CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85088 OF 2022

[Arising out of Order-in-Original No: 13/2021-22/Commr./NS-II/CAC/JNCH dated 1st December 2021 passed by the Commissioner of Customs (NS-II), Nhava Sheva.]

Jindal Drugs Pvt Ltd
Bhakhtawar, 12-A, 12th Floor,
229 Nariman Point, Mumbai - 400021 … ***Appellant***

versus

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

APPEARANCE:

Shri Mihir Mehta, Advocate for the appellant

Shri Sydney D'Silva, Additional Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A/86207/2022

DATE OF HEARING: 17/08/2022
DATE OF DECISION: 15/12/2022

PER: C J MATHEW

The issue before us in this proceeding is the extent to which the legislative design of section 149 of Customs Act, 1962 is amenable to

stretching beyond that suggested by the phraseology to consider consequences as essential to disposal of requests preferred for amendment. Specifically, the intervention has been requested for alteration of 'N' to 'Y' in 55 nos. shipping bills filed for export of '*anethole pure*' and '*cineole pure*' by M/s Jindal Drugs Pvt Ltd. It is, therefore, necessary for us dwell upon the context in which this particular inclusion in shipping bills is of significance, if at all, for exercise of authority conferred by section 149 of Customs Act, 1962.

2. That the 'Y' or 'N' option is peripheral to customs procedure would appear to be so from

> *'5. The Policy HBP para 3.14 relating to declaration of intent for reward on goods requires the exporter to, for shipping bills filed from 1-6-2015 onwards, mandatorily declare intent for rewards on shipping bill. Till then, the present position of mandatory declaration for certain shipping bills would continue. The changed position shall enable Customs to take more informed decisions.'*

in circular no. 14/2015-Cus dated 20th April 2015 of Central Board of Excise & Customs (CBEC) which, while referring to the prescription of

> *'3.14 Declaration of Intent on shipping bills for claiming rewards under MEIS including export of goods through courier or foreign post offices using e-Commerce.*
>
> *(a) Export shipments filed under all categories of the*

Shipping Bills would need the following declaration on the Shipping Bills in order to be eligible for claiming rewards under MEIS: "We intend to claim rewards under Merchandise Exports From India (MEIS)." Such declaration shall be required even for export shipments under any of the schemes of Chapter 4 (including drawback), Chapter 5 or Chapter 6 of FTP. In the case of shipping bills (other than free shipping bills), such declaration of intent shall be mandatory with effect from 1st June 2015.

(b) ……'

in Handbook of Procedures (1st April 2015-31st March 2020) notified through public notice no. 01/2015-2020 dated 1st April 2015, has merely noted the change therein and the relevance in contingencies not yet contemplated. The chronological coinciding of introduction of 'merchandise export from India scheme (MEIS)' in Foreign Trade Policy (FTP) 2015-2020 notified under the authority of Foreign Trade (Development & Regulation) Act, 1992 and the mandating of declaration of intent by Handbook of Procedures (1st April 2015-31st March 2020) as notified by Director General of Foreign Trade (DGFT) under paragraph 1.03 of Foreign Trade Policy 2015-2020 notwithstanding, there can be no doubt that no bill for exports effected under any scheme in the Foreign Trade Policy (FTP) would, henceforth, be outside the purview of this new pre-requisite.

3. From perusal of public notice no. 40/2015-2020 dated 9th October 2015 and no. 47/2015-2020 dated 8th December 2015 issued

by Director General of Foreign Trade (DGFT), placed before us on behalf of appellant, and, in particular of

> *'2..... Declaration of intent is mandatory with effect from June 1, 2015. CBEC has also issued circular no. 14/2015 dated April 20, 201, which requires mandatory declaration of intent from 1.6.2015 onwards. In EDI generated shipping bills, exporters are required to tick mark "Y" in case they intend to claim benefits under MEIS and "N" in case they do not intend to claim benefit under MEIS.....'*

setting out the backdrop for steps taken to resolve 'teething troubles', engendered by the novelty of this abbreviated declaration in shipping bills, it can be inferred that the Directorate General of Foreign Trade (DGFT), concerned with alpha and omega of schemes in the Foreign Trade Policy (FTP), digitalised its entire domain and, having patched onto the electronic environment of assessment and clearance in the customs domain for transmission of details of cross-border movement of merchandise, could undertake processing of closure for discharge from obligation only by availability thereto which, owing to erroneously entered 'N', was denied egress from the customs system. It is also apparent that documenting the declaration of intent, hitherto in vogue for some schemes, entered in some convenient column of the shipping bill for manual processing by Directorate General of Foreign Trade thereafter was phased out with the introduction of electronic processing and, that too, of only such exports as gain entry into the system of Directorate General of Foreign Trade (DGFT).

4. Thus, after 1st June 2015, shipping bills that were to be distinguishable as ticked with 'N' (of concern only to customs clearance system) and ticked with 'Y' (for common use by customs clearance system and licencing authority system) inadvertently landed with an unforeseen third: shipping bills with 'N' ticked erroneously that were not transmitted to the DGFT. The immediate problem of such entry in bills filed between 1st April 2015 and 30th September 2015 was resolved by having the system of the licencing authority populated with the missing details through inter-departmental procedure. It is for enabling the transfer from second to third category, by substituting 'Y' for 'N' in the impugned shipping bills filed after this window, that application was preferred and the denial thereof is now under challenge.

5. With the context of this challenge laid out thus, we may now permit ourselves to proceed to the contents of the grievance of the appellant, *viz.*,

> *'19. In view of the above facts of the case, submission of exporter and findings, I conclude that the request of the exporter, M/s Jindal Drugs Pvt. Ltd., for amendment (conversion of export promotion scheme) under section 149, is liable for rejection on the grounds that the request for amendment is not supported by documentary evidence, which was in existence at the time the goods were exported, as stipulated in Section 149 of the Customs Act, 1962, and the request is time barred in terms of clause 3(a) of the Customs*

Act 1962, and the request is time barred in terms of clause 3(a) of Board Circular 36/2010 dated 23.09.2010 read with Section 149 of Customs Act.'

in order no. 13/2021-2022/Commr./NS-II/CAC/JNCH dated 1st December 2021 of Commissioner of Customs (NS-II), Jawaharlal Nehru Custom House, Nhava Sheva which, being disposal in accord with interpretation of the said authority for subjecting to test of merit in this appeal to the extent of exports having been made from the jurisdiction of the adjudicating authority, is not objectionable exercise of authority. Doubtlessly, statutory power is strictly restricted to the jurisdiction conferred by the statute with extra-jurisdictional claims alienated.

6. However, instead of merely ruling himself out of jurisdiction, as far as five of the shipping bills are concerned, the Commissioner concerned chose to label the inclusion as 'lackadaisical attitude' on the part of the appellant which, in our view, does not behove the role of the official in adjudicatory capacity. There is, indeed, no reason for 'attitude' to even pretend to have bearing in disposal of any application of assessee preferred before a public authority; that which is tolerated in a superior-subordinate equation has no place in customs law. The reasons for such filing may be many; yet, he, without seeking explanation, chose to make observation on behaviour. The sooner customs authorities eschew exaggerated perception of their

responsibilities, the better will the institutional credibility be served.

7. It is, therefore, not unexpected that the adjudicating authority has also scoffed at the plea of 'inadvertent/clerical error' – this sweeping, and seemingly, impulsive assertion of righteousness appears to have glossed over the crude superficiality of absolute untouched by the polish of proportion. That the rectification sought in a mere 55 of the totality of 845 bills filed during the period may well be justified has not found resonance in the 'impartiality' of the adjudicator.

8. As denials of such requests are not normally responded to so elaborately and in a communication emanating directly from the competent authority, a narrative of the background must find a place in our discussions. The appellant, frustrated by the lack of response from customs authorities, had approached the Hon'ble High Court of Bombay in writ jurisdiction which culminated in order of 16th November 2021 directing disposal of

> *'3……representation in accordance with law and upon granting opportunity of hearing to the petitioner within three weeks from date. It is ordered accordingly.*
>
> *In the event the petitioner's prayer for amendment is granted, follow-up action shall be taken also in accordance with law; if, however, the prayer for amendment is disallowed, a reasoned order shall be passed and communicated to the petitioner immediately thereafter'*

thus according judicial recognition of the application dated 27th April 2008 for amendment upon which the impugned decision of the competent authority was made. For rejecting the request, the impugned order held the application to be barred by limitation of time prescribed in circular no. 36/2010 dated 23rd September 2010 which was held to flow from the authority of section 149 of Customs Act, 1962 besides lacking in assurance of documentary evidence essential for authorizing post-shipment amendment.

9. Learned Counsel for appellant submitted that all the shipping bills are complete in every respect for the licencing authority to process for reward under the 'merchandise export from India scheme (MEIS)' but for the inadvertent error that has halted transfer of details to the system of Directorate General of Foreign Trade which, being procedural, is not fatal to their claim. It was submitted that decisions of Hon'ble High Court of Bombay in *Portescap India Pvt Ltd v. Union of India [2021 (376) ELT 161 (Bom)]*, of Hon'ble High Court of Kerala in *Anu Cashews v. Commissioner of Customs, Cochin [2020 (371) ELT 241 (Ker)]*, of Hon'ble High Court of Gujarat in *Gokul Overseas v. Union of India [2020 (3) TMI 167 – Gujarat High Court]* and in *Bombardier Transportation India Pvt Ltd v. Directorate General of Foreign Trade [2021 (377) ELT 489 (Guj)]* and of Hon'ble High Court of Madras in *Global Calcium Pvt Ltd v. Asst Commissioner of Customs (EDC), Chennai [2019 (370) ELT 176*

(Mad)] had, in identical circumstances, directed the substitution of 'N' by 'Y' as well as issue of 'no objection certificate' to facilitate availment of eligible reward. It was further submitted that, even under section 154 of Customs Act, 1962, such rectification of clerical errors is authorized. Relying on the decisions of the Hon'ble High Court of Delhi in *Kedia (Agencies) Pvt Ltd v. Commissioner of Customs [2017 (348) ELT 634 (Del)]* and of the Hon'ble High Court of Gujarat in *Principal Commissioner of Customs, Mundra v. Lykis Ltd [2021 (377) ELT 646 (Guj)]* and *Oriental Carbon & Chemicals Ltd v. Union of India [2021 (377) ELT 850 (Guj)]*, he argued that there was no scope for denial on grounds that section 149 of Customs Act, 1962 does not incorporate.

10. According to Learned Authorized Representative, the scope for post-shipment amendment in shipping bills is restricted only to such as is evinced by documentary evidence to have existed at the time of export and the patent absence of even deducible intent to avail the benefit of 'merchandise exports from India scheme (MEIS)' in any of the documents submitted left no other option to the competent authority under section 149 of Customs Act, 1962; this, he contends, is in compliance of the order of the Hon'ble High Court of Bombay. He further argued that the decision of the Hon'ble High Court of Gujarat in *re Bombardier Transportation India Pvt Ltd* and of the Hon'ble High Court of Madras in *KI International v. Commissioner of*

Customs (Appeal-II), Chennai [2021 (378) ELT 285 (Mad)] had been founded on the endorsement of intent in the shipping bills which is not evident here. As far as the bar of limitation is concerned, he contends that the impugned order has categorically explained the circumstances in which the circular of Central Board of Excise & Customs (CBEC) is applicable.

11. According to the adjudicating authority, the discretion to permit amendments in documents is circumscribed by the conditions that may be prescribed under the empowerment of section 149 of Customs Act, 1962 and that time limit prescribed in circular no. 36/2010 dated 23rd September 2010 of Central Board of Excise & Customs (CBEC) is binding on all subordinate authorities. It has been pointed out by Learned Counsel that the empowerment to 'prescribe form and manner, time as well as restrictions and conditions' was incorporated in section 149 of Customs Act, 1962 only with effect from 1st August 2019, by Finance Act, 2019, while their request was preferred on 27th April 2018 thereby precluding the test of any prescription that may have been put in place prior to this date.

12. The applicability of the bar of limitation in handling requests for amendment under section 149 of Customs Act, 1962 was considered at length by the Tribunal 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] and it was 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.'

from which it is abundantly clear that rejection of the impugned

application for non-conformity with the deadline prescribed therein does not have the authority of law in the absence of such disbarment in section 149 of Customs Act, 1962 or, at time when application was preferred, of empowerment vested in Central Board of Excise & Customs (CBEC) to prescribe such.

13. The amendment sought by the appellant does not involve change of any of the particulars mandated for inclusion under the authority of section 50 of Customs Act, 1962. Nor is there any plea for alteration of endorsement, if any, made in the shipping bills under the authority of section 51 of Customs Act, 1962. All that the appellant seeks is the substitution of 'N' with 'Y' in these bills and, that too, owing to manual facilitation not available as alternative, solely for the purpose of making shipment particulars accessible to the licencing authority. Cavil of the appellant is that the denial of authorization to alter the option in the impugned shipping bills is improper and discriminatory as several decisions cited *supra* have held otherwise. In proceedings leading to the impugned order, the appellant herein had cited the decision in *re Kedia (Agencies) Pvt Ltd* which was discarded with the assertion of inapplicability owing to the amendment effected in section 149 of Customs Act, 1962 since that judgement had been handed down. It would appear that the adjudicating authority has failed to appreciate the tenor of the said decision and that the impugned order demonstrates inconsistency

inasmuch as it insists on the validity of circular of Central Board of Excise & Customs (CBEC) setting out restrictions issued well before that empowerment was conferred by that very amendment. Furthermore, the decision in *re Kedia (Agencies) Pvt Ltd* directed that the appellant be permitted to incorporate the declaration prescribed under the power of amendment vested by section 149 of Customs Act, 1962 despite the objection of Revenue before the Hon'ble High Court that the curability of the defect on which the order of first appellate authority was founded was unacceptable. From a harmonious reading of the presentation of that dispute before the Tribunal and in further appeal thereafter, as set out in the decision of the Hon'ble High Court, it would be appropriate to conclude that the minority opinion, of the 'documentary evidence' intended by section 149 of Customs Act, 1962 not relating to the amendment itself but to the facts on which the amendment is sought, of the Tribunal did find approval in *re Kedia (Agencies) Pvt Ltd* and, especially, from the significant observation that

> *'7…..The pre-condition of a declaration along with the relative forms, for grant of benefit was introduced on 1-4-2008 through an amendment to the Handbook of Procedures. It is now settled law that the provisions of the Foreign Trade (Development & Regulation) Act, 1992, the rules or regulations framed thereunder and the export import policy have the force of law. Handbook of Procedures and the amendments carried out thereto are per se not declaration of law but only impose conditions which are to be fulfilled and otherwise to the requirements of law.…'*

with allowances for the legal provisions to be analysed in such disputes. It is also clear from the discussion *supra* that 'Y'/ 'N' option is a requirement under an authority that does not have force of law. This did not appear to have crossed the ken of the adjudicating authority herein.

14. In *re Haldiram Foods International Pvt Ltd,* the Tribunal had also held that, absent any empowerment to impose restrictions that are not consistent with section 149 of Customs Act, 1962, as it was then, and that the circulars, issued by Central Board of Excise & Customs (CBEC), and extant even now, are to be construed as intended for trade facilitation to overcome procedural impediments in availing benefits of schemes in the Foreign Trade Policy. That legislative intent is now made even more apparent by the sanction in Shipping Bill (Post export conversion in relation to instrument based scheme) Regulations, 2002 *vide* notification no. 11/2022-Customs (NT) dated 22nd February 2022. The legal context within which the competent authority was required to examine the application impugned here is, therefore, relevant and pivotal for disposal of this appeal.

15. According to the adjudicating authority, the absence of any documentary evidence of intent to avail the reward under the 'merchandise export from India scheme (MEIS)' in the Foreign Trade Policy (FTP) 2015-2020 does, in view of the rigour set out in *proviso* to

section 149 of Customs Act, 1962, disentitle them to it. That, in our opinion, is oversimplification hardly befitting the latitude afforded by

> *'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 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:*
>
> *……..'*

of Customs Act, 1962. In *re Haldiram Foods International Pvt Ltd*, the statutory framework was analyzed to hold that

> *'9. ……..it is seen that amendments of documents can be facilitated at any time after their presentation in the custom house. The seemingly 'open-ended' jurisdiction for amendment of documents is, nonetheless, constrained within the discretion vested in the 'proper officer' to permit that. Clearly, it is not a right to have the amendments incorporated and the applicant is, therefore, obliged to justify the necessity, in terms of consequential detriment, for invoking the provision. Concomitantly, it devolves on the 'proper officer' to place the applicant on notice of any want that may impede such permission or of any doubts that may be brought to bear on grant of the application and to further issue a reasoned*

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

10. From our discussion supra on the legal provisions and judicial pronouncements, it emerges that amendments sought under section 149 of Customs Act, 1962 may be permitted in 'documents' subject to justification including the

> *reasonableness of the time within which such alteration is sought to be incorporated and in bills of entry/ shipping bills alterations are to be denied only to the extent of not mirroring the facts at the time of clearance/exportation. Implicitly, the ascertainability of the facts, and not mere elapse of time which was not considered for specifying in the legislation, is to be the factor in determining limitation. Elaboration of unavoidability of the change is a pre-requisite for exercise of discretion by the proper officer who may deny the amendment only upon sufficient reason after considering the submissions of the applicant to counter the proposal for rejection. Any circumscribing or circumvention of this essence is not a correct exercise of discretion vested in the proper officer.'*

and it is only by placement of the impugned pre-requisite in the rubric of the shipping bill under authority of law that the rigour of the *proviso* prevails over the generality of the principal empowerment in section 149 of Customs Act, 1962. And that is where the enumeration of the crucial setting of Handbook of Procedures (HoP), by the Hon'ble High Court of Delhi in *re Kedia (Agencies) Pvt Ltd* is significant. The reliance placed by the competent authority on the *proviso* to section 149 of Customs Act, 1962 renders the rejection to be without sanction of law.

16. 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 tradeoff between sacrifice of duties of customs and incentivization of exports. The judicial decisions cited by Learned Authorized Representative rested upon the oversight role assigned to customs authorities. Here the appellant seeks rewards available for eligible exports under the 'merchandise exports from India scheme (MEIS)' of the Foreign Trade Policy (FTP) which merged several existing schemes and intended to

> *'provide rewards to exporters to offset infrastructural inefficiencies and associated costs.'*

as espoused in chapter 3 of Foreign Trade Policy 2015-2020 which, in terms of judicial rulings, has force of law but with no *quid pro quo,* other than having exported notified goods to notified markets/countries, devolving on exporters. There is no dispute on facts arising therefrom insofar as the impugned exports are concerned and the eligibility, unlike other schemes, for reward requires determination only by the competent authority under the Foreign Trade (Development & Regulation) Act, 1992. The corresponding notification no. 24/2015-Cus dated 8th April 2015, issued under section 25 of Customs Act, 1962, also does not assign any 'scheme driven' responsibility for oversight of exports eligible for the said rewards. As per the Foreign Trade Policy 2015-2020 and the corresponding provision in the Handbook of Procedure, the competent authority under the Foreign Trade (Development & Regulation) Act,

1992 directly and electronically sanctions rewards upon application by eligible exporters; the details of eligible exports are already populated on that system from the shipping bills filed electronically with the jurisdictional customs formation by exporters upon indication of intent to claim the reward by opting for 'Y' in response to the relevant query at that stage. The entire scheme is, thus, administered under the auspices of the Directorate General of Foreign Trade (DGFT) with no role envisaged for customs authorities beyond statutory assignment under section 51 of Customs Act, 1962. That no intrusion in the administration of the scheme or any alteration of existing system of examination was warranted upon inception of the scheme in the said Foreign Trade Policy (FTP) is sufficiently acknowledged – by mere, and imprecise, incantation about informed decision - in circular of April 2015 referred to *supra*. It is not within the purview of subordinate offices of Central Board of Excise & Customs (CBEC) to deduce a bigger role in the scheme; nor to adopt power of veto except by statutory conferment.

17. The statutorily-mandated inclusions in shipping bills, of any hue, are borne within the regulations for implementation of section 50 of Customs Act, 1962; any other is mere 'piggyback riding' prompted by convenient proximity of transaction of relevance which, in the impugned instances, is the trans-authority seepage of information. The 'subsequent' authority conducts its own post-sanction verification for maintaining the

integrity of the scheme without recourse to either the 'preceding' authority or its transactional engagement with exporter. Failure on the part of the appellant to indicate the desired option in the impugned shipping bill has not vitiated the clearance of the goods covered by the shipping bills or of exports having been effected; the only consequence has been the impassability of the data relating to these exports to the 'electronic space' dominated by the authority competent to grant the reward which they claim to be eligible for and which is yet to be determined. All that they asked for was the opportunity for that consummation by lifting of the 'virtual pole barrier' of 'N' as entered in the impugned bills with 'Y' as the counterweight. It is only the Handbook of Procedures, bereft of force of law, and circular no. 14/2015-Cus dated 20th April 2015, *sans* authority flowing from section 50 of Customs Act, 1962 to confer statutory mandate, that required exercise of this option. The particularity, and rigidity, of the *proviso* in section 149 of Customs Act, 1962 should, therefore, be of no consequence to the facts in this dispute.

18. It would appear from the contents of the impugned order and the submissions of Learned Authorized Representative that the onus devolving on the applicant to produce documentary evidence of intent to avail the benefit accruing from 'merchandise exports from India scheme (MEIS)' on exports effected by them has drawn sustenance from two public notices issued by the Directorate General of Foreign Trade

(DGFT) and without considering the lack of significance therein, by assigning or by implication, to the assessment responsibility, or the gateway positioning, of customs authorities. Neither did the public notices seek to draw upon the statutory power of amendment conferred by the customs statute for regularization within the initial window of opportunity. These were intended to empower the subordinate formations of the Directorate General of Foreign Trade (DGFT), in its facilitative role, to overcome the sequestering of information, arising from failure to exercise the preferred option at the stage of entering for export, and not only have access to essential data but also to culminate in issuing of the 'scrips' that are the rewards envisaged in the scheme after carrying out their own documentary checks. Being the sole responsibility of authorities under the Foreign Trade (Development & Regulation) Act, 1992, the mechanics of the scheme cannot be drawn upon by a gateway authority for ascertainment of deservement for reward as qualification for permitting traversing of the gateway. That would amount to second guessing the competent authority or appropriating a 'police' role without authority of law. That public notice no. 40/2015-2020 dated 9th October 2015 and no. 47/2015-2020 dated 8th December 2015 enabled bills filed in April 2015 to September 2015 to be entertained for sanction despite erroneous option of 'N', and without recourse to amendment of shipping bills, is earnest of the facilitative function, and not regulatory restriction, intended by the endorsement prescribed by Handbook of Procedures

appended to Foreign Trade Policy 2015-2020. The submission of Learned Authorized Representative on the non-production of physical copies of shipping bills appears to stem from not having taken cognizance of demonstration of intent either by endorsement or by tick in appropriate box for manual bills and electronic bills respectively. It is that very intent that is sought to be amended and the impossibility of documented intent as touchstone cannot be permitted to be the peg upon which denial of amendment is to be hung. The amendment, which merely has the consequence of data transference for informed decision making on eligibility for reward by competent authority, should have been permitted unless established evidence exists that the goods were not in conformity with details furnished in the shipping bills. No notice to that effect had been issued to enable refuting of such presumption.

19. Accordingly, appeal is allowed insofar as the bills pertaining to the establishment of the respondent-Commissioner is concerned and disposed off with the direction that the 'N' in these be amended to 'Y' for enabling the Directorate General of Foreign Trade (GDFT) to undertake its responsibility within the scheme.

(Order pronounced in the open court on 15/12/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*