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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/399 /2008 Date 18/08/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S MODIPON LTD.
MODI NAGAR,
GHAZIABAD (U.P.)

M/S MODIPON LTD. Appellant

Vs

C.C. (ICD) NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order NoC/305/2008** dated 12.8.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to.:

1. Respondent
   C.C. (ICD) NEW DELHI
   ICD, TUGHLAKABAD, NEW DELHI 110020.
2. Adv. / Consult
   MR.BIPIN GARG
   B-1/1289,A-VASANT KUNJ, NEW DELHI
3. S.D.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

C/399/08

[Arising out of Order-in-Original No.22/2008 dt.17/24.3.08 passed by the Commissioner of Customs, New Delhi)

For approval and signature:

Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER(TECHNICAL)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities:	:

M/s. Modipon Ltd. Appellant

Versus

CC, ICD, TKD, New Delhi Respondent

Appearance

Shri Bipin Garg, Adv. For appellant
Sh. R.K.Verma, Authorised Departmental Representative(DR) For respondent

Coram: Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER TECHNICAL

Final

Date of decision: ~~28.7.08~~
Order No. C/305/08

Per Rakesh Kumar:

The appellants are manufacturer and regular exporter of Nylon Filament Yarn. During Jan'07 to April'07 period, they exported 12 consignments of Nylon Filament Yarn under advance licence scheme. They had already been issued advance licence dt.22.12.06 and they have discharged the export obligation in respect of the advance licence. However, on account of inability to use the duty free raw-material, if imported against the advance licence issued to them, as due to certain reasons, they had to close down their unit, they, by letter dt.20.8.07, requested the Commissioner for amendment of the 12 shipping bills under Section 149 of the Customs Act for conversion from advance licence scheme to DEPB scheme. They also surrendered the advance licence issued to them to the DGFT. The Commissioner, however, by the impugned order rejected their request for amendment of the shipping bills for conversion from advance licence scheme to DEPB scheme. The Commissioner in the impugned order has given the following reasons for rejecting the Appellant's request:

a) It is observed from the instructions/guidelines contained in the Board's circular No.4/04 dt.16.1.04, in this regard that conversion request from one scheme to another may be acceded to only where the benefit of an export promotion scheme claimed by the exporter has been denied by the DGFT or customs due to any dispute, while, this is not so in this case.

b) Section 149 of Customs Act also does not help the Appellant. As per the provisions of Section 149, the amendment of shipping bill can be allowed after the export goods have been exported only on the basis of documentary evidence which was in existence at the time the goods were exported.

2. Heard both the sides.

2.1 Shri Bipin Garg, Advocate, Ld. Counsel on behalf of the appellant made the following submissions:

(1) The Appellant had procured the advance licence dt.22.12.06 and made exports during Jan'07 to April'07 period and the export obligation has been completed. But due to unavoidable circumstances, the Appellant had to close their factory on 7.6.07 and were unable to utilize the material, if imported against the advance licence. Under the circumstances, the Appellant had no choice but to get the scheme converted into DEEC scheme. The Ministry of Commerce has already accepted the surrender of the advance licence.

(2) Before rejecting the request of the Appellant for conversion, the respondent/Commissioner neither issued any show cause notice nor gave any opportunity for personal hearing was granted.

(3) The Appellants by virtue of export are entitled to the export incentives either under advance scheme or under DEEC scheme. Since under the circumstances, the advance licence scheme does not suit them

for reasons as stated above, they have already surrendered the advance licence to the DGFT.

(4) Since advance licence issued to the Appellant, has already been cancelled by the Ministry of Commerce, the Board's circular No.4/04 dt.16.1.04 does not come in the way of granting their request for conversion of the DEEC shipping bill into DEPB shipping bill. As per Section 149 of the Customs Act based on the documents like ARE-1 and shipping bills, at the time of export, amendment to the shipping bills can be allowed.

(5) The Tribunal in a series of judgments has held that the conversion of shipping bill from one export incentive to another incentive scheme should be permitted.

(i)Sologuard Medical Devices Pvt. Ltd. vs CC(Seaport),Chennai
2007(216)ELT.62

(ii) Nucleus Satellite Communications Pvt. Ltd. vs CC(Seaport)
2007(216)ELT.67

(iii) Patodia Syntex Ltd. vs CC, Raigad
2004(176)ELT.189

(iv) Manawat Plastics Pvt. Ltd. vs CC & CE,Nagpur
2007(215)ELT.437

Sterlite
(v) ~~Stelite~~ Optical Technologies vs CC(Exp.) ACC, Mumbai
2008(85)RLT.547

2.2 Shri R.K.Verma, Ld. DR defending the Commissioner's order pleaded that in this case, the benefit under advance licence scheme has not been refused to the appellant by the DGFT and therefore, their request for conversion of DEEC S/Bills into DEPB S/Bills is not valid and that the inability of the appellant to use the advance licence issued to them is not sufficient ground for conversion of the shipping bills from advance licence scheme to DEPB scheme.

3. We have given careful consideration to the submissions from both the sides. In terms of the Board's circular No.4/04-Cus dt.16.1.04, conversion of shipping bills from one export promotion scheme to another can be allowed where the benefit of an export promotion scheme has been denied by the DGFT/MOC or Customs due to any dispute, subject to further conditions that -

(a) request for conversion is made by the exporter within one month of denial of the benefit claimed;

(b) On the basis of available export documents etc., the fact of use of input is satisfactorily proved in resultant export product;

(c) the examination and the endorsements made in the shipping bill/export documents prove the fact of export and the export product is clearly covered under relevant SION and/or DEPB schedule, as the case may be;

(d) on the basis of shipping bill/export documents, the exporter is fulfilling all the conditions of the export promotion scheme into which he is seeking conversion, and

(e) the exporter has not availed the benefit of the export promotion scheme under which the goods were exported and no fraud/misdeclaration/manipulation/investigation has been initiated against him in respect of such exports.

3.1 Condition (b) to (e) for conversion of shipping bill from one Export Promotion Scheme to another in the above mentioned circular of the Board are in accordance with the provisions of Section 149 of the Customs Act,1962, which provides that - "save as otherwise provided in Sections 30 and 41, the proper officer may, in his discretion, authorize any document, after it has been presented to the customs house, to be amended, provided that no amendment of a bill of entry or shipping bill shall be so authorized after the clearance of imported goods for home consumption or warehousing or after 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".

3.2 From the provisions of Section 149, it is clear that when amendment to shipping bill after export of the goods is sought, the same is governed by the proviso to Section 149 and if the requirements of the proviso of Section 149 are satisfied, the amendment has to be allowed. Therefore, for amendment of shipping bill for conversion from one EP scheme to another, what has to be seen is as to whether the conditions (b) to (e) of the Board's circular dt.16.1.04, which are in accordance with the provisions of Section 149, are satisfied and if these conditions are satisfied, the conversion has to be allowed. The conversion of a shipping bill from one EP Scheme to another cannot be linked with denial of the benefit in one scheme by DGFT/MOC or customs due to some dispute, as no such condition for amendment of shipping bill has been prescribed in Section 149. Tribunal, in para 2.1 of its judgment in the case of Man Industries(India) Ltd. vs CC, Mumbai reported in 2006(202)ELT.433, has in this regard held as under:

> "The statutory conditions subject to which such amendment could or could not be made is described in proviso to Section 149 of the Customs Act, which reads as:
>
> 'provided that no amendment of a Bill of entry or a shipping bill or bill of export shall be no authorized to be made 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".
>
> It is not in dispute that the requirements of above mentioned proviso are satisfied by the appellant and consequently, the commissioner ought to have allowed the request for conversion instead of being 'bound' by the terms of a Board's circular which laid down certain situation, only in which conversion was permitted. That the Appellant's case was not specifically covered by one of the situations contemplated in the Board's circular, cannot deny the Appellants, their statutory right to seek any amendment. The statutory right, as also the statutory obligation of the proper officer to amend a document after its presentation in the customs house cannot be curtailed or set at nought by circulars of the Board. The approach adopted by the Respondent has the effect of conferring upon the Board's circular, a status of a statute over-ruling the proviso to Section 149 of the Customs Act,1962, which is impermissible".

3.2.1 Tribunal in the case of Sologuard Medical Devices Pvt. Ltd. CC(Sea Port), Chennai reported in 2007(216)ELT.62 has observed that -

"Circular No.4/04 dt.6.1.04 has debarred conversion of free shipping bills into an advance licence shipping bill as it creates difficulties in the wake of online assessment. I do not find this as adequate ground to deny an exporter the incentives granted by the Govt. If the exporter is able to satisfy the authorities with documentary evidence that existed at the time of respective export shipments, the department is bound to allow the request for conversion in view of the statutory provisions of Section 149".

4. In view of the above discussion, we hold that in this case, the impugned order refusing of request for amendment of the shipping bills for conversion of DEEC scheme into DEPB scheme on the ground that the Appellants have not been denied Advance Licence benefit by the DGFT due to some dispute, is contrary to the provisions of Section 149 and hence not correct. The request of conversion of shipping bills must be considered strictly in terms of conditions (b) to (e) of the Board's circular No.4/04-Cus dt.16.1.04, which are in accordance with the provisions of the proviso to Section 149. However, we find that while refusing the Appellant's request for conversion of DEEC shipping bills into DEPB shipping bills, neither any personal hearing has been given, nor any specific findings on the point as to whether the conditions (b) to (e) of the circular dt.16.1.04 are satisfied or not, have been given. The impugned order is, therefore, set aside and the matter is remanded to the Commissioner for denovo consideration of the Appellant's request for amendment of the shipping bills after hearing the Appellants and examining as to whether the conditions (b) to (e) of the Board's circular dt.16.1.04 are satisfied and if these conditions are satisfied, the

conversion may be allowed. The appeal is disposed off in the above terms.

(S.S.Kang)
Vice President

(Rakesh Kumar)
Member Technical

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