

Any violation relating to foreign exchange is covered under the FEMA, 1999 and not under the Customs Act- Ahmedabad CESTAT

26 July 2022



## Summary

The appellant exported rice to Iran which were delivered to the UAE and received remittance in Indian Rupees from Iran, instead of freely convertible foreign exchange. The allegations were made against the appellant merely on the ground of statements of persons which were not cross-examined. In this respect, the Ahmedabad Customs, Excise, Service Tax Appellate Tribunal (CESTAT) held that rejection of cross-examination of statements of persons is a violation of principles of natural justice. The CESTAT stated that the show cause notice (SCN) was issued under the Customs Act, however the provisions invoked by only alleging violation of provisions of FTP<sup>1</sup> and FEMA, 1999<sup>2</sup>. The CESTAT found that the violations relate to post export conditions. Thus, the CESTAT opined that any violation relating to foreign exchange is covered under the FEMA, 1999 and not under the Customs Act.

Therefore, the CESTAT held that since the case pertains to alleged violation of the provisions of FTDR<sup>3</sup> as well as that of FEMA, hence, the Customs authorities did not have jurisdiction to issue the SCN for said violation.

## Facts of the case

- The appellant had filed the shipping bills/export documents for export of rice to Iran, but the goods were delivered at the UAE. In respect to this, the appellant received remittance in Indian Rupees from Iran instead of free convertible foreign currency, which appeared as mis-declaration on part of appellant.
- A SCN was issued to the appellant, in respect of which the adjudicating authority (AA) had held that the goods are liable for confiscation and imposed the penalties. The aggrieved appellant had filed appeal before the Commissioner (Appeals) who dismissed the appeals. Thus, the aggrieved appellant filed appeals before the CESTAT.
- The appellant submitted that the allegations are based on statements of

persons and letters from shipping line. The appellant further contended that the goods became the property of the foreign buyer once the goods were shipped, and the bill of lading was issued. Hence, the Indian exporter cannot be held liable for any change in the port of discharge of goods after the goods were out of charge. Further, the Customs authorities do not have jurisdiction to issue SCN in this case.

### Ahmedabad CESTAT observations and ruling<sup>4</sup>:

- **Statements are not admissible as evidence:** The CESTAT stated that person needs to be examined as a “witness” to rely upon the statement and if evidence is admissible then such witness should be offered for cross-

<sup>1</sup> Para 2.53 of the Foreign Trade Policy

<sup>2</sup> Section 8 of the Foreign Exchange Management Act, 1999

<sup>3</sup> Foreign Trade (Development & Regulation Act) and rules made there under

<sup>4</sup> Order No. - A/10785-10787/2022 dated 7 July 2022

examination as per Act<sup>5</sup>. In the instant case, there is an absence of compliance with provision, hence, the statements are not admissible as evidence.

- **Export documents were not amended:** The CESTAT stated that there was no record to show that the export documents were amended to permit import of goods at the UAE. Therefore, there was no scope for clearance of goods in the UAE and its subsequent sale once the documents were made in the name of Iranian buyer.
- **Phytosanitary Certificates were produced:** The CESTAT noticed that the Phytosanitary Certificate<sup>6</sup> was required with each consignment in case of food products. In the present case, the CESTAT noticed that there is no allegation or any evidence that the said certificates were amended at any stage in order to get the goods cleared in a country other than Iran.
- **Ownership lost once the let export order (LEO) issued:** The appellant lost its ownership of goods once the 'LEO' was issued by the Custom authorities. Hence, the appellant cannot be held responsible if the importer had given instructions to change the port as it was the owner of goods.
- **No violation of the Customs Act:** The CESTAT observed that the goods were actually exported to the UAE according to the Customs, thus, the payments should have been received in convertible foreign exchange. Further, there is no doubt that any violation

relating to foreign exchange is covered under FEMA, 1999 and not under the Customs Act. Therefore, the CESTAT held that since it was only a case of alleged violation of the provisions of FTDR<sup>7</sup> as well as that of FEMA, the Customs authorities did not have jurisdiction to issue the SCN for said violation.

#### Our comments:

The present case revolves around irregularities in respect of receipt of currency w.r.t. to the exported goods.

As per the statutory provision<sup>8</sup> of FTP, the export proceeds realised in Indian rupees against exports to Iran are permitted to avail export benefits/incentives, at par with exports realised in freely convertible currency. However, in the present ruling, the Custom authorities are of a view that the goods were actually exported to the UAE, thus payment should have been realised in convertible foreign currency.

The CESTAT relied on various rulings<sup>9</sup>, wherein it had been held that if there is violation of FEMA and related regulations, suitable action lies with the enforcement authorities and the Reserve Bank of India (RBI). Further, in case of violations of export import (EXIM) policy, adjudication can only

<sup>5</sup> Section 138B of Customs Act

<sup>6</sup> issued by the Ministry of Agriculture and Farmer Welfare, Government of India

<sup>7</sup> Foreign Trade (Development & Regulation Act) and rules made there under

<sup>8</sup> 2.53- Export to Iran –Realisations in Indian Rupees to be eligible for FTP benefits/incentives of FTP 2015-2020

<sup>9</sup> Chinku Exports Vs. Commissioner of Customs, Calcutta, Order no. A/505/99-NB dated 23 June 1999, Bank of Nova Scotia Vs. Commissioner of C.Ex (Adj), Bangalore, Order no. 748 and 749/2008 dated 3 July 2008

be done by notified authorities<sup>10</sup>. Hence, the Customs authorities did not have jurisdiction to issue the SCN for violation related to post export condition.

The present ruling is a welcoming ruling and is likely to set precedence in similar matters.

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<sup>10</sup> Notified under Section 13 of FTDR,1992

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