IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No.40162 of 2013

(Arising out of Order-in-Original No. 12/2012 dated 11.12.2012 passed by the Commissioner of Customs, Tuticorin)

M/s. Summer India Textile Mills P. Ltd. **Appellant**
176/2A, Kozhikkalanatham Road
Tiruchengode – 637 211.

Vs.

Commissioner of Customs **Respondent**
Custom House
New Harbour Estate
Tuticorin – 628 004.

APPEARANCE:

Shri S. Murugappan, Advocate for the Appellant
Shri S. Balakumar, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Date of Hearing : 28.1.2022
Date of Pronouncement: 01.02.2022

Final Order No. **40032 / 2022**

Per Ms. Sulekha Beevi C.S.

The issue in this appeal is rejection of request for conversion of free shipping bills filed under EOU scheme into drawback shipping bills.

2. The appellant M/s. Summer India Textile Mills Pvt. Ltd. were operating under 100% EOU scheme. They were granted EOU status vide LOP dated 7.4.1998 issued by the Madras Export Processing Zone (MEPZ) for manufacture and export of cotton grey fabric. They applied for no objection certification for exit of their unit from EOU scheme and operate under EPCG scheme on 30.5.2008. The Development

Commissioner on 8.7.2008 issued a letter granting no objection in principle for exit from the scheme.

3. On 21.3.2009, they informed the Development Commissioner regarding the delay in payment of duty for debonding. The Assistant Development Commissioner, MEPZ vide his letter dated 25.11.2009 granted further time upto 31.1.2010 only for the purpose of payment of pending dues. The Deputy Commissioner vide letter dated 21.12.2009 informed the appellant to pay Rs.2,48,72,339/- along with interest and to surrender green card, LUT before 31.1.2010. The Deputy Commissioner vide his letter dated 16.2.2010 informed MEPZ, Chennai that the unit has paid all the dues to the department and allowed final exit from 100% EOU status on 18.2.2010. It was informed by Assistant Development Commissioner, MEPZ, Chennai that exports made by the appellant upto 31.10.2009 were taken into account for calculation of Net Foreign Exchange Earnings (NFEE).

4. The appellant was granted authorization for EPCG scheme by office of the Joint Director General of Foreign Trade, Coimbatore under EPCG license dated 2.1.2009. Thereafter, the appellant vide their letter dated 12.3.2010 requested for conversion of 274 EOU shipping bills to drawback shipping bills on the ground that they have not availed any duty benefit or EOU benefit for the period from 1.2.2009 to 19.2.2010 and that they have filed all 274 shipping bills under free shipping bills. They also submitted a letter dated 11.3.2010 issued by Superintendent, Tiruchengode Range, wherein it is reported that "SITMPL (appellant) had not procured any goods under CT-3 under Notification No. 22/2003-CX dated 31.3.2003 and imported any goods

under procurement certificate under Notification No. 52/2003-Cus dated 31.3.2003 after 13.10.2008”.

5. The request of the appellant for conversion from free shipping bills to drawback shipping bills was rejected vide letter dated 16.11.2010. Only upon such rejection, the appellant filed appeal before Tribunal and vide Final Order No. 687/2011 dated 27.6.2011, the Tribunal set aside the order rejecting the request for conversion of shipping bills and remanded the matter for fresh decision by the adjudicating authority. The appellant was given further chance of personal hearing and the Commissioner has again passed the impugned order rejecting the request for conversion of the shipping bills into drawback shipping bills. Aggrieved by such order, the appellant is before the Tribunal for the second time.

6. The learned counsel Shri S. Murugappan appeared and argued for the appellant. He submitted that the appellant applied for exit from EOU scheme on 8.7.2008. The Development Commissioner issued a letter granting no objection in-principle for exit from the scheme. After this date, the appellant did not avail any benefit of duty exemption under the scheme and paid the applicable duties on the capital goods, stock of materials etc. Vide letter dated 16.2.2002, the jurisdictional Development Commissioner issued a no dues certificate. The final exit order dated 18.2.2010 was issued by the Development Commissioner.

7. At the time of request for exit from EOU scheme, they applied for EPCG authorization and the same was granted on 2.1.2009 permitting export of finished goods under EPCG scheme.

8. Between 1.2.2009 and 19.2.2010, by oversight, the appellants continued to make their exports without claiming any drawback though

they were not availing EOU benefits. For this reason, the appellant made request for conversion of these 274 free shipping bills to drawback shipping bills. The same has been rejected without any legal basis even in the second round of adjudication.

9. He submitted that the jurisdictional Superintendent of Central Excise in the certificate dated 11.3.2010 has confirmed that the appellants have not procured any goods indigenously or by way of import after 31.1.2009. The goods were exported after stuffing and sealing by the jurisdictional Central Excise officers under ARE-1. The procedure mentioned in terms of Circular No. 6/2002-Cus dated 23.1.2002 is to be followed for receiving incentives. In Circular No. 13/2003-Cus dated 3.3.2003, it is confirmed that these instructions will hold good if export consignments of EOU is sealed by customs / central excise officers.

10. The learned counsel adverted to Foreign Trade Policy 2009 – 2010 Chapter 5 (export Promotion Capital Goods) EPCG Scheme para 6.18. The said para which relates to exit from EOU scheme reads as under:-

> *"6.18 (a) With the approval of DC, an EOU may opt out of scheme. Such exit shall be subject to payment of Excise and Customs duties and industrial policy in force.*
>
> *(b) If unit has not achieved obligations, it shall also be liable to penalty at the time of exit.*
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> **** **** **** **** ****
>
> *In case there is no proceeding pending under FT(D&R) Act, DC shall issue final debonding order within a period of 7 working days. Between 'No Dues Certificate' issued by Customs and Central Excise authorities and final debonding order by DC, unit shall not be entitled to claim any exemption for procurement of capital goods or inputs. However, unit can claim Advance Authorization / DEPB / Duty Drawback. Since the duty calculations and dues are disputed and take a long time, a BG / Bond / Installment processes backed by BG shall be provided for expediting the exit process."*

11. Circular No. 13/2003-Cus dated 3.3.2003 referred by the learned counsel for appellant read as under:-

> *"I am directed to refer to the Board's Circular No. 6/2002-Cus. dated 23/1/2002 on the above-mentioned subject. In this connection, representations have been received by the Board as to what would be the examination norms for exports by EOUs and units in SEZs. It has been pointed out that such exports are undertaken under the Free Shipping Bills, but certain export incentives are available to them.*
>
> *2. The matter has been examined and it is clarified that exports by EOUs and units in SEZs shall be governed by examination norms, as applicable for EPCG/DEEC schemes, prescribed in para 2.1 (D) of the Circular No. 6/2002-Cus. dated 23.1.2002. However, if the export consignment of EOUs or SEZs unit has been sealed by Customs/Central Excise Officer, the norms at para 2.1 (A) of the said Circular will apply. The norms prescribed in para 2.1(B) of the said Circular for exports under 'free shipping bill' is applicable to only those exports which are not under any export promotion scheme.*
>
> *3. These instructions may be brought to the notice of all concerned by way of issuance of suitable Public Notices/Standing Orders.*
>
> *4. Difficulties, if any, in the implementation of these instructions may be brought to the notice of the Board. Kindly acknowledge receipt of this Circular."*

13. Board circular No. 6/2002-Cus dated 23.1.2002 was referred to by the learned counsel. The relevant para reads as under:-

> *"The scale of physical examination of various categories of exports at the port of export shall be as follows:*
>
> *Factory Stuffed Export Cargo:*

Category of Exports	*Scale of Examination*
Export goods stuffed and sealed in the presence of the Customs/Central Excise officers at the factories of manufacture, ICD/CFS, notified warehouses and other places where the Commissioner has, by a special order, permitted examination of goods for export.	*No examination except (a) where the seals are found tampered with; or (b) there is specific intelligence in which case, permission of Deputy / Assistant Commissioner would be required before checking.*

> *Export under Free Shipping Bills:*

Category of Exports	*Scale of Examination*

Exports under Free Shipping Bills i.e. where there is no export incentive	*No examination except where there is a specific intelligence."*

13. As per section 149 of the Customs Act, 1962, the conversion of free shipping bills has to be allowed if the appellant has furnished necessary documents. In the present case, the request for conversion has been rejected without any sufficient grounds. He submitted that the issue is covered by the decision of the Tribunal in the case of Ginni International Ltd. Reported in 2013 (297) ELT 402 (Tri. Del.) which is on the similar set of facts. The said order was appealed by the department before the Hon'ble High Court of Delhi as reported in 2014 (307) ELT 466 (Del.). The view taken by the Tribunal though affirmed by the Hon'ble High Court, the matter was remanded for the limited purpose of verifying whether the inputs have been procured on payment of duty etc. He prayed that the appeal may be allowed.

14. The learned AR Shri S. Balakumar supported the findings in the impugned order. The learned AR referred to para 19, 24, 25 of the impugned order which reads as under and prayed that the appeal may be dismissed.

> *"19. The request of SITMP was rejected vide this office letter / speaking order in file C. No. VIII/06/98/2010-Export dated 16.11.2010 on the grounds that; the conversion is not allowed as per terms of para 3.2 of the Circular No. 04/2004-Cus dated 16.1.2004; the 274 nos. of shipping bills filed under EOU scheme continued to be treated as an EOU till the date of final de-bonding order i.e. upto 18.2.2010 and in case of EOU, drawback cannot be sanctioned; the assessment was done for EOU shipping bills and varios parameters and factors required for assessing correct drawback were not checked during assessment and examination was also not done as per drawback scheme. At the post export stage, neither assessment nor examination can be done for drawback shipping bill; if goods were being manufactured during the period when EOU status remained, the goods manufactured in machinery which was hitherto non-duty paid, will have the benefit of cost. Therefore, no incentive is allowed in such bills. Therefore, they cannot be considered for drawback shipping bills.*

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24. In this instant case, the department had rejected the request of SITMPL for conversion of 274 shipping bills filed during the period from 1.2.2009 to 19.2.2010 by SITMPL from EOU scheme shipping bills to drawback scheme shipping bills. The contention of the department is based on the fact that during this period the exports done by SITMPL are to be considered as export by EOU unit and the conversion to drawback scheme cannot be allowed in terms of para 3.2 of the Circular No. 4/2004-Cus dated 16.1.2004 which provide that the claim of conversion from one scheme to another can only be allowed in case of denial of benefit under one scheme by DGFT/MoC&I or customs due to any dispute. The counsel of SITMPL during personal hearing and in written submissions has argued that the circular was superseded by Circular No. 36/2010-Cus dated 23.9.2010, wherein, instructions were given to decide the request of conversion on the basis of section 149 of Customs Act, 1962.

25. I find that Circular No. 36/2010-Cus dated 23.9.2010 provides for new guidelines regarding conversion of free shipping bills to export promotion scheme shipping bills and conversion of shipping bills from one scheme to another. In Circular No. 36/2010 dated 23.9.2010, it is specifically mentioned under para 6 that "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". In view of the term provided under para 6 of the Circular ibid, the circular is applicable only for shipping bills filed on or after the date of issuance of Circular No. 36/2010-Cus dated 23.9.2010."

15. Heard both sides and perused the records.

16. At the outset, it has to be stated that the appeal is filed against rejection of request for conversion of free shipping bills to drawback shipping bills. On perusal of the impugned order, the discussion is mainly focused on the issue whether the appellant is eligible for drawback benefit or not. Needless to say that the Tribunal has no jurisdiction to entertain an appeal which relates to an order of drawback benefits. However, an order relating to the rejection of conversion of free shipping bills which falls under section 149 of the Customs Act, 1962 is well within the jurisdiction of the Tribunal.

17. Section 149 of the Customs Act, 1962 reads as under:-

> *"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 custom house to be amended [1] [in such form and manner, within such time, subject to such restrictions and conditions, as may be prescribed]:*
>
> ***Provided** that no amendment of a bill of entry or a shipping bill or bill of export shall be so 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.*
>
> *[**Provided** further that such authorisation or amendment may also be done electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:*
>
> ***Provided** also that such amendments, as may be specified by the Board, may be done by the importer or exporter on the common portal.]"*

18. As per the said provision, if the documents evidencing the export of goods is produced, the request for conversion has to be considered by the officer. Though it is within the jurisdiction of the proper officer to allow the amendment of a free shipping bill, such discretion has to be applied as contained in section 149 of the Customs Act, 1962. The question as to whether appellant is eligible for the drawback benefits has to be considered only after the drawback shipping bills are presented for claim. If the claim of drawback is rejected an appeal against the rejection of drawback benefits has to be filed before the revisionary authority.

19. In the present case, the request is only for conversion of free shipping bills in terms of section 149 of the Customs Act, 1962. It is not the case of the department that the appellant has not produced sufficient document to prove that the export of goods were done by them. So also there is no allegation that there is delay in filing the request for conversion. On such score, we are of the view that the request for conversion cannot be denied. However, we make it clear

that the claim for drawback after conversion of the free shipping bills to drawback shipping bills has to be reconsidered by the officer as per the provision of law. By allowing the conversion of the free shipping bills to drawback shipping bills, we do not make any finding that the appellant is eligible for drawback benefits. We only hold that there are no grounds to deny the conversion / amendment of shipping bills in terms of section 149 of the Customs Act, 1962. The eligibility of drawback has to be looked into by the concerned officer.

20. In the result, the impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Pronounced in open court on 01.02.2022)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. ANJANI KUMAR**)
Member (Technical)

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