Customs Appeal No. 40150 of 2014
Customs Appeal No. 40151 of 2014
Customs Appeal No. 40152 of 2014

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI**

COURT HALL No. III

(1) CUSTOMS APPEAL No. 40150 of 2014

(Arising out of Order-in-Original No.22552/2013 dated 22.11.2013 passed by Commissioner of Customs (Seaport-Export), No.60, Rajaji Salai, Chennai 600 001)

M/s. Gupta Enterprises **... Appellant**
Eastern Street, Post Bag No.44,
Eluru – 534 001 (A.P)

Versus

**The Commissioner of Customs
(Seaport-Exports)** **...Respondent**
Custom House,
No.60, Rajaji Salai,
Chennai 600 001.

WITH

(2) CUSTOMS APPEAL No. 40151 of 2014

(Arising out of Order-in-Original No.802/2013-AIR dated 27.11.2013 passed by Commissioner of Customs (Airport & Aircargo), New Custom House, Meenambakkam, Chennai 600 027)

M/s. Gupta Hair Products Pvt.Ltd. **... Appellant**
279, Sydenhams Road, Nehru Timber Market
Choolai,
Chennai 600 112

Versus

**The Commissioner of Customs
(Airport & Aircargo)** **...Respondent**
New Custom House,
Meenambakkam,
Chennai 600 027.

AND

(3) CUSTOMS APPEAL No. 40152 of 2014

(Arising out of Order-in-Original No.801/2013-AIR dated 27.11.2013 passed by Commissioner of Customs (Airport & Aircargo), New Custom House, Meenambakkam, Chennai 600 027)

M/s. Gupta Enterprises **... Appellant**
Eastern Street, Post Bag No.44,
Eluru – 534 001 (A.P)

Versus

The Commissioner of Customs
(Airport & Aircargo) **...Respondent**
New Custom House,
Meenambakkam,
Chennai 600 027.

APPEARANCE :

Mr. L. Gokulraj, Advocate
For the Appellant

Ms. Anandalakshmi Ganeshram, Supdt. (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 07.07.2023
DATE OF DECISION : 17.07.2023

FINAL ORDER No.40559-40561/2023

ORDER : Per Ms. SULEKHA BEEVI, C.S.

Brief facts are that the appellant exported goods under various shipping bills indicating a claim for benefit under the Focus Product Scheme as per Chapter 3 of the Foreign Trade Policy. The goods were

eligible for all Industry Rate of duty drawback. They had inadvertently omitted to claim the drawback applicable to the exported goods under the scheme. The appellant then filed a request for conversion /amendment of the shipping bills into drawback shipping bills as provided under Section 149 of the Customs Act, 1962 read with Rule 12 of the Customs, Central Excise and Service Tax Drawback Rules, 1995. The original authority vide orders impugned herein rejected the request. Hence these appeals.

2. Ld. Counsel Shri L. Gokul Raj submitted that original authority has rejected the request for conversion to shipping bills in Appeal Nos.C/40151/2014 & C/40152/2014 on two grounds. Firstly, that there was no examination of the goods exported. Secondly, the request for amendment is time-barred in terms of Board's Circular No.36/2010-Cus. dt. 23.09.2010.

3. In Appeal No.C/40150/2014, the original authority has rejected the request for conversion of shipping on the ground that the appellant has not established that the omission to file the drawback shipping bills was due to reasons beyond his control.

4. In regard to the first ground that there was no examination of the goods exported, Ld. Counsel submitted that the appellant had filed the shipping bills under Focus Product Scheme given in Circular No.1/2009-Cus. dt.13.1.2009 which is on par with the norms for examination for exports made under the scheme of drawback provided

under circular No.6/2002-Customs dt 23.1.2002. It is argued that as per Circular No.1/2009-Cus. dt. 13.1.2009 officers have to select for open and examination, a minimum of two packages with a maximum of 5% of packages (subject to maximum of 20 packages from a consignment). The package number to be opened for examination will be selected by the system. That therefore the rejection of request on the ground that the consignment was not examined is without basis.

5. The second ground for rejection is that the request for amendment is made beyond 3 months from LEO as provided in Board Circular No.36/2010—Cus. dt. 23.09.2010. Ld. Counsel adverted to the decision of the Tribunal in the case of *Autotech Industries (India)* Ltd*. Vs CC Chennai-IV* - 2022 (380) ELT 364 (Tri.-Mad.) to argue that in the said decision the Tribunal has discussed the issue of time bar and held that when no time limit is prescribed under Section 149 of the Customs Act, 1962 the department cannot reject the request for conversion on the basis of Board circular. It is also pointed out that in the present case, the requests filed are within three months and only single request is beyond the period of one month. To support the arguments on the issue of time bar the decision of the Hon'ble Jurisdictional High Court in the case of *Global Calcium Pvt. Ltd. Vs CC Chennai IV* in CMA No.875/2017 dt 29.6.2017 was relied. The decision of the Hon'ble High Court of Kerala in the case of *Parayil Food Products Pvt. Ltd. Vs Union of India* - 2021 (375) ELT 486 (Ker.) was also relied. The Hon'ble High Court in the case of *CC, Tuticorin Vs Thiru Arooran*

Sugars Ltd. - 2014 (307) ELT 248 (Mad.) was referred to by the Ld. Counsel to argue that the said judgment of the Hon'ble High Court has distinguished the decision in the case of *CC Vs Suzlon Energy Ltd.* - 2013 (293) ELT 3 (Mad.) which has been relied by the original authority to reject the request for conversion as time barred.

6. With regard to the rejection on the ground that the appellant has not put forward any ground to establish that the omission to file drawback shipping bills was for reasons beyond his control, it is submitted by the ld. Counsel that the omission was bonafide and thereafter the appellant has sought the remedy of conversion of shipping bills as provided under Section 149 of the Customs Act, 1962. He prayed that the appeals may be allowed.

7. Ld. A.R Ms. Anandalakshmi Ganeshram appeared for the Department and supported the findings in the impugned order. It is submitted that Board circular No.36/2010 prescribes the guidelines for conversion from one export promotion scheme to another. In the instant case, 22 shipping bills were given Let Export Order between 16.10.2012 and 22.11.2012 whereas the request for conversion was made on 16.02.2013 and received by the department on 22.02.2013 which is beyond the stipulated time limit prescribed in the Board circular which is 3 months. Though the remaining shipping bills were given let Export Order between 03.12.2012 and 22.12.2012 and the request made for conversion is within the time limit but since the packages were not physically opened for examination at the time of

export, the adjudicating authority has rightly rejected the request for conversion. It is submitted that examination reports certifying the contents of the export consignment are not available as the consignments were not opened for physical examination at the time of export. Further, as per Rule 12 (1) (a) of Drawback Rules, 1995 the exporter had failed to declare the intention to claim the benefit under drawback scheme at the time of export which resulted in not examining the goods. The appellant has not fulfilled the conditions as stipulated in the Board circular. Therefore, the request for conversion has been correctly rejected.

8. It is argued by the Ld. A.R thar the importer / exporter cannot claim amendment of shipping bills as a matter or right. The words used viz. "proper officer may" in his discretion can authorize any document to be amended indicates that the power to exercise is only discretionary power. The Commissioner has refused to exercise the discretion in favour of the appellant. The appellant has not followed the guide lines prescribed by the Board circular No.36/2010. She prayed that the appeals may be dismissed.

9. Heard both sides.

10. The main issue to be considered in these appeals is whether the rejection of request for conversion of shipping bills into drawback shipping bill is legal and proper.

11. The first ground for rejection is that some of the requests are made beyond the period of 3 months as stipulated in the Board circular No.36/2010. The very same issue came up for consideration before the Tribunal in the case of *Autotech Industries (India)* Ltd. (supra) and the Tribunal held that the request for conversion of shipping bill cannot be rejected as time barred on the basis of the Board circular.

12. The Tribunal in the said case has observed as under :

"17. The only requirement under Sec. 149 to allow amendment is that the exporter has to produce documentary evidence which was in existence at the time of export. The department does not specifically dispute the export of goods. The appellants have furnished copies of Shipping Bills, BRC and ARE-1. These documents are sufficient to prove that goods manufactured by them using imported inputs were exported. The ARE-1 document would show that the goods have been removed from the factory for export after it has been examined/verified by the Superintendent of Central Excise. The reverse side of ARE-1 *inter alia* reads as under :-

"Certified that I have opened and examined the packages *No. 5/12 and found that the particulars stated and the description of goods given overleaf* and the packing list (if any) are *correct* and that all the packages have been stuffed in the container No. NIL with marks and the same has been *sealed with Central Excise Seal Lead Seal."*

18. the above document would establish the description, quantity of the goods exported. The Bank Realization Certificate (BRC) would prove that consideration for the export has been received.

19. The Learned AR has argued that the documents are not available with the department and that it is usually stored only for five years. As per Sec. 149, the requirement is not that the documents should be available with the department. It merely states that the exporter has to furnish documentary evidence which were in existence at the time of exports. In the case of *M/s. Hewlett Packard Enterprises* which is referred by us later, this point was discussed in para 12 and 13 of the judgment. The contention of the Revenue that the documents should be available with the department was not accepted by the Hon'ble High Court. The proviso gives an opportunity to the exporter/importer to furnish documents which were in existence at the time of export/import and get the error rectified. We therefore hold that the rejection of request on the ground that appellants did not furnish documents is factually and legally untenable.

20. We may now address the issue of limitation which is the main ground for rejecting the request for conversion of free shipping bills to drawback shipping bills. The request for conversion/amendment of shipping bill is made under Section 149 of the Customs

Act, 1962. This section does not prescribe any time limit for filing an application for amendment of shipping bill. The said section reads as under :-

"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 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".

21. It can be seen that law allows amendment of the shipping bill even after the goods have been exported. The only requirement, as already discussed, is that the exporter has to produce documentary evidence which was in existence at the time when goods were exported.

22. The question as to whether the conversion of the shipping bills can be allowed at a later stage after exports has been considered in a plethora of judgments. In the decisions relied by the Learned Counsel for appellant, this issue has been held in favour of the assessee allowing the conversion of shipping bill and reiterating that Section 149 of Customs Act, 1962 does not prescribe any time limit.

23. The jurisdictional High Court in the case of *M/s. Hewlett Packard Enterprises* v. *Joint Commissioner of Customs* - 2021 (375) E.L.T. 488 observed that the proviso in Section 149 permits amendment even after clearance for home consumption, if contemporaneous documents to establish the export are supplied by assessee. In the said case, the writ petitioner imported goods during the period 24-7-2019 to 26-7-2019 by filing 17 bills of entry. The invoices contained an error while mentioning the unit price of the imported products which came to be perpetrated in the Bill of Entry as well. On realizing the error they approached the Customs authorities seeking amendment under Section 149 of Act ibid. The amendment sought was rejected on the ground that the imported goods have already been cleared for home consumption. On 17-10-2019, the petitioner made a further request to which the officer *vide* communication dated 31-10-2019 referred to the judgment of Hon'ble Supreme Court in the case of *ITC Ltd.* v. *CCE, Kolkata-IV* - 2019 (368) E.L.T. 216 and informed that petitioner could file refund for the excess customs duty paid. Yet another request was made on 21-11-2019 and documents in the nature of (i) Price list, (ii) Purchase order *inter se* the petitioner and its supplier's reflecting the correct unit price (iii) original invoices showing the error (iv) purchase order (v) remittance report on 3-1-2020 order was submitted. However, the request was rejected once again. The Hon'ble Court held as under :-

"11. Admittedly, in the present case, the goods have been cleared for home consumption and therefore the petitioner seeks the benefit of the proviso, as per which, the petitioner/assessee would be entitled for amendment if it were able to supply sufficient evidence by way of documents that were 'in existence' at the time of the goods were cleared, deposited or exported to establish the error.

12. The lis in this matter revolves around the interpretation of the phrase 'in existence', as according to the revenue the phrase should be read as available with the Department

and it is only if the documents relied upon by the petitioner seeking amendment were, in fact, 'on record' that such amendment could even be considered.

13. I cannot agree. What is contemplated *vide* the proviso to Section 149 is an opportunity to be extended to an assessee to produce such documents that were 'in existence' at the stipulated time that would serve to establish the error, if any, in the B/E. The genuineness of such documents or a confirmation as to whether such documents were actually 'in existence' is certainly to be left open for thorough examination by the customs authorities and the Court would have no say in such a factual matter. Suffice it to say that the Department should take note of the documents that are presented by an assessee as being 'in existence' at the relevant time to evidence an error sought to be amended.

14. In the light of the discussion as aforesaid, the rejection of the request for amendment by the respondent is set aside to be re-done *de novo*. This writ petition is allowed."

24. The Hon'ble jurisdictional High Court in the case of *Global Calcium Pvt. Ltd.* v. *Commissioner of Customs, Chennai vide* judgment dated 29-6-2017 in CMA No. 875 of 2017 observed as under :-

1. After some arguments, Mr. Derrick Sam, seeks to withdraw the captioned appeal. Learned Counsel, however, says that he has only one apprehension, which is, that the Adjudicating Authority may subject the claim for duty drawback to the time limit of three months provided in the Circular No. 36/2010-Cus., dated 23-9-2010 (in short, "2010 Circular").

2. According to us, this apprehension is misplaced, as in paragraph 6 of the order, the Tribunal has, clearly, stated that "the time bar provision will not apply in this matter".

3. Needless to say, since, the Revenue has not come up by way of cross objection, they cannot raise any cavil about limitation of three months prescribed in the Circular.

4. We may also indicate that neither Rule 12(1)(a) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, nor Section 149 of the Customs Act, 1962, (in short, "the Act") prescribes, any time limit for processing the claim of duty drawback.

4.1 Furthermore, Mr. Chopda, has not been able to show any other provision in the Act or, the Rules framed thereunder, which provide for a time limit for processing the claim lodged for duty drawback.

5. As indicated above, the Tribunal has not accepted the stand of the Revenue that the Assessee's claim can be subject to time limit, as provided in the 2010 Circular.

6. Accordingly, the appeal is dismissed as withdrawn. Resultantly, pending application shall stand closed. There shall, however, be no order as to costs.

25. In the above judgment, the Hon'ble High Court has referred to the Board Circular, Section 149 of Customs Act, 1962 and Section 12(1)(a) of Drawback Rules and opined that the apprehension of the Counsel for petitioner that the request for conversion would be subject to scrutiny on the ground of limitation is for no reason.

26. The Hon'ble High Court of Delhi in the case of *Dimension Data India Pvt. Ltd.* v. *Commissioner of Customs* - 2021 (376) E.L.T. 192 (Bom.) has examined the very same issue. In the said case, the Bills of Entry dated 15-3-2019 to 25-4-2019 were sought to be amended. During internal audit, the petitioner realized that it had made inadvertent typo error at the time of filing the Bill of Entry by incorrectly declaring the CTH as 8517 69 90 instead of correct CTH 8517 69 30. For the goods under CTH 8517 69 30, the rate of duty is NIL whereas in respect of goods under other heading, the rate of duty is 20%. The error resulted in payment of excess duty to the tune of Rs. 14,50,01,413/-. Immediately, on detecting the error, a letter dated 7-6-2019 was submitted requesting to correct the bill of entry. The request was declined. The Hon'ble High Court referred to various decisions including the decisions in *Hewlett Packard Enterprises* (supra) and *Usha International Ltd.* v. *Assistant Commissioner* - 2019 (365) E.L.T. 56 (Mad.). The relevant paras read as under :-

"17. The Learned Counsel for the petitioners submits that the mistake in adopting the correct classification for the purpose of assessment can be rectified under Section 149 read with Section 154 of the Customs Act, 1962. Section 149 of the Customs Act, 1962 a proper officer in his discretion may authorise any document to be presented. Section 149 of the Customs Act, 1962 reads as under :-

"Amendment to 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 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."

18. In WP Nos. 18891 to 18893 of 2017, this High Court by its decision dated 25-7-2017 has held that the only embargo under Section 149 of the Customs Act, 1962 is that a person seeking relief cannot rely upon a documentary evidence, which came into existence after the goods were cleared, deposited or exported, as the case may be.

xx xx xx

26. With these observation, the above writ petitions are partly allowed with a direction to the 1st respondent or any other officer authorised under the Act :

(i) to pass a speaking order in respect of assessment made in the 23 and 9 bills of entries of the respective petitioner under Section 17 read with proviso to Sections 149 and 154 of the Customs Act, 1962 within a period of six month from the date of this order after giving adequate opportunity to the petitioners to establish the classification of imported wall fan under sub-heading 8414 51 90 following the principle [it] of natural justice.

(ii) Refund any will be subject to the petitioner satisfying the test of unjust enrichment."

27. The Commissioner has denied the request for conversion of shipping bills by resorting to the Board Circular. The relevant paras 3 and 4 of the Board Circular No.

36/2010 has already been reproduced in para 8 above. By this Circular, a period of three months is prescribed to file the request for conversion/amendment. Section 149 does not prescribe any time limit for filing an application for amendment of document. No doubt that Section 149 of the Customs Act, 1962 would prevail over the Board circular. Further, Rule 12(1) of the Drawback Rules,1995 which lay down the procedure to claim drawback also allows filing of belated declaration to claim drawback if the Commissioner is satisfied that the failure to file the declaration was due to reasons beyond the control of exporter. The Rules also does not limit the time. We have to hold that the request for conversion of Free Shipping Bill cannot be denied as time-barred by resorting to the Board Circular.

28. Be that as it may, before concluding, we are not able to overlook a serious question presented by the peculiar facts of the case before us. In the absence of any period of limitation prescribed in the section, whether it would mean that the remedy/relief can be sought for at any time when the Importer/Exporter wake up to realize the mistake or omission. In our opinion, the remedy has to be sought for within a reasonable time. A legal claim cannot be enforced if there is a long delay in asserting the right or the claim."

13. The second ground for rejection is that the packages have not been opened for examination. Ld. Counsel has produced Board Circular No.1/2009-Cus. dt. 31.01.2009 which provides for norms for opening and examination of consignments in case of export promotion scheme. In the present case, the shipping bills are filed under the Focus Product Scheme and are not completely free shipping bill. The exporter cannot be disadvantaged by rejecting the request for conversion of the shipping bill when the export of goods have not been disputed. Further, there is no evidence brought forth by the department as to any specific violation of any provisions of law with regard to the goods exported.

14. The third ground for rejection is that the appellant has not put forward any ground justifying that the omission to file drawback shipping bill was for reasons beyond his control. As per Rule 12 (1) (a) of Drawback Rules, 1995, the declaration has to be made at the time

of exports, as to whether goods are eligible for drawback. Such declaration has not been made by the appellant in the shipping bills but they had claimed the benefit under the Focus Product Scheme. Rule 12(1) of Drawback Rules,1995 reads as under :-

> **"Statement/Declaration to be made on exports other than by Post** - (1) In the case of exports other than by post, the exporters 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, and if so, at what rate or rates and make a declaration on the relevant shipping bill or bill of export that -
>
> (i) a claim for drawback under these rules is being made;
>
> (ii) in respect of duties of Customs and Central Excise paid on the containers, packing materials and materials and the service tax paid on the input services used in the manufacture of the export goods on which drawback is being claimed, no separate claim for rebate of duty or service tax under the Central Excise Rules, 2002 or any other law has been or will be made to the Central Excise authorities :
>
> Provided that if the Commissioner of Customs is satisfied that the exporter or his authorised 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 authorised agent, and for reasons to be recorded, exempt such exporter or his authorised agent from the provisions of this clause"

15. It can be seen that the said rule allows conversion of shipping bill, if the exporter or his authorized agent has, for reasons beyond his control, failed to file the declaration. In the present case, the appellants have submitted that they had inadvertently omitted to file the declaration that the shipping bills are drawback shipping bills. We find that appellant has given plausible explanation for the omission. The rejection of request for conversion on this ground cannot sustain and requires to be set aside.

16. From the discussions made above, and after following the decisions (supra), we are of the considered opinion that the rejection of request for conversion of shipping bill is not justified. Impugned orders are set aside. Appeals are allowed with consequential relief if any, as per law.

(Pronounced in court on 17.07.2023)

Sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

Sd/-

(SULEKHA BEEVI C.S.)
Member (Judicial)

gs