

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

Customs Appeal No.40304 of 2023

(Arising out of Order in Original No. 101577/2023 dated 31.3.2023 passed by the Commissioner of Customs, Chennai)

M/s. J.K. Tyre and Industries Ltd.

Truck Radial Plant, 437
Hebbal Industrial Area
Mysuru, Karnataka – 570 016.

Appellant

Vs.

Commissioner of Customs

Chennai II Commissionerate
Custom House
No. 60, Rajaji Salai
Chennai – 600001.

Respondent

APPEARANCE:

Shri D. Gopalan, Advocate for the Appellant
Shri Anoop Singh, Authorized Representative for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 41097/2024

Date of Hearing : 12.07.2024

Date of Decision: 21.08.2024

Per M. Ajit Kumar,

This appeal is filed by M/s. J.K. Tyre and Industries Ltd. against Order in Original No. 101577/2023 dated 31.3.2023 passed by the Commissioner of Customs, Chennai – II Commissioner (impugned order).

2. Brief facts of the case are that the appellant preferred an application for conversion of shipping bills under NFEI scheme to drawback scheme and to the consequent duty drawback under the provisions of sec. 74 of the **Customs Act, 1962 (CA 1962)** read with

Re-export of **Imported Goods (Drawback of Customs Duties) Rules, 1995** on re-export of "style steel Cord S311, Steel Spools B80, Plastic Pallets, Plastic Separators" to M/s. XING DA Steel Cord (Thailand) Co. Ltd. vide Shipping Bills No. 4017003 dated 7.9.2022, 3841846 dated 30.8.2022 and 3322352 dated 5.8.2022 on payment of **Integrated Goods and Services Tax @ 18%**. The Appellant availed credit of aforesaid IGST paid by them. After due process of law, the adjudicating authority rejected the request for conversion of the above shipping bills. Aggrieved by the said order, the appellant has filed this appeal.

3. Shri D. Gopalan, learned counsel appeared for the appellant and Shri Anoop Singh, learned authorized representative appeared for the respondent.

3.1 The learned counsel for the appellant submitted that upon sample testing of the subject goods, the goods were found defective, and the entire lot was returned to the supplier vide the Impugned three SB's. The invoices were endorsed stating that the subject goods "got rejected and are being returned to the consignee on non-replacement and non-returnable basis". They duly reversed the input tax credit availed by them on the IGST paid on the subject goods and the time of import so as to seek drawback. At this stage, they realised that the impugned Shipping Bills were filed inadvertently under Code 99 [No Foreign Exchange Involved ("NFEI")] instead of under Code 19 [Shipping Bill for Duty Drawback] for claiming drawback of duty. Therefore, the appellant filed three applications dated 20.09.2022, seeking amendment of the impugned shipping bills, viz., conversion of

NFEI shipping bills into drawback shipping bills. However, the Ld. Commissioner of Customs (Chennai-II), Imports has passed the impugned order rejecting the appellant's application for conversion of NFEI shipping bills to drawback shipping bills. The Ld. Counsel has stated that,

A. The impugned shipping bills are eligible for conversion into drawback shipping bills under Section 149 of the CA 1962 subject to the condition that the documentary evidence on the basis of which the amendment is carried out was in existence at the time of import or export of the goods, as the case may.

B. The question whether the subject goods were the same goods that were re-exported vide the impugned Shipping Bills, are not relevant for permitting the conversion of the impugned Shipping Bills.

C. The conversion of shipping bills under Section 149 cannot be rejected on the basis of Circular 36/2010-Cus dated 23.09.2010. The impugned order has incorrectly held that the powers granted under Section 149 is subject to prescribed restrictions and conditions and such restrictions and conditions have been prescribed vide the circular No. 36/2010. In terms of Section 2(32) of CA 1962 to mean "prescribed" means prescribed by regulations made under this Act. Further, as per Section 2(35) *ibid*, "regulations" means the regulations made by the Board under any provision of this Act. The combined reading of the above provisions clearly show that restrictions/ conditions mentioned in Circulars issued by the Board cannot be treated as those 'prescribed' under the CA 1962.

D. The Appellant submits that even section 74 of the CA 1962 nowhere mentions the requirement of physical examination as the only basis on which the proper officer is satisfied regarding the goods exported.

E. Non-declaration of 'drawback' claim on the Shipping Bill as required under Rule 4 of Drawback Rules cannot be a basis for rejecting Appellant's request for conversion of Shipping Bills.

F. The Appellant submits that the declaration claiming drawback was inadvertently not made by them in the impugned Shipping Bills, which can be cured as held by the Hon'ble Karnataka High Court in **Carl Zeiss** case.

G. Without prejudice to the above grounds, it is submitted that the application submitted by the Appellant requesting conversion of free Shipping Bills to Drawback Shipping Bills itself is an application for refund under Section 27 of the Act since the Appellant was otherwise eligible for claiming refund of the IGST paid by them at the time of import of goods used in manufacture of the re-export goods.

The Ld. Counsel prayed that the appeal may be allowed in full along with consequential relief.

3.2 The learned AR stated on behalf of the respondent that the Commissioner has passed a detailed order rejecting the appellants request which is based on the Act and Rules. As per **Section 74** of the CA 1962, 1962, duty needs to be repaid as drawback only when any goods which have been imported are capable of being 'easily identified' and upon which any duty has been paid on importation and have entered for export and the proper officer makes an order for clearance

of such goods under **Section 51**. Export goods are thus required to be identified to the satisfaction of AC/DC as the goods which were imported. It remains undisputable fact that the Exporter has contravened above statutory conditions. He further submitted that the exporter shall at the time of export of the goods state on the shipping bill, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback under section 74 and make a declaration on the relevant shipping bill to that effect. He referred to para 4 of **Circular No. 36/2010-Customs** dated 23.09.2010 dealing with conversion of free shipping bills to export promotion scheme shipping bills and conversion of shipping bills from one scheme to another which is reproduced below:

"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."

The Ld. AR stated that the circular articulates the need for verifying the identity of the goods entered for export as stated in **Section 74** of CA 62 and in the light of nil examination norms for free shipping bills conversion cannot be allowed. He stated that it remains an undisputable fact that the Exporter by filing a free shipping bill and post export trying to convert it into a drawback shipping bill has made impossible the examination of the export goods. He further referred to **Circular No. 46/2011 Customs** dated 20.10.2011 dealing with Exports under Duty Drawback Scheme. The relevant portion of the instructions relation to "identification of goods" and "determination of use" in terms of Section 74 of the CA 1962, as discussed is reproduced below:

- (a) In terms of the section 74 of the CA 1962, 1962, the export goods are to be identified to the satisfaction of the Assistant/Deputy Commissioner of Customs. This may require examination and verification of various parameters, including but not limited to physical properties, weight, marks and numbers, test reports, if any, documentary evidences vis-à-vis import documents etc., for identification of the goods. If such export goods have been 'used after import', the same is to be determined besides establishing the identity of the goods. It may be ensured that in all such cases where drawback under section 74 is claimed, the Assistant / Deputy Commissioner of Customs shall pass a speaking order giving detailed reasons with regard to establishing the identity or otherwise of the goods under re-export and determination of use, if any, while sanctioning duty drawback or otherwise. It may further be noted that the detailed speaking orders, following the principles of natural justice, are to be issued in both cases, i.e. where drawback is proposed to be sanctioned (either in full or part) or proposed to be denied.
- (emphasis added)

He stated that due to the actions of the Exporter in filing a free shipping bill the identity of the goods were not examined and could not be established and they have made themselves ineligible for their benefits. A plain reading of the statute makes it clear that the Act itself differentiates between simple re-export to re-export in which drawback is allowable. Statutory provisions have been contravened. Rules made by the Central Govt in exercise of the powers conferred by section 74 of the CA 1962, 1962 namely **Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995** have been contravened. In view of above submissions and case records, the case may be decided on merits and the appeal rejected.

4. We have carefully gone through the appeal papers and have heard the rival parties. Before examining the rival contentions, it would be fruitful to reproduce the relevant portion of the impugned order for easy reference.

“8.1 With regard to the issue, whether drawback under section 74 of the Customs Act, 1962 can be allowed based on the document and evidences available on record, I find that a combined reading of the legal stipulations enumerated in para 4 above, and the compliance by the exporter / importer leads to the short conclusion that in case of a claim for drawback on re-export of imported goods, the goods should necessarily be subjected to physical examination to establish their identity and use. This was not done in this case.

8.2 Further requirement of declaration by the exporter under Rule 4(a)(i, ii & iii) of Re-export of Imported Goods (Drawback of Customs Duties), Rules 1995 can be waived by the Pr. Commissioner / Commissioner as per proviso to the rule, provided the exporter demonstrates that he could not comply with these provisions due to reasons beyond his control. I find that the exporter has not cited any such reason in the present case.

8.3 Further, the exemption, if allowed, is only about the declaration and not about the physical examination of the goods to establish the identity and usage of the goods. Thus, though the B/Es and shipping bills indicate export of the imported goods, there is no way to establish the identity of the goods, which is the mandatory requirement to allow the duty drawback under section 74 of the Customs Act, 1962.

9. I find that relief under proviso to 4(a) of Re-export of Imported Goods (Drawback of Customs Duties), Rules 1995 is limited to granting waiver in deserving cases, from making statements and declarations and it does not grant any freedom or exemption from the requirement of establishing identity and use of the goods being re-exported. Also, such waiver is available to the exporter at discretion of the Pr. Commissioner / Commissioner only on the condition that the compliance of the provisions was not possible for the exporter due to the reasons beyond his control. In the present case, no such ground has been made out by the exporter.

10. In view of the above discussions and findings, I find that the importer / exporter has failed to fulfill the mandatory requirements under section 74 of the Customs Act, 1962 read with Re-export of Imported Goods (Drawback of Customs Duties), Rules 1995 and facility circular 04/2021 issued by Chennai Customs. Therefore, the request for conversion of NFEI shipping bill into drawback shipping bill and the consequent claim for duty drawback under section 74 of the Customs Act, 1962 merit rejection.”

(emphasis added)

Further, there is no doubt that the formation of opinion by the Competent Authority is a purely subjective process founded on existent circumstances. We find that the dispute here pertains to the discretionary jurisdiction of the Commissioner of Customs under the

impugned section of the CA, 1962. However, there are no allegations made by the appellant that the discretion has been exercised in an illegal manner or on wholly untenable grounds or is arbitrary or perverse. We shall now take up the issues raised by the appellant sequentially.

5. **Shipping Bills are eligible for conversion into drawback shipping bills under Section 149 of the CA 1962.**

5.1 The appellant has relied upon the following judgments in this regard to state that conversion of a SB is permissible, even if the goods exported were not physically examined by the Department.

- a. Hindustan Unilever v. UOI [2021 (49) G.S.T.L. 292 (Mad.)]
- b. Hewlett Packard Enterprise India (P) Ltd v. Jt Commissioner of Customs [2021 (375) E.L.T. 488 (Mad.)]
- c. M/s. Summer India Textile Mills P. Ltd. v. Commissioner of Customs, Tuticorin, 2022 (2) TMI 101-CESTAT CHENNAI
- d. Carboline India Pvt. Ltd. v. Commissioner of Customs, Chennai-IV, 2022 (381) ELT 397 (Tri. Chennai)
- e. M/s. Autotech Industries (India) Pvt. Ltd. v. Commissioner of Customs Chennai IV Commissionerate, 2021 (11) TMI 518-CESTAT CHENNAI
- f. Indian Oil Corporation Ltd. v. CC, Tuticorin, 2023 (12) TMI 576-CESTAT CHENNAI.

Each case presents its own features. A discretionary power to allow also carries with it the power not to allow, based on the facts and circumstances of the issue at hand. It is to be stated that the power under Section 149 of CA 1962 involves exercise of discretion, the scope of review during appeal in such a case is to examine if the discretion has been rightly exercised and that it is not based on irrelevant materials and is fair and reasonable in the circumstances. The Hon'ble

Supreme Court in its judgment in the case of **State of Orissa & Ors. Vs Md. Illiyas** [AIR 2006 SUPREME COURT 258 / 2005 AIR SCW 5925] held that a decision is a precedent on its own facts. It is not everything said in a judgment that constitutes a precedent. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. A 'precedent' means that a principle of law actually presented to a court of authority for consideration and determination has, after due consideration, been declared to serve as a rule for future guidance in the same or analogous cases. We find that no such principle has been declared by the Hon'ble Courts in the judgments cited and the decisions rendered are based on the facts of each case.

5.2 At this stage it would be relevant to refer to Section 149 of the CA 1962 1962, which is extracted below;

SECTION 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 custom house to be amended, 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 of 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 authorization 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.

(emphasis added)

We find that section 149 is a discretionary provision which gives the power to the proper officer to authorise any document, after it has been presented in the custom house to be amended, under certain restrictions and conditions, if he so deems fit. It is not an exclusive provision for the conversion of one type of SB into another. Amendment from one SB type to another cannot be claimed as a matter of right. Further no formal request for an amendment of the SB's under section 149 of CA 1962, as is being pleaded now, appears to have been made. That technicality however need not detain us as a disqualification, but is useful in understanding the action that followed.

6. **The question whether the subject goods were the same goods that were re-exported vide the impugned Shipping Bills, are not relevant for permitting the conversion of the impugned Shipping Bills.**

6.1 We find from the appellants letter dated 01/11/2022 addressed to the Commissioner of Customs that the appellant had initially approached the Customs department requesting for cancellation of 'Let Export Order' (**LEO**) and amending the impugned shipping bill under section 74 of CA 1962, but they were informed that the shipping bill had moved to 'history' in the computer system and hence it could not be recalled for LEO cancellation. They then vide their letter dated 01/11/2022 had requested the department to permit cancellation of the impugned shipping bills and permit for reassessment under section 74 of CA 1962, so as to enable them to get the duty drawback amount as per the customs norms.

6.2 We find that it is not correct on the part of the appellant to state that the question whether the subject goods were the same goods that were re-exported vide the impugned Shipping Bills, are not relevant

for permitting the conversion of the impugned Shipping Bills. As discussed earlier section 149 of CA 1962 is not a section specific to the conversion of one SB type to another. When a specific request is made by an exporter for a particular amendment in the SB which has monetary implications on the exchequer any prudent officer would have to take a holistic view of the amendment being sought. This discretion has to be tempered by the mandate of section 74 which permits the payment of drawback only if the goods are identified to the satisfaction of the AC / DC of Customs as the goods which were imported. Hence the proper officer feeling that the request for amendment of the SB and to reassess it for drawback under section 74 of CA 1962 requires examining the identity of the goods, cannot be faulted.

7. **The conversion of shipping bills under Section 149 cannot be rejected on the basis of Circular 36/2010-Cus dated 23.09.2010.**

7.1 According to the appellant the impugned order has incorrectly held that the powers granted under Section 149 is subject to prescribed restrictions and conditions and such restrictions and conditions have been prescribed vide the circular No. 36/2010. In terms of Section 2(32) of CA 1962 to mean "prescribed" means prescribed by regulations made under this Act. Further, as per Section 2(35) *ibid*, "regulations" means the regulations made by the Board under any provision of this Act. The combined reading of the above provisions clearly show that restrictions/ conditions mentioned in Circulars issued by the Board cannot be treated as those 'prescribed' under the CA 1962. They have relied upon the judgment of the Hon'ble Bombay High

Court in **Colossustex Pvt. Ltd. v. Union of India**, [2024 (387) ELT 277 (Bom.)], which dealt with a case in which a request for amending particulars in the SB, was rejected as being time barred in terms of para 3(a) of the Circular. The judgment held para 3(a) Of the circular to be ultra vires of section 149 of CA 1962. The facts of the case are distinguished as discussed below.

7.2 Circular No. 36/2010 in as much as it relates to the facts in issue in this matter, does not seek to prescribe any additional conditions above that which is prescribed in the Act. Section 74 of CA 1962, permits the payment of drawback only if the goods are “capable of being easily identified” to the satisfaction of the AC / DC of Customs as the goods on which duty has been paid on importation. As stated in Circular No. 46/2011- Customs dated 20.10.2011, this includes but is not limited to physical properties, weight, marks and numbers, test report if any, document evidence vis-à-vis import documents etc. In short, to identify goods as being the same at the time of export as they were at the time of import, requires it to be (i) same in nature/ physical identity, (ii) quantity and (iii) state of use / quality (new / old etc). The identity, quantity and quality of goods are not capable of being ascertained by examining the paperwork alone and requires physical examination of the consignment. Unscrupulous traders can tailor make documents, marks and numbers to cover up a blame worthy act of substitution of goods/ concealment etc. All this has a bearing on the drawback to be paid. It is common knowledge that goods once purchased from a shop when returned back as per conditions of return are thoroughly examined before being taken back by the shop keeper.

There is no reason why when goods are being returned by way of re-export involving a payout from the exchequer, a lesser standard of verification based on documents alone is to be held sufficient. In the case of the detection of a fraud such a decision could be held as irrational and perverse, at times with consequences for the officer causing the loss. The goods can best be identified satisfactorily by physical examination, unless the proper officer for reasons known to him arrives at his satisfaction otherwise. Hence no such direction can be given curtailing the discretion of the proper officer to confine his satisfaction to a verification of documents alone. The Circular has not exceeded this prescription made in the Statute. In any case the Commissioner of Customs has not leaned too heavily on Circular No.36/2010 and the order is in conformity with the existing provisions of the Act and Rules as is clear from the extract of the order reproduced above.

7.3 In the light of decision of the Commissioner of Customs being compliant with the provisions of law, reliance placed by the appellant on the judgments in **CCE, Bolpur v. Ratan Melting & Wire Industries**, [2008 (231) E.L.T. 22 (SC)] and **Commissioner of Customs and Service Tax, Bangalore v. Sony Sales Corporation**, [2021 (376) ELT 472 (Kar.)] to the effect that Circular cannot be interpreted contrary to the statute itself is not relevant to the facts of this case.

7.4 While the Act and Rules confer discretion to an officer under certain circumstances, it should not result in arbitrary power being conferred on the executive in the absence of any guidance as to how

that discretion should be exercised. In such situations administrative Circulars provide criteria or guidelines for exercise of that discretion. It seeks to achieve uniformity, nondiscriminatory and predictable application of discretion. This is all the more important when it is exercised by a large number of officers at different Customs stations and in situations that has an effect on trade / industry and the financial and economic interest of the country. Administrative Instructions/ Circulars help in achieving uniformity, predictability, removal of ambiguity, cost saving and provides a level playing field for the trade on the one hand, while putting a check on blame worthy conduct on the other. In **Sant Ram Vs State of Rajasthan**, [AIR 1967 SC1910], a **Constitution Bench** of the Supreme Court has held that statutory rules cannot be amended by Executive instructions but "if the rules are silent" on any particular point, Government can fill up the gaps by issuing executive instructions, in conformity with the existing rules. The relevant portion is extracted below;

“We proceed to consider the next contention of Mr. N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.” (emphasis added)

{Also see **CIT Vs A. Raman & Company** [AIR 1968 SC 49] / **Union of India Vs Rakesh Kumar** [(2001) 4 SCC 309] / **Union of India Vs Majji Jangamayya** [(1977) 1 SCC 606]}

8. **Section 74 of the CA 1962 nowhere mentions the requirement of physical examination as the only basis on which the proper officer is satisfied regarding the goods exported.**

8.1 Use of prudence and good sense need not be specifically stated in a section. However, what has been provided for in the section is discretion for the proper officer to use it. Issues like the actual identity of the goods being exported, whether the entire quantity is being exported or whether any short shipment is involved or whether the imported goods have been used after being destuffed at the factory, may require to be satisfied by a physical inspection of the goods, calling for a test report etc. The Hon'ble Apex Court in **Gazi Saduddin v. State of Maharashtra and Another** [(2003) 7 SCC 330] examined the question of discretion and stated as under;

"Primarily, the satisfaction has to be of the authority passing the order. If the satisfaction recorded by the authority is objective and is based on the material on record then the courts would not interfere with the order passed by the authority only because another view possibly can be taken. Such satisfaction of the authority can be interfered with only if the satisfaction recorded is either demonstratively perverse based on no evidence, misreading of evidence or which a reasonable person could not form or that the person concerned was not given due opportunity resulting in prejudicing his rights under the Act."

The decision taken in the impugned order cannot be stated to be illegal or having suffered from procedural impropriety or being irrational in the sense that it was in outrageous defiance of logic or moral standards. Whether the subjective satisfaction by the proper officer could have been achieved only by physical examination cannot be a matter of challenge so long as the use of discretion is not perverse etc.

No such allegation is made by the appellant whose main grouse is only the use of discretion by the proper officer resulted in him wanting to examine the goods. In the case of **West Bengal Electricity Regulatory Commission v. Cesc Ltd.** [(2002) 8 SCC 715 / (2002) 7 Scale 217] the Hon'ble Apex Court has held that the rule of prudence in law is that the appellate power is not to be exercised for the purpose of substituting one subjective satisfaction with another, without there being any specific reason for such substitution.

9. **Non-declaration of 'drawback' claim on the Shipping Bill as required under Rule 4 of Drawback Rules cannot be a basis for rejecting Appellant's request for conversion of Shipping Bills**

9.1 For a better understanding of the averments made by the appellant, Rule 4 is reproduced below;

Rule 4. - Statements/Declarations to be made on exports other than by post.-

In the case of exports other than by post, the exporter **shall** at the time of export of the goods -

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback under section 74 and make a declaration on the relevant shipping bill or bill of export that -

(i) the export is being made under a claim for drawback under section 74 of the Customs Act;

(ii) that the duties of customs were paid on the goods imported;

(iii) that the goods imported were not taken into use after importation;

OR

(iii) that the goods were taken in use;

[Provided that if the Commissioner of Customs is satisfied that the exporter or his authorized agent has, for reasons beyond his control, failed to comply with the provisions of this clause, he may, after

considering the representation, if any, made by such exporter or his authorized agent, and for reasons to be recorded, exempt such exporter or his authorized agent from the provisions of this clause.]

(b) furnish to the proper officer of customs, copy of the Bill of Entry or any other prescribed document against which goods were cleared on importation, import invoice, documentary evidence of payment of duty, export invoice and packing list and permission from Reserve Bank of India to re-export the goods, wherever necessary.

We find that the rule specifically mentions that certain conditions that 'shall' be met by the exporter intending to claim drawback exports other than by post. The object and purpose of the procedure laid down is to ensure that the Customs department is made aware that the SB involves the payment of drawback and the goods can be subject to checks as felt necessary. Since the object of the rule would be defeated by non-compliance causing a loss to the exchequer, hence the said rule has to be held as mandatory. Further it is not that the appellant's non-compliance was to do with something unimportant and tangential or that the procedure was so confusing or incorrectly written that the omission should be accepted. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. Further when a statute uses the word "shall", prima facie, it is mandatory, more so for the reason that non-compliance of the rule may result in excess / undue payment of drawback causing a loss to the exchequer. In the **State of U.P. & Ors. v. Babu Ram Upadhya** [(1961) 2 SCR 679(CB)], the Hon'ble Apex Court observed as under:

"Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or obligation: see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51."

The proverb 'trust but verify' is a salutary one and adherence to it by statutory authorities helps to ensure that they discharge their fiscal responsibilities with due care and diligence. The use by the proper officer of his discretion to satisfy himself of the identity of the goods by physical examination is well within the provisions of law and cannot be faulted.

10. **The Appellant submits that the declaration claiming drawback was inadvertently not made by them in the impugned Shipping Bills, which can be cured as held by the Hon'ble Karnataka High Court in Carl Zeiss case (supra).**

10.1 Proviso to Rule 4(a) of the Drawback Rules allows the Commissioner of Customs to exempt an exporter or his authorized agent who has failed to comply with the provisions of this clause from its provisions, for reasons beyond the exporters control. Firstly the present case is not one where the reasons were beyond the exporters control as examined and recorded by the Commissioner in the impugned order. In fact no such reason has even been placed before us. Secondly, a single act of omission or error of judgment can be stated to have happened inadvertently. A case of the three impugned SB's being filed over the period of a month, repeatedly without following the procedure set out in the Rules can't be held to be a case of mistaken filing or inadvertence. There has been a 'want of diligence' by the appellant. It is thus a case of negligence, if there was no fraudulent intention. Boards Circular was available as a guide but was not heeded to. Negligence in common parlance means and implies a failure to exercise due care, expected of a reasonable and prudent

person. Injury caused to oneself due to such negligence, may at times have to be endured and cannot be a reason to substitute the decision of the Proper Officer. Thirdly the issue is within the discretionary domain of the Commissioner and he has given valid reasons for not allowing the conversion of the 'free' SB to a 'drawback' SB. The judgment in the Carl Zeiss case does not lay down any law doing away with the declaration and the matter has to be examined on a case to case basis.

11. **The application submitted by the Appellant requesting conversion of free Shipping Bills to Drawback Shipping Bills itself is an application for refund under Section 27 of the Act since the Appellant was otherwise eligible for claiming refund of the IGST paid by them at the time of import of goods used in manufacture of the re-export goods.**

11.1 All claims for refund of Customs dues, have to be made as per section 27 of CA 1962 and are subject to the procedure and restrictions stated there in. As stated by the Hon'ble Apex Court in Union of **India & Ors. Vs VKC Footsteps India Pvt Ltd.** [Civil Appeal No 4810 of 2021/ 2021 (15) SCR 169], the refund of taxes is neither a fundamental right nor a constitutional right. Refund is always a matter of a statutory prescription and can be regulated by the statute subject to conditions and limitations. The issue of refund has been dealt with elaborately under the landmark nine Judge verdict of the Hon'ble Supreme Court in **Mafatlal industries Ltd Vs Union of India** [1997 (89) E.L.T. 247 (S.C.)], decided by a majority of 8:1. As per the majority decision, the language of the statute could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the

general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters. This is a bar upon a bar and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Central Excise Act 1944. (Section 27 in the case of a refund under the Customs Act 1962). Hence any claim for refund of customs duties has to be made as per the provisions of section 27 of CA 1962.

12. Having regard to the discussions above we find that the exercise of discretion by the original / proper authority is fair and reasonable. Neither has the appellant alleged or brought out any perversity or irrationality in the use of such a discretion. Hence the decision does not require any substitution just because the appellant feels that another view may be possible. We hence uphold the impugned order and reject the appeal. The appeal is disposed of accordingly.

(Order pronounced in open court on 21.08.2024)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)