

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2010 OF 2022

1. Colossustex Private Limited

having address at 8577/4, Fourth
Floor, Vatika Mindscapes, street
Shanti Devi, New Rohtak Road,
Karol Bagh, Delhi-110005.

.. Petitioner No.1

2. Todi Rayons Private Limited

having address at 5007, 5th
Floor, World Trade Center,
Ring Road, Surat-395002,
Gujarat.

.. Petitioner No.2

Versus

1. Union of India

Through the Secretary, Ministry of
Finance, Department of Revenue,
North Block, Secretariat Building,
New Delhi – 110 001.

2. The Central Board of Excise and Custom,

Through the Secretary, Ministry of
Finance, Department of Revenue,
North Block, Secretariat Building,
New Delhi – 110 001.

3. The Deputy Commissioner of Custom,

having office at, Export Section,
Chapter-5402, Speedy. CFS
Multimedia Ltd., Sonari Village,
Taluka-Uran, Dist. Raigad,
Maharashtra- 400 707.

4. The Commissioner of Custom NS-II,
Jawahar Lal Nehru Custom House,
Nhava-Sheva,
Tal. Uran Dist-Raigad,
MH-400 707.

5. The Assistant Commissioner of Customs NS-II,
Jawahar Lal Nehru Custom House,
Nhava-Sheva,
Tal. Uran Dist-Raigad,
MH-400 707.

.. Respondents

....

Ms. Neha Anchlia, a/w. Mr. Anand Kanse, for the Petitioners.

Mr. Karan Adik, a/w. Mr. Dhananjay B. Deshmukh, for the Respondents.

....

**CORAM: G.S. KULKARNI &
JITENDRA JAIN, JJ.**

DATE : 23rd AUGUST, 2023

Oral Judgment (Per G.S. Kulkarni, J.) :

Rule made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

2. This petition under Article 226 of the Constitution of India, is filed by the Petitioners primarily being aggrieved by an order dated 29th December, 2021 passed by the Assistant Commissioner of Customs, Nhava Sheva, whereby the Petitioners' application for amendment of the shipping bills has been rejected. The Petitioners

have prayed for the following reliefs:-

- “(a) that this Hon’ble Court be pleased to issue a writ of Certiorari or other appropriate writ, direction or order striking down para 3(a) of Circular No.36/2010 Custom dated 23.09.2010 as ultra vires Section 149 of the Custom Act, 1962 and also ultra vires of Articles 14 and 19(1)(g) of the Constitution of India.*
- “(b) that this Hon’ble Court be pleased to issue a writ of Certiorari or other appropriate writ, direction or order quashing the letter dated 29.12.2021 issued by Respondent No.5 on behalf of Respondent No.4.*
- “(c) that this Hon’ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing Respondent No.4 to accept application for conversion made by the Petitioners vide letter dated 25.10.2021 and 18.10.2021.”*

3. It is the case of the Petitioners that Petitioner No.1 is a Merchant Exporter and Petitioner No.2 is an Importer as also a Merchant Exporter.

4. On 20th September 2018, Petitioner No.2 imported goods under Advance Authorization No.5210042794 dated 9th October 2018, for carrying out the manufacturing process of final product for the purpose of Export. On 31st March 2021, Petitioner No.2 was required to export the goods to fulfill its export obligations so as to

avail of the benefit of the Advance Authorization on or before 31st March 2021. On 24th May 2021, Petitioner No.2 sold the goods to Petitioner No.1. On 25th May 2021. Petitioner No.2 exported the goods vide Let Export Order dated 25th May 2021.

5. On 23rd September 2021, the Director General of Foreign Trade, vide its notification of the even date, extended Export Obligation Period of specified Advance & EPCG Authorizations for those Advance authorization where the original or extended export obligation period expired during the period between 1st August 2020 to 31st July 2021. The Export Obligation period was, accordingly, extended till 31st December 2021.

6. On such backdrop, on 18th October 2021 and, thereafter, on 25th October 2021, Petitioner Nos. 1 and 2, respectively, by such letters, requested Respondent No.3 to amend the shipping bills from one scheme to the other as per the provisions of Section 149 of the Customs Act, 1962 ("the Act"). By the impugned communication dated 29th December 2021, the Assistant Commissioner of Customs/Respondent No.4 rejected the request as made by the Petitioners in the light of the impugned Circular No.36/2010 Customs dated 23rd September 2010 and, more particularly, applying paragraph 3(a) of the said Circular, *inter alia* recording that the request for conversion of the shipping bills has not been made within three

months from the date of the Let Export Order dated 25th May 2021. As the challenge has been mounted to such communication, it would be relevant to reproduce the impugned communication, which reads thus:

“Date: 29.12.2021

To,

*Colossustex Private Limited,
8577/4, Fourth Floor, Street Shanti Devi,
New Rohtak Road, Karol Bagh,
Delhi -110005.*

*Subject: Amendment of Shipping Bill No.1990910
dated 25.05.2021-regarding*

- 1. Please refer to your letter dated 25.10.2021 on the above mentioned subject.*
- 2. At the outset it is informed that the request made by you is not mere a case of amendment but also involves conversion of the shipping bills from one export promotion scheme to another. The Board has stipulated restrictions and conditions for conversion of shipping Bills from one export promotion scheme to another vide Circular No. 36/2010-Customs dated 23.09.2010. Accordingly, the request has been examined in light of Board Circular 36/2010 dated 23.09.2010 read with section 149 of the Customs Act 1962.*
- 3. It is found that the request for amendment has been received on 25.10.2021 and the Let Export Order (LEO) for the shipping bill was granted on 25.05.2021. Thus, it is seen that the request for amendment has not been made within three months from the date of Let Export Order (LEO).*
- 4. Therefore, it is intimated that your request for amendment /conversion has been rejected as time barred without going into the merits of the case by the competent authority, i.e. the Commissioner of Customs, NS-II, JNCH.*

sd/-

(M.N. KOPADE)

*Assistant Commissioner of Customs,
CEAC, NS-II, JNCH, NHAVA SHEVA”*

7. Learned Counsel for the Petitioners in assailing the impugned communication has drawn our attention to the impugned Circular of which the legality has been assailed. Although the relevant clause of the Circular is clause 3(a), it would be appropriate to note the Circular in its entirety, which reads thus:

CIRCULAR NO.36/2010-CUSTOMS

F.No.600/121/2009-DBK
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Custom

New Delhi, the 23rd September 2010

To

All Chief Commissioners of Customs/Central Excise/Customs & Central Excise,
All Commissioners of Customs/Custom (P/Customs & Central Excise,
All Director Generals of CBEC,
Chief Departmental Representative of Customs Excise & Service Tax Appellate Tribunal,

Sir/Madam,

Sub: Conversion of free shipping bills to export promotion scheme shipping bills and conversion of shipping bills from one scheme to another – reg.

I am directed to invite attention to the Board's circular No.4/2004 -Cus dated 16.01.2004 which debars conversion of free shipping bills to Advance License/DFRC/DEPB shipping bills and allows conversion of shipping bills from one export promotion scheme to another only where the benefit of an export promotion scheme claimed by the exporter has been denied by the DGFT/MoC&I or Customs due to any dispute.

2. It has been represented to the Board that the norms for allowing conversion of shipping bills may be relaxed and the Commissioners should be allowed to consider requests for conversion of shipping bills from free to export promotion scheme and from one export promotion scheme to another on a case to case basis depending on the merits of the

case. It has also come to notice of the Board that the Tribunals in a series of judgments have held that amendment to shipping bill after export of goods is governed by the proviso to section 149 of the Customs Act, 1962 and if the requirements of the said proviso are satisfied, conversion of shipping bill should be allowed. The conversion of the shipping bill from one scheme to another cannot be linked with denial of benefit of one scheme by DGFT/MoC&I or Customs due to some dispute as no such condition for amendment of shipping bill has been provided in section 149 of Customs Act, 1962.

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 endorsement made on the shipping bill/export documents prove the fact of export and the export product is clearly covered under relevant SION and of 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 goods were exported and no fraud/declaration/manipulation has been noticed or investigation

initiated against him in respect of such exports.

4. Free shipping bills (shipping bills not filed under any export promotion scheme) are subject to 'nil' examination norms. Conversion of free shipping bills into EP scheme shipping bills (advance authorization, DFIA, DEPB, reward schemes etc) should not be allowed. However, the Commissioner may allow All Industry Rate of duty drawbacks on goods exported under free shipping bills, without conversion of such free shipping bill to Drawback Scheme shipping bill, in terms of the proviso to rule 12(1)(a) of the Customs, Central Excise & Service Tax Drawback Rules, 1995.

5. Due care may be taken while allowing conversion to ensure that the exporter does not take benefit of both the schemes i.e. the scheme to which conversion is sought and the scheme from which conversion is sought. Whenever conversion of a shipping bill is allowed the same should be informed to DGFT so that they may also ensure that the exporter does not take benefit of both the schemes.

6. This circular supersedes the Board circular No.4/2004-Cus dated 16.01.2004 and the earlier circulars issued in the past on this issue. This circular shall be applicable only to shipping bills filed on or after the date of issuance of this circular. Till such time as EDI system is modified to allow conversion of shipping bill in the EDI system, conversion may be allowed manually.

7. A suitable Public Notice for information of the Trade and Standing Order for guidance of the staff may be issued. Difficulties faced, if any in implementation of the directions may be brought to the notice of the Board.

Kindly acknowledge receipt of this Circular.

sd/-
(Pramod Kumar)
Technical Officer (DBK)"

8. Our attention is also drawn to the provisions of Section 149 of the Customs Act, which provides for amendment of documents prior to its amendment by Finance Act, 2019 as also to the provisions as it stood post the amendment as effected by Finance Act, 2019 with effect from 1st August 2019:

9. Section 149, prior to its amendment by the Finance Act, 23 of 2019, reads thus:

“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 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:”

10. Section 149 post amendment by Finance Act, 2019 reads thus:

“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 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:

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:

PROVIDED ALSO that such amendments, as may be

specified by the Board, may be done by the importer or exporter on the common portal.”

11. Learned Counsel for the Petitioners has also drawn our attention to a decision of the Division Bench of this Court in the case of **Pinnacle Life Science Pvt. Ltd. vs. Union of India**¹ wherein Circular No.36/2010 had fell for consideration of this Court. A Division Bench of this Court, after examining the provisions of the Circular in the context of Section 149 of the Customs Act, observed that the time-limit of three months as prescribed by paragraph 3(a) of Circular, was illegal and without jurisdiction. Our attention has also been drawn to a decision of the Division Bench of Gujarat High Court in the case of **M/s. Mahalaxmi Rubitech Ltd. vs. Union of India**². The Division Bench, considering the provisions of Section 149 of the Customs Act, had held that the impugned Circular to the extent it prescribes the time-limits in para 3(a) was ultra vires the provisions of Article 14 of the Constitution of India as also Section 149 of the Customs Act, 1962.

12. Learned Counsel for the Petitioners would submit that the impugned communication, which has been addressed subsequent to the decision of the Gujarat High Court in **M/s. Mahalaxmi Rubitech Ltd.** (supra), is *per se* illegal. It is submitted that even otherwise the impugned Circular No.36/2010 dated 23rd September 2010 could not

1 2022 (7) TMI 725 (Bom.)

2 C/SCA/21636/2019

have been applied to reject the request as made by the Petitioners for amendment of the shipping bills.

13. On the other hand, Mr. Adik, learned Counsel for the Respondent Revenue, has opposed the petition. Mr. Adik has placed reliance on the affidavit-in-reply of G. Sita Rama Raju, Assistant Commissioner of Customs to submit that the actions of the department were justified. The primary contention as urged in the reply affidavit as also argued by Mr. Adik is to the effect that impugned Circular No.36/2010 dated 23rd September 2010 is required to be held to be valid as it satisfies the mandate of Section 149 of the Customs Act as amended by Finance Act, 23 of 2019. Mr. Adik's contention is premised on the insertion of the following words in Section 149 of the Customs Act, 1962:

“In such form and manner, within such time, subject to such restrictions and conditions, as may be prescribed.”

14. Mr. Adik would submit that once the provision itself as amended confers a power and as wide as contained in the amended provision, it would not be correct for the Petitioners to contend that the impugned Circular No.36/2010 dated 23rd September 2010 would be rendered ultra vires and illegal when it prescribes in paragraph 3(a) a time-limit of three months, from the date of the export order for making any application for amendment of the documents in question.

In short, it is Mr. Adik's submission that by virtue of the amendment as effected by Section 29 of the Finance Act, 2019, the Circular would stand saved and it would continue to apply with full force, and at all material times, after its publication and for such reason it has been applied rightly by the Assistant Commissioner to reject the Petitioners request to amend the shipping bills. Mr. Adik has a peculiar submission when he submits that the decision as rendered by the Coordinate Bench of this Court in **Pinnacle Life Science Pvt. Ltd.** (supra) is *per incurium* as it does not take into consideration the effect of the amendment as effected to Section 149. It is next submitted that insofar as the reliance on behalf of the Petitioners on the decision of the Division Bench of the Gujarat High Court in **Mahalaxmi Rubitech Ltd.** is concerned, referring to para 17 of the said decision, Mr. Adik would submit that it would support the Revenue's contention.

15. It is on such backdrop, the rival contentions have fallen for our consideration. At the outset, we may observe that prior to the amendment of Section 149 by the Finance Act, 23 of 2019, i.e. prior to 1st August 2019, admittedly, there was no authority and/or any power vested with the Central Government to prescribe any time-frame and/or restrictions and conditions to be imposed on amendment of the documents as Section 149 would stipulate. It is admittedly during the prevalence of the provision as it stood prior to the 2019 amendment, that the Circular in question (impugned Circular No.36/2010) came to

be issued. The impugned Circular could not have prescribed any time-limits when the substantive provision of Section 149 of the Customs Act itself did not confer such power on the Central Government and, hence, for such reason, the impugned Circular prescribing the time-limits was *per se* contrary and ultra vires of Section 149 of the Customs Act. The Central Government could exercise power, provided such a power and authority was conferred by Section 149 of the Act, which is the only provision under the Customs Act, which provides for amendment to the documents. It was, thus, not permissible for the Central Government to issue the impugned Circular and, more particularly, prescribing the time-lines in paragraph 3(a) when it provided that a request for conversion be made by the exporter within three months of the date of the Let Export Order, only when such request would be considered. Thus, in our opinion, the said Circular itself was rendered bad and illegal and was contrary to the provisions of Section 149 of the Customs Act.

16. Learned Counsel for the Petitioners in such context would be correct in relying on the decision of the Coordinate Bench of this Court in **Pinnacle Life Science Pvt. Ltd.** (supra) wherein the Court observed that the impugned Circular could not have been issued by the Central Board of Excise and Customs (CBEC) prescribing for three months time period to make a request for amending the bills as per Section 149 of the Act, when no time was prescribed and once such

time period was not prescribed then such Circular could not have been issued.

17. We are afraid that none of the contention, as urged by Mr. Adik, can be accepted to confer any validity to the impugned Circular in the light of the amendments to Section 149 as brought about by the Amendment Act, 2019. This for more than one reason. First and foremost, the impugned Circular at the time when it was issued cannot be traced to any authority, power and jurisdiction vested with the CBEC considering the provisions of Section 149 as it stood. Secondly, even the 2019 amendment cannot be construed to confer any retrospective validity to the said Circular. Even assuming if such an authority is to be conferred, the Circular falls to the ground as Section 149 itself provides that it can be issued only in a manner as may be prescribed. The use of such words in the provision are required to be understood in the context as the Act would provide. In such context, the relevant provisions are Section 2(32) of the Customs Act which defines as to what would be meant by the term “prescribed”. Section 2(32) reads thus:

“2(32) “prescribed” means prescribed by regulations made under this Act”

18. Further Section 2(35) defines the term “regulations”. The same reads thus:

“2(35) “regulations” means the regulations made by the Board under any provision of this Act.”

19. We may also refer to the provisions of Section 157 of the Customs Act, which is the general power to make regulations, which provides that without prejudice to any power to make regulations contained elsewhere in the Customs Act, the Board may make regulations consistent with the Act and the Rules, generally to carry out the purpose of the Act. Sub-section 2(a) thereof provides for the different types of regulations, which can be framed by the Board.

20. Mr. Adik has not contended that the impugned Circular in any manner can be categorized to be regulations. Neither the content of the Circular can be read to mean that the Circular is in any manner would provide for regulations framed under the Customs Act. If this be the case, then even assuming that Mr. Adik is correct that Section 149 stood amended by the Finance Act, 23 of 2019, the impugned Circular cannot be attributed as any Regulations by applying even the amended provisions of Section 149. Thus, Mr. Adik’s contention on all counts justifying the Circular of 36/2010 cannot be accepted and would be required to be rejected.

21. We also find that in exercise of the powers under Section 157 of the Customs Act, various regulations have been prescribed, namely, the Warehoused Goods (Removal) Regulations, 2016,

Warehouse (Custody and Handling of Goods) Regulations, 2016, etc. Certainly, it would be totally untenable for Mr. Adik to contend that the Circular in any manner can be elevated to be any regulations considering the plain language of Section 149 read with sub-section (2) of Section 157 and Section 2(32) and 2(35) of the Act.

22. We are also inclined to subscribe to the view taken by the Gujarat High Court in the case of **M/s. Mahalaxmi Rubitech Ltd.** when the Division Bench, considering the purport of Section 149, as it stood post 2019 amendment, has held the Circular to the extent it incorporates para 3(a) was ultra vires of Article 14 of the Constitution of India as also ultra vires of Section 149 of the Customs Act, 1962. In our opinion, the Assistant Commissioner could not have been oblivious of the settled position in law that once the Gujarat High Court had struck down the Circular considering that the Customs Act has a pan-India operation being a Central Act, following the decision of the Supreme Court in **Kusum Ingots & Alloys Ltd. vs. Union of India And Anr.**³ The decision of the Gujarat High Court on the Circular in question was applicable and binding on all the customs jurisdictions throughout India.

23. Thus, there is also no warrant in the Respondents contending that by virtue of the amendment as brought about to Section 149 by the 2019 Amendment Act, without following the

³ (2004) 6 SCC 254.

procedure as mandated by Section 149, namely, in the “manner as prescribed” and as recognized by Section 2(35) the Circular would be valid.

24. In the light of the above discussion, the petition needs to succeed. It is, accordingly, allowed in terms of prayer clauses (a) to (c). However, insofar his relief prayer clause (c) is concerned, the same shall be subject to the other compliances as may be warranted by law.

25. Rule is made absolute in the above terms. No costs.

(JITENDRA JAIN, J.)

(G.S. KULKARNI, J.)