CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85743 OF 2024

[Arising out of Order-in-Original No: 254/2023-24/Commissioner/CEAC/NS-II/CAC/JNCH dated 1st March, 2024 passed by the Commissioner of Customs (NS-II), Nhava Sheva.]

Fine Organic Industries Ltd
Fine House, Anandji Street, Off. M.G.Road
Ghatkopar (East), Mumbai-400077 … ***Appellant***

versus

Commissioner of Customs (NS-II)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 ***…Respondent***

APPEARANCE:

Shri Anil Balani, Advocate for the appellant

Shri Krishna Azad, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85967/2025

DATE OF HEARING: 07/11/2024
DATE OF DECISION: 06/05/2025

PER: C J MATHEW

Appeal of M/s Fine Organics Industries Ltd lies against order[1] of Commissioner of Customs (NS-II), Jawaharlal Nehru Customs House, Nhava Sheva disposing off request, preferred under section 149 of Customs Act, 1962, for substitution of 'scheme code 00' to 'scheme code 03' in shipping bill 3985539/05.09.2022. The appellant, holder of advance authorisation under the appropriate scheme in the Foreign Trade Policy for export of 'FINAMUL– 97 (SSL)' for which import of 'lactic acid' and 'stearic acid' were permitted, had effected shipment of 35 consignments till 27th March 2023 and, while reconciling the deployment thereof in the finished goods, learnt that, in shipment, covered by the impugned shipping bill, erroneous reference had been inserted.

2. Learned Counsel for the appellant submitted that the disposal of their application was not consistent with the provisions of law and had travelled beyond the scope of section 149 of Customs Act, 1962 inasmuch as the circumstances, permitting amendment therein though obtaining, had been overlooked by the adjudicating authority for which reliance was placed on the decision of the Tribunal in *Posco Maharashtra Steels Ltd v. Commissioner of Customs (Export-I) [2022 (12) TMI 668 – CESTAT MUMBAI]*, besides certain other prior decisions rendered in disputes pertaining to the period before Regulations under section 149 of Customs Act, 1962 were notified.

3. We have heard Learned Authorised Representative who

[1] [order-in-original no. 254/2023-24/Commissioner/CEAC/NS-II/CAC/JNCH dated 1st March, 2024]

submitted that the impugned order is categorical on ineligibility for availment inasmuch as the goods had not undergone prescribed level of examination that the export category sought would have been subjected to.

4. It is seen that reliance has been placed on the 'Shipping Bill (Post export conversion in relation to instrument-based scheme) Regulations, 2022 which came into effect on 22nd February 2022. It is also seen that the Commissioner of Customs has held that the said regulations did not, as apparent from the definition in regulation 2(1)(b) and 2(1)(c) read with section 28AAA of Customs Act, 1962, envisage conversion from 'free shipping bill' to 'scheme shipping bill' owing to the limited and restricted scope of the Regulations. We do not find this conclusion to be the correct position in law inasmuch as, while the Regulations deal with conversion, the scope of section 149 is intended for amendments to shipping bills generally; the restricted nature of the Regulations is evident from the definition assigned to 'conversion' as limited to a particular category of amendment and the permissibility of such amendment does not either restrict the empowerment under

> *'149. 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 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:*
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> *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:*
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> *Provided also that such amendments, as may be specified by the Board, may be done by the importer or exporter on the common portal.'*

or limit the 'proper officer' to the 'amendment' contemplated in the Regulation.

5. Commissioner of Customs further held that the conditions in scheme for conversion provisioned for in circular[2] of the Central Board of Excise and Customs (CBEC) had also not been complied with besides enunciating that such conversion would not be consistent with the scheme of administration of exports attached with incentives under the Foreign Trade Policy (FTP). These two aspects were considered by the Tribunal in *re Posco Maharashtra Steels Ltd* thus

> *'6. The Tribunal, having considered an identical assertion*

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[2] [no. 36/2010-Cus dated 23rd September 2010]

of empowerment, has, in Haldiram Foods International Pvt Ltd v. Commissioner of Customs, Nagpur [final order no. 86108/2020 dated 16th December 2020 disposing of customs appeal no. 86048 of 2020 against order-in-original no. F no. VIII (Cus) 25-159/Cus. Hqrs./2019 dated 29th October 2020 of Commissioner of Customs, Nagpur], held that

> *'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 2010of Central Board of Excise & Customs.*
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> *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 8th 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.'*

making it abundantly clear that the invoking of any time bar, whatsoever, for rejection of such applications does not have the authority of law in the absence of such disbarment in section 149 of Customs Act, 1962 or by any prescription issued after 1st August 2019 under the authority of amended section 149 of Customs Act, 1962.

7. The contextual setting of the circular – commonly referred to in the application for amendment and in the impugned refusal of permission – had also been examined by the Tribunal in the decision supra to conclude that its intent was facilitative. In the present instances, amendment may well have the beneficial consequence of affording import of goods against, or transferability of, authorization issued under the appropriate scheme of the Foreign Trade Policy (FTP) upon grant by the competent authority. Hence, resort to the pre-amendment circular in the application preferred by the appellant does not, in the light of its facilitative intent, invite opprobrium or conclusion that the stipulations are applicable in entirety.

8. However, the authority drawn therefrom in the impugned order does not stand on the same footing as the circular was intended, in the pre-amended setting, to enable intramural migration so as not to deny the incentives flowing from eligible exports. The amendment sought for does not involve alteration of description of the exports themselves as declared in accordance with section 50 of Customs Act, 1962 or the ascertainment recorded by customs authorities under section 51 of Customs Act, 1962. That the goods exported are such as have been manufactured by deploying the capital goods permitted for import under the licence envisaged in the 'zero duty export promotion capital goods (EPCG)' scheme is *not disputed as the bills have been cleared without objection as intended for fulfilling obligations therein. This is also not a case of intramural migration but the appending of another scheme in the Foreign Trade Policy (FTP) relating to 'inputs' to the permitted scheme for import of capital goods for manufacture of related 'output' that has, indisputably been exported. Every change sought under section 149 of Customs Act, 1962 does not, therefore, involve verification of documentary evidence in existence at the time of import or export, as the case may be.*

9. Though the issue has been portrayed as befitting ascertainment within the rigour of first proviso in section 149 of Customs Act, 1962 as shipping bills were sought to be amended, the distinction between the generality of the principal enactment and the particularity of the proviso as enunciated in re Haldiram Foods International Pvt Ltd thus

> *'9. From a plain reading of*
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> > *'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;*
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> > *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.'*
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> *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.*
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> *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.'*

makes it clear that rejection of request for amendment in circumstances that are outrightly not in conformity with the literal phraseology of section 149 of Customs Act, 1962 may

> *not be overturned for lack jurisdiction but can upon passing the test of conformity with either the principal enactment or the more rigourous in the proviso, as the case may be. From the nominal nature of the amendment sought without impacting any statutorily prescribed detail in the entry mandated by section 50 of Customs Act, 1962, the application does not fall within the sphere of the proviso that has been resorted to in the impugned order.*

Owing to above, it was necessary for the Commissioner of Customs to consider the documents furnished by the appellant herein which lies within the scope of section 149 of Customs Act, 1962 as basis for any amendment.

6. Furthermore, the limited scope of section 149 of Customs Act, 1962, as mechanism for amendment without going into the consequences, was considered by the Tribunal, in *re Posco Maharashtra Steels Ltd*, to hold that

> *'12. Yet another aspect of jurisdiction, even by stretching of the framework, to pre-judge eligibility in the context of the nominal amendment sought by appellant has been brought up by Learned Counsel. In many of the schemes in the Foreign Trade Policy (FTP), both the tax collection agency and the trade promotion authority are inevitably, and inextricably, to synergistically oversee the performance and compliance – episodically by the former and terminally by the latter – for ensuring optimal tradeoff between sacrifice of duties of customs and incentivization of exports. The 'duty free import authorization (DFIA)' scheme in the Foreign Trade Policy (FTP) envisages that the authority under Foreign Trade (Development & Regulation) Act, 1992 scrutinizes eligibility and issues the*

instrument designed to achieve the objectives of the scheme by import of permitted goods to be used in manufacture of stipulated goods and furnishing of evidence of fulfillment of export obligation to the issuing authority for closure of the file concerned in the office of Directorate General of Foreign Trade; within this sequence, customs authorities are concerned with assessment of shipping bills relating to stipulated goods under section 51 of Customs Act, 1962 and, while undertaking statutory mandate of section 47 of Customs Act, 1962, with adherence of imports effected against bills of entry with the enumeration in the instrument issued by the authority under Foreign Trade (Development & Regulation) Act, 1992. As far as post-exportation variant of the scheme is concerned, it is for the authority under Foreign Trade (Development & Regulation) Act, 1992 to take a call on eligibility for the instrument specified in the Foreign Trade Policy (FTP); any which way, the jurisdictional oversight of customs authorities will not surface until the benefit of corresponding notification, issued under section 25 of Customs Act, 1962, is sought and that, as yet, was only a gleam in the eye of the applicant herein. We also find that there is no controverting of the submission of Learned Counsel for appellant that post-exportation processing of application under 'duty free import authorization (DFIA)' scheme in the Foreign Trade Policy (FTP) by the Directorate General of Foreign Trade (DGFT) is not contingent upon any specific evaluation of the exported goods. Neither is the pivotal role of that agency contested in the submission of Learned Authorized Representative. To decide on eligibility of import at this stage is patently in excess of jurisdiction and peremptory. This premature filtration at the threshold not envisaged in section 149 of Customs Act, 1962 and arrogating of 'policing' over statutory authority vested in another agency of the State is unacceptable.'

7. In the light of the documentation available for

ascertainment of conformity of the impugned goods with that required to be exported in fulfillment of obligation under the scheme of Foreign Trade Policy (FTP), the consequence of amendment, providing access to claim for fulfilment of export obligation, is a separate decision independent of the amendment and to be taken on the facts of each export. It was not proper for the authority under section 149 of Customs Act, 1962 to anticipate and preclude exercise of power, arising from non-compliance with the notification against which the imports have been permitted subject to fulfilment of obligation, by the proper authority to do so.

8. Accordingly, the impugned order is in error and is set aside to enable the proper officer, under section 149 of Customs Act, 1962, to decide upon the requests in the light of law as enacted and judicially determined.

9. Appeal is allowed by way of remand.

(Order pronounced in the open court on 06/05/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*