CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85041 OF 2024

[Arising out of Order-in-Original No: 167/2023-24/Commr/NS-II/CAC/JNCH dated 30th October 2023 passed by the Commissioner of Customs (NS-II), Nhava Sheva.]

United Phosphorus (India) LLP
Uniphos House, Madhu Park, 11th Road, Khar West,
Mumbai- 400 052 … ***Appellant***

versus

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

APPEARANCE:

Shri Rajeev Dinkar Waglay, Advocate for the appellant

Shri Deepak Sharma, Deputy Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85975/2025

DATE OF HEARING: 19/11/2024
DATE OF DECISION: 13/05/2025

PER: C J MATHEW

The narrow issue for consideration in this appeal, of M/s United Phosphorus India LLP against order of Commissioner of Customs (NS-

II), Jawaharlal Nehru Customs House, Nhava Sheva, is the correctness of confiscation of export goods that, having discharged appropriate duties of customs and were not prohibited for export, had been permitted clearance in terms of section 51 of Customs Act, 1962. In proceedings for recovery of ₹ 12,92,45,820, citing ineligibility for incentives claimed under 'merchandise exports from India scheme (MEIS)' of the Foreign Trade Policy (FTP), on export of 'insecticides', containing 'bifenthrin', effected against 225 shipping bills between 20th November 2017 and 18th September 2020, the impugned order[1] confirmed proposals in the show cause notice.

2. The show cause notice, proposing recovery under section 28(4)/section 28AAA of Customs Act, 1962, assailed the claim as erroneous stemming from alleged incorrect classification, as covered by tariff item 3808 9199, in the shipping bills while asserting that, according to sub-heading note 2 to chapter 28 of First Schedule to Customs Tariff Act, 1975, products containing 'bifenthrin (ISO)' were, on the basis of package weight, more appropriately covered by sub-headings 3808 61 to 3808 69.

3. This particular scheme for promotion of exports, notified under the Foreign Trade Policy (FTP) 2015-20 on 1st April 2015, offered monetary support to exporters - manufacturing and service - with

[1] [order-in-original no: 167/2023-24/Commr/NS-II/CAC/JNCH dated 30th October 2023]

emphasis on 'ease of doing business', merged five erstwhile schemes for promotion of exports of manufactured goods and one for services, by securing 'duty credit scrips' to be used for discharge of duty liabilities arising from levy on commodities and services – both domestic, till June 2017, and imported – and as percentage of value of exports. By public notice[2], schedule of country groups and reward rates - identified by ITC (HS) code - were notified to guide sanction by the competent authority in the Directorate General of Foreign Trade (DGFT) having access to such shipping bills, on which intent of availment was declared and had been approved for shipment under section 51 of Customs Act, 1962, upon trigger for processing by submission of proof of landing at destination. Notification no. 25/2015-Cus dated 8th April 2015 enabled exemption from duties of customs to the extent of value of 'scrips' produced at time of import of eligible goods.

4. According to Learned Counsel for appellant, recourse to recovery provisions was not, in the absence of proposal for such on imported goods cleared by foregoing duties of customs payable but for such exemption, tenable. He submitted that the proceedings, intended merely for withdrawal of validity of 'scrips' for import, could not resort to section 28 of Customs Act, 1962 which provided authority only for recover of duty not paid, duty short-paid or erroneously refunded. It

[2] [no. 2/2015-20 dated 1st April 2015]

was pointed out that section 28AAA of Customs Act, 1962 was available to be invoked, and only in circumstances of transfer of ‘scrips’, for recovery of duties foregone on imports by persons other than the exporter and the appellant, having, themselves, used the ‘scrip’, was beyond its purview. It was further submitted that, with no dispute on the value of goods that had been exported, there was no scope for interference by customs authorities as far as grant of ‘scrips’ was concerned. He contended that the use of the ‘scrips’ for foregoing duty, otherwise payable on import, had not been touched upon in the show cause notice leaving no scope for venturing upon merits of assessment and discharge of duty liability thereof, let alone recourse to section 28(4) of Customs Act, 1962. Reliance was placed on the order[3] of the Tribunal, in *Bharat Rasayan Ltd v. Commissioner of Customs, Nhava Sheva -II*, disposing off appeal[4] against order[5] in similar circumstances.

5. Learned Authorized Representative submitted that the goods, going by sub-heading notes in chapter 38 of First Schedule to Customs Tariff Act, 1975, merited another classification which customs authorities were empowered to substitute by revision of assessment. He relied upon the decisions of the Tribunal in *Seaswan Shipping and Logistics v. Commissioner of Customs, Tuticorin [2024 (1) TMI 257 –*

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[3] [final order no. 85446/2024 dated 1st May 2024]
[4] [customs appeal no. 87134/2022]
[5] [order-in-original no. 29/2022-23/CC/NS-II/CAC/JNCH dated 12th August 2022]

CESTAT CHENNAI] on invoking of jurisdiction by customs authorities, in *Cipra Enterprises v. Commissioner of Customs, New Delhi [2023 (1) TMI 463 – CESTAT NEW DELHI]* affirming competence to confiscate goods for misdeclaration and in *Fashion Accessories and ors v. Commissioner of Customs, Kandla [2024 (3) TMI 293 – CESTAT AHMEDABAD]* affirming parallel jurisdiction under Customs Act, 1962 insofar as schemes under the Foreign Trade Policy (FTP) were concerned.

6. The impugned order has placed elaborate emphasis on sub-heading notes in chapter 38 of First Schedule to Customs Tariff Act, 1975 and so did the arguments of Learned Authorized Representative. We may categorically state that this line of reasoning and resort to legal principle does not impress us as such findings lay bare demonstrated misapplication of customs law to the factual matrix of the dispute. The impugned goods are export consignments and section 2 of Customs Tariff Act, 1975 leaves no room for doubt that the elaborate structuring of the First Schedule therein provides, under the authority of section 12 of Customs Act, 1962, rate of duty of goods under import and that the less elaborate and limited enumeration in the Second Schedule is intended to provide rate of duty, if any, for export goods. While chapter/heading and sub-heading/tariff item codes are found in both Schedules therein, the *seriatum* ordering in the Second Schedule extinguished existence of all other goods. There was, thus, no cause for

falling back on note in section/chapter, or description at any level, of the First Schedule to Customs Tariff Act, 1975 for assessment of goods under export or for re-assessment of goods already exported. Nor is there any scope for recourse to General Rules for Interpretation of the Import Tariff to accord primacy to description in the First Schedule to Customs Tariff Act, 1975.

7. The purpose of declaration under section 50 of Customs Act, 1962 is to enable processing for assessment to duty, if any, under section 17 of Customs Act, 1962 for ascertainment of duty liability, if any, having been discharged as well as of goods not being prohibited for export before grant of permission for loading on ‘outward bound’ conveyance. Assessment is a function of ‘rate of duty’ and ‘value’ and, while there is no disputation of the latter, the absence of applicable rate of duty erases any jurisdiction for acceptance, or re-determination of ‘rate of duty’, and consequent alteration of assessment. There is, thus, no scope for invoking of section 28 of Customs Act, 1962 in the absence of any duty to be recovered. From a plain reading of section 28AAA of Customs Act, 1962, there is no room for doubt that, in the absence of fraudulently obtained scrips being led as evidence to void an instrument, and owing to framework restrictions in section 28 of Customs Act, 1962 in bringing the ingredients to bear even on a *bona fide* purchaser of ‘scrip’ procured from the original holder, the special incorporation may not be amenable for deployment by customs

authorities. It has not been alleged that the impugned instrument was in possession of anyone other than the appellant.

8. It is worth noting that the impugned proceedings are not about recovery of duty, either unpaid on exported goods or on goods imported without duty by presentation of resultant 'scrip', but intended for erasing benefit under export promotion schemes in the Foreign Trade Policy (FTP) accruing from exports and, that too, without any allegation of non-export, of export of questionable quality or at unacceptable value. The 'merchandise export from India scheme (MEIS)' itself has been devised under the authority of Foreign Trade (Development & Regulation) Act, 1992 and administered by licencing authorities designated under the statute with customs assessment and procedures being of peripheral significance save for certification of description and value therein. Its actual deployment, involving altogether different assessment upon importation of goods and for discharging assessed levy thereof by presentation of 'scrip' for attendant exemption from duty to such extent, is an act unknown to the present proceedings. The proceedings, thus beyond the jurisdictional reach of section 28 and section 28AAA of Customs Act, 1962, step into the administrative quarter of the licencing authority to issue 'scrips' by revising details in the shipping bills, *viz.*, the ITC (HS) code therein, already assessed and cleared. The ITC (HS) Code is 'direction neutral' enumeration of goods and, though drawing inspiration from the

Harmonized System of Nomenclature (HSN) for the purposes of trade policy uniformity and adopted for convenience, is neither authority, in the manner accorded by section 2 of Customs Tariff Act, 1975, for assessment by 'proper officer' nor for consequence of detriment under customs law remaining only for ascertainment of prohibition on import or export. The General Interpretative Rules, as appropriate, that are appended to Customs Tariff Act, 1975 do not apply to the ITC (HS) Code appended to the Foreign Trade Policy (FTP) and, particularly, to Appendix 3A with which 'merchandise exports from India scheme (MEIS)' is concerned.

9. Thus it was that, in *re Bharat Rasayan Ltd*, the Tribunal held that

> *'13. We deem it proper to address a very pertinent issue which arises in situation we are dealing with and it is about the role of customs authorities. Merchandise Exports from India Scheme (MEIS) is intended to offer incentives to eligible exporters on the basis of their export performance in a given year. Thus, the actual exports, as evidenced in shipping bills endorsed in accordance with Section 51 of Customs Act, 1962, are scrutinized by the licensing authority i.e. DGFT and scrips issued thereon in accordance with eligibility for inputs as designed in the Standard Input Output Norms (SION). Customs authorities have no role in this process once the exports have been completed. It lies within the exclusive domain of the agency designated under Foreign Trade (Development & Regulation) Act, 1992 and no other. To invalidate exports, it is necessary for customs authorities to invoke section 113 of Customs Act, 1962 and Section 113(i) in particular. Under this provision, only goods entered for exportation can be*

subject to confiscation and, as per section 2(18) 'export' means 'taking out of India to a place outside India,' implying that once goods have left India they cease to be under exportation. Such exports, under Section 51 of Customs Act, 1962, attain finality and can be reopened only if duty has not been collected or goods are found to be prohibited; there is no other empowerment for post-export confiscation. Eligibility for any benefit arising therefrom lies alone within the exclusive domain of the agency designed under Foreign Trade (Development and Regulation) Act, 1992 as the shipping bill cannot be nullified except in the said circumstances.

14. The role of customs authorities, if at all, may commence only upon presentation of scrips for clearance of exported goods that too in accordance with Notification No. 24/2015-dt. 8.4.2015 issued u/s. 25 of the Customs Act, 1962. Once the scrips are issued and are presented before customs authorities to be debited towards duty liability as assessed, the acceptance thereof is governed by the notification (supra) issued u/s. 25 ibid. This is segregation of jurisdiction, which is implicit in the notification applicable to utilization of scrips on imports of goods. There is, thus, no concurrent jurisdiction over the stages involved between export and import and each stage is governed to the limits of licensing and assessment jurisdiction by the respective statutes.

15. The functions of the licensing authorities and the customs authorities operate in different fields. The function of the licensing authorities is to consider whether any particular item should be allowed to be imported or exported due to various circumstances such as the requirement of the item, the amount of foreign exchange involved, permissibility and the relevant factors. If satisfied about the feasibility and permissibility the licensing authority grants license and, at times, may impose such conditions as they find necessary. This granting of licence may be dependant upon a policy enunciated in advance by the Government or may *even be made to depend on the individual judgment of the licensing authority. As against this, the function of customs authorities start only after the goods are imported and brought into the territorial water of the country. Customs authorities are concerned with the recovery of Customs duty and to check evasion of payment of duty and with the prevention of entry of goods which are prohibited goods as defined by the Customs Act. It is not for the customs authorities to interpret licensing policy or to enforce the same once a valid licence is produced or to dissect the license granted. This function is of the licensing authority. If this bifurcation of function is not adhered to, there is every likelihood of utter confusion. The licensing authority may interpret the policy one way and the customs authorities may take contrary view producing a conflict between the two authorities resulting in harassment to the importer or exporter, as the case may be. It is therefore, that the function of the two authorities which operate in two different spheres must be kept within their proper ambit. If a licence is granted in respect of a particular item by the licensing authority, the customs authority will have no right or power to go beyond the licence and determine the classification or reclassifying the same. It is only the licensing authority who has to determine the said question at the time of granting licence.*

16. Before parting with this matter, there is another aspect of the present proceedings that needs highlighting. The exercise of rejecting the entitlement to the scrip commenced with reclassification of the export goods, for assigning a different tariff item in Schedule to Customs Tariff Act, 1975. The classification of the goods is exclusive to Section 12 of Customs Act, 1962 and that too only for levy of duty. The classification declared by the exporter can be disturbed only by reference to the General Rules for Interpretation of the Export Tariff appended to Customs Tariff Act, 1975. Like undertaking of reclassification for imported goods, it is necessary that the onus of identifying the correct classification as *substitute for declared classification rests with the assessing officer/proper officer. Such reclassification is to be undertaken solely for the purpose of conformity with the General Rules for Interpretation and not for any other purpose. Reclassification for any other purpose has no place in adjudication.*

17. In view of the discussions made hereinabove, we are of the view that the customs authorities have overstepped its jurisdiction by resorting to re-classification of exported goods and cancelling the MEIS scrips. The same are hereby restored to the appellants. Accordingly the impugned order is set aside and the appeal filed by the Appellant is allowed with consequential relief, if any, in accordance with law.'

10. In *re Seaswan Shipping and Logistics,* the Tribunal was faced with a dispute in which a 'customs broker' was imposed with penalties under section 114 and section 114AA of Customs Act, 1962 and, in the course of which, the appellant therein had questioned jurisdiction of customs authorities leading to the observation that

'6.2 The power to grant the MEIS rewards/benefit being conferred only on the DGFT authorities in terms of Chapter 3 of the FTP, no action can be taken by customs authorities.

The matter has been examined. The scheme of the Customs Act, 1962 and the Foreign Trade (Development and Regulation) Act, 1992, provide that while Customs officers, have powers to take action for assessment of dutiable goods under the Customs Tariff Act 1975 and to detect, prevent and take penal action on the irregular/illegal import and exports of goods as per the Customs Act 1962, the decision of DGFT shall be final on all matters relating to interpretation of EXIM Policy, relating to classification for import/export of goods as per the ITC (HS) including various scheme under the umbrella of the Foreign Trade (Development *and Regulation) Act, 1992 and the EXIM Policy framed there under. Further to regulate imports/exports under various duty exemption schemes by way of scrips issued by DGFT, Customs notifications are issued by Central Board of Indirect Taxes and Customs (CBIC) and these scrips have to be registered by the importer/exporter concerned in the designated Customs House. On failure to comply with the specified conditions of the schemes, the duty that was exempted becomes recoverable by the Customs Department under the Customs Act. In addition to action by the Customs Department, the licensee is liable to penal action by DGFT under the FTDR Act 1992, for not fulfilling the conditions of the licence issued. Hence in respect to the violations under the individual provisions of the two Acts, levy of penalty or confiscation, may be initiated under the Customs Act apart from penal action being taken under section 11 of the Foreign Trade (Development and Regulation) Act, 1992 including the suspension or cancellation of the license issued under the FTDR Act, 1992. The Merchandise Exports from India Scheme (MEIS) Scheme is designed to provide rewards to exporters to promote the manufacture and export of notified goods/products. The 'Duty Credit Scrips' and goods imported/domestically procured against them is freely transferable. The Scrips can be used for payment of various Customs and Central Excise duties and fees as specified. In the impugned case no dispute on the classification heading of the goods under the schedule to the Customs Tariff Act 1975 has been raised. In fact, it is mentioned that as soon as the discrepancy in the classification heading was pointed out the exporter has paid the excess MEIS benefits claimed. In the era of self-assessment any wrong declaration including that of the classification of the goods which is done deliberately in the Shipping Bill/Bill of Lading for earning undue benefit on export of goods can be examined and penal action taken against all the persons concerned by Customs if so warranted. Such blame worthy acts ultimately affect the payment of Customs and Excise duties through use of freely transferable ineligible scrips, thus defrauding the exchequer. Hence while grant of rewards to the exporter is by the DGFT*

> *preventing the leakage of revenue is the concern of Customs. Therefor while the power to grant the MEIS rewards/benefit is conferred on the DGFT authorities, action for violation of specific provisions of law can be taken under both the Acts by the respective authorities.'*

The correctness of re-determination of ITC (HS) Code or classification according to First Schedule to Customs Tariff Act, 1975 did not lie within the compass of the dispute; merely, the consequence of confiscation under section 113 of Customs Act, 1962 *qua* person who did not own the goods impugned therein and of furnishing documents for assessment. The description of procedures in the scheme and the role of customs authorities therein are, thus, more in the nature of *obiter dicta* and, therefore, does not advance the cause espoused by Learned Authorized Representative.

11. In *re Cipra Enterprises*, the Tribunal disposed off appeal, limited to imposition of penalty, and reduced penalty owing to mitigating factors without addressing the issue of jurisdiction under law. It would not also be out of place to take note that any dispute in which classification, under the Schedules to Customs Tariff Act, 1975 (or CTH, in common parlance), is an element lies within the domain of a division bench of the Tribunal and that such was not an issue in the two aforesaid decisions. In *re Fashion Accessories*, the appellant therein was proceeded against in relation to both imported goods and exported goods and, owing to the former, the jurisdictional issue was of only peripheral relevance. The

competence to proceed against goods imported, and duty discharged by way of exemption notification, in which misdeclaration of the ITC (HS) Code of the corresponding exports had been admitted by the appellant therein placed any call to determine jurisdictional competence outside its pale. It is one thing to exercise statutory powers incorrectly and yet another to assert powers inappropriately. Here, concerned as we are with the latter, the decisions cited by Learned Authorized Representative are not relevant.

12. For the above reasons, the re-determination of ITC (HS) Code in the shipping bills is without authority of law and the consequent denial of eligibility to scrips is invalid. The appeal is allowed and impugned order set aside.

(Order pronounced in the open court on 13/05/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*