above discussion and in the facts and circumstances of the case, the rejection of conversion of the 26 shipping bills from Advance Authorization scheme to Duty Drawback scheme is not maintainable. Hence the request of the appellant for conversion of 26 Shipping Bills from Advance Authorization Scheme to Duty Drawback Scheme is allowed subject to fulfillment of the other conditions for such conversion and under intimation to DGFT.

(Order pronounced in Open Court on 18.08.2023)

(Pullela Nageswara Rao)
Member (Technical)

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