CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Customs Appeal No. 87621 of 2022

(Arising out of Order-in-Original No. 38/2022-23/CC/NS-II/CEAC/CAC/JNCH dated 22.08.2022 passed by the Commissioner of Customs, JNCH, Nhava Sheva II, Mumbai II)

M/s. Pinnacle Life Science Pvt. Ltd. **…..Appellant**
Mahindra & Mahindra Indl. Estate,
3rd Floor, Plot no. 109-D, Sion (East),
Mumbai

Vs.

Commissioner of Customs, Nhava Sheva II **…..Respondent**
JNPT, Custom House,
Nhava Sheva

APPEARANCE:

Shri Rishabh Sinha, Advocate on behalf of Shri Prasanna S. Namboodiri, Advocate for the appellant
Shri Ram Kumar, AC (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Mr Ajay Sharma, Member (Judicial)

FINAL ORDER No: 85481/2024

DATE OF HEARING : 08.11.2023
DATE OF DECISION : 07.05.2024

PER: C J MATHEW

The limited issue in this appeal of M/s Pinnacle Life Science Pvt Ltd is the denial of their application for amendment of shipping bills filed for export of goods undertaken by them ostensibly in pursuance of obligation arising from utilization of three ‘advance authorisation’ for procurement of ‘ciprofloxacin API’ as ‘inputs’ against ‘invalidation letters’ within the framework of the eponymous scheme in the Foreign Trade Policy (FTP). The mechanics and minutiae of the scheme are not relevant to the dispute though Commissioner of Customs (NS—II), Jawaharlal Nehru Customs House (JNCH), Nhava Sheva appears to have been overly concerned with the consequences thereto in discarding the request *vide* the impugned order[1].

2. It was the claim of the appellant that, in shipping bill no. 2581106/07.05.2020, 3582060/03.07.2020, no. 5497599/28.09.2020, no. 6870697/30.11.2020, no. 7950958/16.01.2021 and no. 8628779/13.02.2021 for export of ‘ciprofloxacin tablets’, they had inadvertently omitted to include details of the ‘advance authorisations’ as also in the tax and commercial invoices and, instead, were declared as ‘scheme code 19’ for drawback entitlement against the eligible ‘scheme code 03’ for the said scheme in the Foreign Trade Policy (FTP). The request, under section 149 of Customs Act, 1962, was rejected by drawing upon the framework of circular[2] of Central Board of Excise & Customs (CBEC) – as it then was – ostensibly owing to

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[1] [order-in-original no. 38/2022-23/CC/NS-II/CEAC/CAC/JNCH dated 22nd August 2022]
[2] [no. 36/2010-Cus dated 23rd September 2010]

such being binding on all customs officers and, apparently, stemming from the injunction therein that

> *'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 good's were exported and no fraud/ misdeclaration/manipulation has been noticed or investigation initiated against him in respect of such exports.'*

3. It is the contention of Learned Authorised Representative that the appeal lacks merit owing to the less rigorous scheme of examination that exports under claim for drawback are subjected to. According to him, the endorsement in the shipping bills evinces absence of physical examination and further that availing of the benefits of a scheme, *viz*., drawback, is another disbarment in the circular as set out *supra*.

4. According to Learned Counsel for appellant, the said circular of 2010 lacks authority as the empowerment to prescribe restrictions and conditions was incorporated in section 149 of Customs Act, 1962 only by Finance Act, 2019 with similar incorporation in section 157 of Customs Act, 1962 at the same time. It was pointed out that Shipping Bill (Post export conversion in relation to instrument based scheme) Regulations, 2022 was notified only with effect 22nd February 2022. Several decisions that had occasion to delve into the statutory restrictions and setting aside of rejection of amendment requests were cited by Learned Counsel.

5. Our attention has been drawn to the decision[3] of the Hon'ble High Court of Bombay in *Colossustex Private Ltd and others v. Union of India and others* striking down the restrictions in the circular for lack of statutory authority and disinclination to accept the contention of the respondents that these restrictions should be read into subsequent statutory empowerment. Consequently, the rejection in the impugned order is not just jeopardized but stultified.

6. The scope of section 149 of Customs Act, 1962 is statutorily circumscribed by the framework of the provision. It is intended for rectification of documents issued by parties to a commercial engagement which is, thereby, transposed into the statutorily prescribed entry envisaged by section 46 and section 50 of Customs Act, 1962. The empowerment stands on its own, and subject only to verifiability of facts as available on date of import or export, as the case may be. No other intrusion may be permitted to influence the disposal of request for amendment. The impugned circular suffers from the pre-disposition to perceive all, and any, request for amendment in terms of the consequences whereas the consequences to assessment of any benefit stems from another statutory provision which the designated authority is required to dispose off in accordance with the facts and the statutory framework of that empowerment. The convergence of the two in the

[3] [order dated 23rd August 2023 disposing off writ petition no. 2010 of 2022]

impugned circular has had the effect of excoriating a jurisdiction contrary to legislated empowerment.

7. All that the appellant has sought is for substitution of ‘scheme code 19’ by ‘scheme code 03’ in the shipping bills and related invoices. A nearly identical dispute, to the effect that

> *‘2. The request was denied for not adhering to circular no. 36/2010-Customs dated 23rd September 2010 of the Central Board of Excise & Customs (CBEC) which restricted conversions only to certain classes of bills in which the subjective satisfaction intended by section 149 of Customs Act, 1962 could be elicited from documentary evidence available at the time of export and only if sought for within three months from the date of ‘let export order (LEO)’ endorsed in the shipping bills.’*

had been agitated before the Mumbai bench of the Tribunal in *Seco Tools India Pvt Ltd v. Commissioner of Customs (Export), Air Cargo Complex, Mumbai*[4] and it was elaborated therein, while disposing off the appeal[5] against order[6] of Commissioner of Customs, Mumbai, that

> *‘6. From the narration, it would appear that the shipping bills had been filed with all particulars including the ‘advance authorisations’ in fulfilment of which the exports were intended and it was merely the absence of any reference to the said scheme of the Foreign Trade Policy in the heading*

[4] [final order no. A/85916/2022 dated 29th September 2022]
[5] [customs appeal no. 86895 of 2016]
[6] [order-in-original no. CAO No 01/16-17/ADJ (X) ACC dated 24th May 2016]

of the shipping bills which, by recourse to section 149 of Customs Act, 1962, was sought to be rectified in the application of the appellants herein addressed to the jurisdictional Commissioner of Customs and which, in turn, was prompted by the notice issued to the appellants herein by the authority empowered under the Foreign Trade Policy (FTP) for remedial action. Besides being a justification for the elapse of time in seeking recourse to section 149 of Customs Act, 1962, the stage in the sequencing offers a clearer perspective of the consequence, if any, of acceptance of the request for amendment. This is an aspect that, of necessity, is to be addressed by us as, even though the ostensible ground for rejection was the threshold bar of limitation prescribed in the impugned circular of Central Board of Excise & Customs (CBEC), the discussion in the impugned order did venture to consider the examination norms that exports against 'free shipping bills' are relieved of.

7. Requests for conversion of 'shipping bills' fall into five broad categories: from 'free' to 'drawback', 'free' to 'scheme', 'scheme' to 'drawback'. 'drawback' to 'scheme', and 'scheme' to 'scheme' and it is common ground that 'free shipping bills' are not burdened by norms of examination while all others are. The impugned order also does not purport to deny request for conversion from 'free' to 'drawback' which is entirely an 'in house' disposal; for the several schemes in the Foreign Trade Policy, access, as well as exit, vests in the licencing authority with customs formations concerned with episodic imports and exports in accordance with section 47 and section 50 of Customs Act, 1962 respectively that are aggregated only for closure by *redemption. It is at this stage that the authentication of exports claimed to have been effected for discharge of obligation is sought for from customs authorities by the licencing authority. Consequently, it is in the administration of schemes in the Foreign Trade Policy (FTP) that the oversight of consignment-wise transaction is supplemented by authentication of the instrument-wise aggregation of shipments which should have no bearing as a decision arising from section 149 of Customs Act, 1962. By dwelling on the consequence of amendment, which lies within the remit of the licencing authority, instead of the justification for discarding the request for amendment in each of the shipping bills, it appears to us that the framework within which amending enablement is to be exercised has been exceeded.*

8. From a plain reading of the statutory empowerment for

> *'...... **Amendment of documents** – Save as otherwise provided in Section 30 and 41, the proper officer may, in his discretion, authorize any document after it has been presented in the customs house to be amended.*
>
> *Provided that no amendment of a bill of entry or a shipping bill or bill of export shall be authorised to C/86895/2016 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.'*

in section 149 of Customs Act, 1962, it is seen that the principal provision pertains to documents that have been presented in a customs house in relation to any procedure under Customs Act, 1962; such documents may affect the contents of forms for entry prescribed under Customs Act, 1962 which is impliedly permissible, as a consequence, subject to the restriction embodied in the proviso. Any amendment, upon authorisation by the 'proper officer', would have to be incorporated by the person who filed the document(s). The proviso applies specifically to contents of bills of entry and shipping bills in which changes are to reflect only the documents existing at the time of clearance for home consumption/deposit in warehouse or clearance for export, as the case may be. Therefore, denial by recourse to a finding other than on the specific amendment requested by an importer/exporter would be tantamount to traversing beyond the framework of statutory empowerment.

9. Doubtlessly, the physical characteristics of goods covered by bill of entry/shipping bill can be authenticated only in consonance with the report of examination, if any, but that is not the request made by the appellant herein or the cause of rejection adverted by the competent authority. The plea is for alteration of the category of the bills to that of the scheme of export which the appellant claims to have been operating under. A finding on the inappropriateness of the request made by the appellant has not been rendered in the impugned order.'

and by drawing upon

'13. The decision of the Tribunal in ***Haldiram Foods International Pvt Ltd vs. Commissioner of Customs, Nagpur*** *disposing of appeal no. C/86048/2020 against orderin-original no. F.No. VIII(Cus) 25-159/Cus.Hqrs/2019 dated 29th October 2020 of Commissioner of Customs, Nagpur, after considering a catena of decisions, including those relied upon by Learned Authorised Representative before us here, and the series of circulars held that*

> '*9. From a plain reading of*
>
> > *'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 customs house to be amended;*
> >
> > *PROVIDED that no amendment of a bill of entry or shipping bill or bill of export shall be so 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 in the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be.'*
>
> *in Customs Act, 1962, it is seen that amendments of documents can be facilitated at any time after their presentation in the custom house. The seemingly 'open-ended' jurisdiction for amendment of documents is, nonetheless, constrained within the discretion vested in the 'proper officer' to permit that. Clearly, it is not a right to have the amendments incorporated and the applicant is, therefore, obliged to justify the necessity, in terms of consequential detriment, for invoking the provision. Concomitantly, it devolves on the 'proper officer' to place the applicant on notice of any want that may impede such permission or of any doubts that may*

be brought to bear on grant of the application and to further issue a reasoned order in the event of rejection. The deployment of the expression 'document' and the appending of proviso is calculatedly significant. Though not one of the enumerations in section 2 of Customs Act, 1962, 'document' is found scattered within several operative provisions, especially in the context of entries, as prescribed, and of assessment, connoting the evidence in support of the contents in the entry under section 46 and section 50 of Customs Act, 1962. Having been specifically defined, and being forms designed for assessment and clearance, 'bill of entry' and 'shipping bill' are not documents as intended in section 149 of Customs Act, 1962; indeed, the distinguishment accorded to these by the proviso argues the special dichotomy of the prescription for making the entry from the documents evincing the entry. This cleaving appears to have been intended to justify further limitation on the generality of empowerment to permit amendments in disposal of requests pertaining to bills of entry/shipping bills by freezing the moment of clearance/exportation as the touchstone. The distinction is attributable to source; 'documents' belong to the importer/exporter and the freedom to amend those is to be unabridged save of such content the amendment of which may be detrimental to the interests of the State while bills of entry/shipping bills, being prescriptions of the State, may be allowed for amending by importer/exporter only for conformity with the factum pertaining to export/import. The rationale for distinguishing the approach to making *changes in shipping bills and the ultimate consequence of shifting between schemes cannot be more blindingly apparent.*

10.From our discussion supra on the legal provisions and judicial pronouncements, it emerges that amendments sought under section 149 of Customs Act, 1962 may be permitted in 'documents' subject to justification including the reasonableness of the time within which such alteration is sought to be incorporated and in bills of entry/ shipping bills alterations are to be denied only to the extent of not mirroring the facts at the time of clearance/exportation. Implicitly, the ascertainability of the facts, and not mere elapse of time which was not considered for specifying in the legislation, is to be the factor in determining limitation. Elaboration of unavoidability of the change is a pre-requisite for exercise of discretion by the proper officer who may deny the amendment only upon sufficient reason after considering the submissions of the applicant to counter the proposal for rejection. Any circumscribing or circumvention of this essence is not a correct exercise of discretion vested in the proper officer.

11.The request of the appellant herein has been denied for non-compliance with the circular cited in the impugned order. Appellant had been compelled to forgo coverage, and inconsistent with the law as it now appears, under a scheme in the Foreign Trade Policy that may have entitled them to post-exportation import of specified goods without payment of duty and it is only *by the requested amendment that the Directorate General of Foreign Trade could consider extending that privilege to them. Approval of the request would exclude them from the reimbursement, contractually stipulated, in section 75 of Customs Act, 1962 and, therefore, entails recourse to section 149 of Customs Act, 1962. Further enablement for privileges flowing from a scheme, devised under the authority of Foreign Trade (Development & Regulation) Act, 1992, would emanate from the flexibility intended by circular no. 36/2010-Cus dated 23rd September 2010 of Central Board of Excise & Customs.*

12.The imperative of implementing schemes of export promotion under the Foreign Trade Policy even at the cost of foregoing revenue mandates facilitation that may seemingly be in conflict with the remit of the taxing authority; a post-exportation conferment of that escapement is even less likely to facilitated and circular no.36/2010-Cus dated 23rd September 2010 is but a pathway to the larger objectives of governance. It is moot, therefore, if the intent of the circular is to be perceived in its letter, as held by the 'proper officer', rather than in its spirit as claimed by the appellant. To deduce the propriety of either alternative, we turn to the legislative authority for such prescriptions as well as the chronological evolving of a uniform approach to guiding such facilitation. Circular no. 36/2010-Cus dated 23rd September 2010 was preceded by circular no. 4/2004- Cus dated 16th January 2004 of Central Board of Excise & Customs which it also superseded. The impetus for the original circular was the *disadvantage at which an exporter was placed on disallowance of eligibility for a particular scheme by the Director General of Foreign Trade and consequent inability to seek the privileges of another scheme owing to the absence of any authority that customs formations could take recourse to. Several years later, the facility of migration, contingent only upon such rejection, was, upon representation by the exporting community, considered to be ripe for availment as a commercial option to be exercised by the exporter. The timeframe of one month, in the first of the circulars, kicking in from rejection by the Directorate General of Foreign Trade, could no longer be the benchmark and a longer span of three months from the date of 'let export order (LEO)' was considered to suffice for the exercise of such option. Hence, it is apparent that the more recent circular was intended to liberalise the migration from one scheme of the Foreign Trade Policy to another. The other conditions in both the circulars were intended to ensure that it was indeed eligible goods that had been exported. Neither of the circulars claim to draw sustenance from any statutory enablement under Customs Act, 1962 and are, therefore, to be construed as guidance for trade facilitation on the part of the field formations under Central Board of Excise & Customs.*

13.Central Board of Excise & Customs is, under section 151A of Customs Act, 1962, empowered to issue 'orders, instructions and directions' to officers of Customs who are required to observe and follow these; however, even when the superseding circular was communicated, such empowerment was limited to *'uniformity in the classification of goods or with respect to the levy of duty thereon' and it was only with effect from 8 th April 2011 that such 'orders, instructions and directions' could encompass*

> *'….implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to any provision, restriction or procedure for import or export of goods…'*

In the absence of such authority, which could be construed as empowerment to enforce restricted applicability, the impugned circular, as well as its predecessor, could not have imposed rigid restrictions that are not contemplated in the parent statute and, in the context of facilitative intent, is to be implemented in accordance with the spirit of liberalised approach to request for conversion from one scheme to another. The Tribunal, in re Parle Products Pvt Ltd, also acknowledged this conclusion thus

> *'5.6 We find strong force in the contentions raised by learned Counsel for the appellant that Hon'ble High Court of Kerala in the case of Leotex (supra) in para 4 has held that the Board itself had decided to liberalise the provision regarding conversion from one scheme to another, there should not be any reason to allow the same.*

Consequently, the bar of limitation could be invoked only in the absence of any mitigating circumstances offered up in response to clarification sought by the 'proper officer' from the appellant for an appropriate decision. We are unable to perceive any such considered resolution of the request preferred by the appellant to the Commissioner of Customs.

> *14.It is evident that the impugned order is bereft of a comprehensive appreciation of the schema of amendment to, and conversion of, shipping bills, as elaborated in our discussions supra. The cryptic, and even peremptory, disposal of the request, without conforming to the reasonableness and judiciousness, mandated by section 149 of Customs Act, 1962 and disregarding the spirit in which the guidance was offered in the circular of Central Board of Excise & Customs, is not an outcome of responsible discharge of authority devolving upon the Commissioner of Customs. The applicant was not informed of the deficiencies, if any, that precluded them from being eligible for conversion; nor were they afforded an opportunity to demonstrate that their eligibility for coverage under the intended scheme was unimpeachable.*
>
> *15. Considering the limited, and unacceptable, ground on which the application was rejected, we are unable to decide on the claim of eligibility for conversion. It would, therefore, be appropriate that the impugned order is set aside for the application to be returned to the Commissioner of Customs and, in the light of our observations, for fresh determination of eligibility for conversion.'*

According to the appellant, the intent of the impugned exports as being in discharge of obligation under the 'advance authorisation scheme' of the Foreign Trade Policy is evident from the shipping bills and it is merely the title of the said bills that is stated to require alteration for enabling the appellant herein to remedy the defect pointed out by the licensing authority under the Foreign Trade Policy. Any

> *further processing of their claim before the licensing authority arises under the Foreign Trade (Development & Regulation) Act, 1992 which, even if envisaging clearance from customs authorities for a decision on the closure of the said authorizations is, yet, an event of the future with no relevance on the request made before the competent authority under section 149 of Customs Act, 1962 and should not have been a criterion for deciding upon the said request.'*

we are led to conclude that the impugned order is in error. A contrary view would have the effect of allowing the jurisdiction in section 149 of Customs Act, 1962 to overwhelm the jurisdiction to decide as empowered by Customs Act, 1962 or any other law.

8. Following the resolution thereto and a *catena* of other decisions, we set aside the impugned order and direct the competent authority to dispose off the request of the applicant without considering the benefits that may flow thereby and strictly restricting itself to the judicial determination set out in the several decisions *supra*.

(Order pronounced in open court on 07.05.2024)

(Ajay Sharma) **Member (Judicial)**	**(C J Mathew)** **Member (Technical)**

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