IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

WP(C).No. 12338 of 2004 (R)

PETITIONER:

GTN TEXTILES LIMITED
P.B.NO.101, ERUMATHALA, ALWAYE
REPRESENTED BY ITS CHIEF EXECUTIVE, MR.P.C.SEKSARIA.

BY ADVS.SRI.E.K.NANDAKUMAR (SR.)
SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURYAN THOMAS
SRI.SANDEEP GOPALAKRISHNAN

RESPONDENTS:
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1. THE UNION OF INDIA
REPRESENTED BY THE SECRETARY, MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE) NORTH BLOCK
NEW DELHI 110 001.

2. THE JT.DIRECTOR GENERAL OF FOREIGN TRADE
IST FLOOR, KENDIRYA SADAN, SULTHAN BAZAR
KOTI, HYDERABAD 500 095.

3. THE DY. COMMISSIONER OF CUSTOMS (EXPORTS)
JNPT PORT (NHAVASHEVA), NAVI MUMBAI - 7.

4. THE DY. COMMISSIONER OF CUSTOMS (EXPORTS)
CUSTOM HOUSE, CHENNAI - 1.

5. THE DY. COMMISSIONER OF CUSTOMS (EXPORTS)
AIR CARGO COMPLEX, BEGUMPET, HYDERABAD - 500 016.

6. THE DY. COMMISSIONER OF CUSTOMS (EXPORTS)
MUMBAI PORT TRUST, SHOORJI, VALLABHADAS MARG
BALLARD ESTATE, MUMBAI- 400 038.

7. THE DEPUTY COMMISSIONER OF CUSTOMS (EXPORTS)
CUSTOM HOUSE, COCHIN - 9.

R1 TO 7 BY ADV. SMT.T.D.RAJALAKSHMI, SCGSC
R1 TO R7 BY ADV. SRI.S.KRISHNAMOORTHY, ADDL.CGSC
R1 BY ADV. SRI.P.GOPINATH MENON,SC,CEN.BOARD OF EX
R BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL,(SR),SC,C

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07-09-2015 , THE COURT ON THE 12-11-2015 DELIVERED THE FOLLOWING:

WP(C).No. 12338 of 2004 (R)

APPENDIX

PETITIONER'S EXHIBITS

P1- TRUE COPY OF THE RELEVANT EXTRACT FROM THE EXIM POLICY 1997-2002, DEALING WITH THE DEPB SCHEME.

P2- TRUE COPY OF THE RELEVANT EXTRACT FROM THE HANDBOOK OF PROCEDURES, WHICH DEALS WITH PROCEDURE TO BE FOLLOWED BY AN EXPORTER FOR GETTING THE BENEFIT OF THE DEPB SCHEME.

P3- TRUE COPY OF THE PUBLIC NOTICE NO.PN4(RE 98)/1997-2002 DATED 15.04.1998 ISSUED BY THE GOVT. OF INDIA.

P4- TRUE COPY OF THE PUBLIC NOTICE NO.10(RE 98)/1997-2002 DATED 01.05.1998 ISSUED BY THE GOVT. OF INDIA.

P5- TRUE COPY OF THE CIRCULAR DATED 28.01.2003, NO.06/2003-CUS. ISSUED BY THE GOVT. OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE.

P5(A)- TRUE COPY OF THE CIRCULAR DATED 12.05.2003, NO.40/2003-CUS. ISSUED BY THE GOVT. OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE.

P5(B)- TRUE COPY OF THE CIRCULAR DATED 16.01.2004, NO.04/2004-CUS. ISSUED BY THE GOVT. OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE.

P6- TRUE COPY OF THE LETTER DATED 03.11.03 ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT, WITH ENCLOSURE.

P7- TRUE COPY OF THE LETTER DATED 03.11.03 ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT, WITH ENCLOSURE.

P8- TRUE COPY OF THE LETTER DATED 03.11.03 ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT, WITH ENCLOSURE.

P9- TRUE COPY OF THE LETTER DATED 03.11.03 ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT, WITH ENCLOSURE.

P10- TRUE COPY OF THE LETTER DATED 13.12.03 ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT, WITH ENCLOSURE.

P11- TRUE COPY OF THE LETTER DATED 13.12.03 ISSUED BY THE PETITIONER TO THE 4TH RESPONDENT, WITH ENCLOSURE.

P12- TRUE COPY OF THE LETTER DATED 25.03.04 ISSUED BY THE PETITIONER TO THE 5TH RESPONDENT, WITH ENCLOSURE SENT BY REGISTERED POST ACK. DUE(ALSO ATTACHED).

P13- TRUE COPY OF THE LETTER DATED 25.03.04 ISSUED BY THE PETITIONER TO THE 6TH RESPONDENT, WITH ENCLOSURE SENT BY REGISTERED POST ACK. DUE(ALSO ATTACHED).

P14- TRUE COPY OF THE LETTER DATED 11.11.03 ISSUED BY THE PETITIONER TO THE 7TH RESPONDENT, WITH ITS ENCLOSURE LETTER NO.GTNC/DEPB/104/03.

P15- TRUE COPY OF THE LETTER DATED 11.11.03 ISSUED BY THE PETITIONER TO THE 7TH RESPONDENT, WITH ITS ENCLOSURE LETTER NO.GTNC/DEPB/103/03.

P16- TRUE COPY OF THE LETTER DATED 11.11.03 ISSUED BY THE PETITIONER TO THE 7TH RESPONDENT, WITH ITS ENCLOSURE LETTER NO.GTNC/DEPB/102/03.

P17- TRUE COPY OF THE LETTER DATED 11.11.03 ISSUED BY THE PETITIONER TO THE 7TH RESPONDENT, WITH ITS ENCLOSURE LETTER NO.GTNC/DEPB/101/03.

P18- TRUE COPY OF THE LETTER DATED 11.11.03 ISSUED BY THE PETITIONER TO THE 7TH RESPONDENT, WITH ITS ENCLOSURE LETTER NO.GTNC/DEPB/105/03.

P19- TRUE COPY OF THE LETTER DATED 11.11.03 ISSUED BY THE PETITIONER TO THE 7TH RESPONDENT, WITH ITS ENCLOSURE LETTER NO.GTNC/DEPB/106/03.

P20- TRUE COPY OF THE LETTER DATED 10.12.2003 TO THE 2ND RESPONDENT, NO.GTN/SP/JUGFT/DEPB/611/03-04.

P21- TRUE COPY OF THE LETTER DATED 10.12.2003 TO THE 2ND RESPONDENT, NO.GTN/SP/JUGFT/DEPB/612/03-04.

P22- TRUE COPY OF THE LETTER DATED 10.12.2003 TO THE 2ND RESPONDENT, NO.GTN/SP/JUGFT/DEPB/614/03-04.

P23- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/990/DGFT.

P24- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/991/DGFT.

P25- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/992/DGFT.

P26- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/989/DGFT.

P27- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/993/DGFT.

P28- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/994/DGFT.

P29- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/995/DGFT.

P30- TRUE COPY OF THE LETTER DATED 11.12.2003 TO THE 2ND RESPONDENT, NO.GTN/SP/JDGFT/DEPB/613/03-04.

P31- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/997/DGFT.

P32- TRUE COPY OF THE LETTER DATED 03.01.2004 TO THE 2ND RESPONDENT, NO.GTN/03-04/RP/996/DGFT.

P33- TRUE COPY OF THE LETTER DATED 26.03.2004 TO THE 2ND RESPONDENT, NO.GTNC/2004, WITHOUT ENCLOSURE.

P34- TRUE COPY OF THE LETTER DATED 26.03.2004 TO THE 2ND RESPONDENT, NO.GTNC/2004, WITHOUT ENCLOSURE.

P35- TRUE COPY OF THE LETTER DATED 26.03.2004 TO THE 2ND RESPONDENT, NO.GTNC/2004, WITHOUT ENCLOSURE.

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WP(C).No. 12338 of 2004 (R)

P46- TRUE COPY OF THE LETTER DATED 26.03.2004 TO THE 2ND RESPONDENT, NO.GTNC/2004, WITHOUT ENCLOSURE.

P47- TRUE COPY OF THE LETTER DATED 26.03.2004 TO THE 2ND RESPONDENT, NO.GTNC/2004, WITHOUT ENCLOSURE.

P48- TRUE COPY OF THE LETTER DATED 26.03.2004 TO THE 2ND RESPONDENT, NO.GTNC/2004, WITHOUT ENCLOSURE.

P49- TRUE COPY OF THE STATEMENT SHOWING THE DETAILS OF SUMMARY OF SHIPPING BILLS FILED FOR CONVERSION INTO DEPB SHIPPING BILLS AT DIFFERENT CUSTOM HOUSES ALONG WITH DETAILS OF SHIPPINGS PORT-WISE/RESPONDENT WISE ATTACHED.

P50- TRUE COPY OF THE DETAILS OF DEPB APPLICATION FILED WITH 2ND RESPONDENT-JUDGFT HYDERABAD-LIST OF APPLICATIONS SUBMITTED AFTER SHIPPING BILLS GOT CONVERTED FROM CHENNAI CUSTOMS (2 PAGES).

RESPONDENTS' EXHIBITS: NIL

TRUE COPY

P.A.TO JUDGE

ANU SIVARAMAN, J.
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W.P.(C).No.12338 of 2004
= = = = = = = = = = = = = = = = =
Dated this the 12th day of November, 2015

JUDGMENT

1. The petitioner company had, during the period from 01.04.1997 to 15.04.1998 effected exports of cotton yarn through various ports in India. During the relevant period, exporters of specified products were eligible for the benefit of various export promotion schemes as were declared by the Government of India from time to time through announcements in the EXIM policy. The EXIM policy for the five-year period from 1997 to 2002 introduced the "Duty Entitlement Pass Book Scheme" (DEPB Scheme), which contemplated the grant of an incentive to exporters based on the total fab value of the final product exported by them. As per the scheme, an exporter of specified final products would be entitled to receive a percentage of the total fab value of the product exported and this amount could be used by the exporter to pay import duties on the raw materials imported by him. The exact percentage of the total fab value, to which an exporter was entitled to, would be made known by the Ministry of Commerce through public notices issued from time to

time. These public notices would contain the rates of DEPB which would be arrived at the Ministry of Commerce after taking into account the consumption pattern of the various inputs and packing material in the final produce exported.

2.. The DEPB rate in respect of packing material was announced for the first time only in 1998 through Public Notice No.PN4 (RE 98)/1997-2002 dated 15.04.1998. The said rates were made applicable even for exports effected between 01.04.1997 and 15.04.1998 vide Public Notice No.10 (RE-98)/1997-2002 dated 01.05.1998. The petitioner could not, therefore, follow the procedure prescribed in the Handbook of Procedures for getting the benefit of the DEPB Scheme. The petitioner filed “Free” shipping bills with the customs authorities at the various ports from where the exports were effected. Thereafter, the petitioner approached the customs authorities at the various ports and applied for conversion of the free shipping bills already filed into DEPB shipping bills.

3. While the Customs Authorities at some ports accepted the shipping bills filed by the petitioner for conversion, those in

other ports refused to accept the shipping bills. As some of the customs authorities were refusing to accept the shipping bills, the petitioner was constrained to send copies of the said documents to them under cover of letters giving details of the shipments effected during the relevant period.

4. Respondents 3 to 7 have not taken any action on the applications preferred by the petitioner for conversion of the free shipping bills into DEPB shipping bills. Exts.P5, P5(a) and P5(b) circulars were issued by the Government providing that permitting free shipping bills into advance licence/DEPB/DFRC shipping bills should not be allowed. As regards permitting conversion of shipping bills from one export promotion scheme to another, such conversion was to be allowed only subject to the conditions stipulated therein. The petitioner has filed this writ petition seeking a declaration that Ext.P5 series of circulars have no application to the case of the petitioner and for directions to the authorities to issue necessary certification converting the free shipping bills for exports during the period from 01.04.1997 to 15.04.1988 into DEPB shipping bills. The learned counsel for

the petitioner has also brought to my notice a public notice dated 14.11.2003 stating that all exporters filing application for actual user DEPB pending realisation of export proceeds or a transferable DEPB subsequent to realisation of export proceeds, in respect of shipment where the date of order of net export is prior to 01.04.2002, shall be required to do so latest by 31.04.2004. The petitioner submits that all benefits under the DEPB pending realisation have been claimed by them before 31.03.2004. In the above circumstances, the respondents are duty bound to consider the claim raised by the petitioner for conversion of the bills, it is submitted.

5. The respondents have filed a counter affidavit stating that there was a provision in the handbook of procedure of EXIM policy 1997-2002 that exporters can file DEPB shipping bills even for product which is not having DEPB rate. As and when the credit is notified, they will be given the benefit of DEPB. Public notice issued in this regard dated 21.5.1997 is produced as Ext.R1. As per the said notice, DEPB claim was to be filed within 60 days of the notification of the credit rate. In this case, it is the admitted

case that the credit rate was notified on 01.05.1998. The time specified for availing the benefit expired on 01.08.1998, therefore the benefit of the DEPB scheme having not been availed within the time specified, has lapsed and cannot be claimed, it is submitted. Ext.R1 public notice dated 21.5.1997 specifically prescribes that the exporter may export products for which credit rate is not notified provided that such export products are covered under the standard input/output norms which are listed in the handbook of procedures. In case the credit rates for such products are notified, the exporter shall be entitled for DEPB provided, an application for issuance of DEPB is made within a period of 90 days from the date of exports or 60 days from the date of notification of credit rate, whichever is later.

6. Heard Sri.Sandeep Gopalakrishnan, learned counsel appearing for the petitioner, Sr.S.Krishnamoorthy, learned Central Government Standing Counsel appearing on behalf of the first respondent and Sri.Thomas Mathew Nellimoottil, learned Standing Counsel for the Central Board of Excise and Customs.

It is submitted by the learned counsel appearing for the petitioner that the claim raised by the petitioner is only with regard to conversion of free shipping bills to DEPB shipping bills. Some ports have also accepted the conversion and have given the eligible DEPB credit to the petitioner. All the bills have been raised before 31.03.2004. In the above circumstances, it is submitted, there is no justification whatsoever for denied benefit of DEPB under the EXIM policy for 1997-2002 to the petitioner. Learned counsel appearing for the petitioner also places reliance on section 149 of the Customs Act which reads as follows:-

> "**149. Amendment of documents**. – Save as otherwise provided in Secs 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the custom 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."

7. It is submitted that the Act having specifically provided for a provision to amend all documents other than those mentioned in Sections 30 and 41 as well as those specified in the proviso, the respondents were not justified in refusing to consider the request made by the petitioner relying on a circular or a public notice issued, it is submitted.

8.. In the instant case, the reason put forth in the counter affidavit for refusing to consider the claim of the petitioner is to the effect that the EXIM policy for the period 1997-2002 provided that the exporter shall file only blue colour shipping bills for DEPB purpose and should indicate in the shipping bill that the export is being made under the DEPB scheme. It is contended that it was only due to the mistake committed by the petitioner that free shipping bills were filed when there was provision in the handbook of procedure that exporters can file DEPB shipping bills even for the products not having declared DEPB rates. It is stated that as per Ext.R1, the time limit has been prescribed for making an application for issuance of DEPB in respect of products whose DEPB rates were not notified as on the date of the export. The exporter, in such cases, has to make an application for DEPB within 60 days of the date on which such rate is notified. Since no such application was made within the said prescribed time, it is submitted that the benefit stood lapsed and could not be claimed or availed on a later date.

9. I have considered the rival contentions advanced by the parties as also the pleadings and the materials on record. Section 149 of the Customs Act,1962 provides for authorisation by the proper officer, in his discretion, for amendment of any document after it has been presented in the customs house. The exceptions to this power are provided in the section itself. In view of a specific provision contained in the statute, it is for the competent among the respondents to consider whether the claim of the petitioner for the amendment of a free shipping bill into a DEPB bill can be construed as an amendment of a bill of export after the goods have been exported on the basis of the documentary evidence which was in existence at the time the goods were exported. In the instant case, there is no dispute regarding the eligibility of

the petitioner for credit under the scheme in terms of the policy. There is also no dispute as regards the rates of DEPB the petitioner was entitled to. The only issue involved is with regard to the delay in seeking the benefits under the DEPB scheme. The requests made by the petitioner have not been addressed or replied to by the proper officers. In view of the specific provisions contained in Section 149, I am of the opinion that the proper officers were duty bound to consider the request made by the petitioner for amendment of the shipping bills. The refusal to do so amounts to abdication of statutory responsibility. The petitioner has a specific case that Ext.R1 cannot fetter the powers of the proper officers under the Act. From a reading of the provisions of the Act as well as the amendments made to th EXIM policy and the public notice issued as per Ext.R1, I am of the opinion that the discretion of the proper officer under Section 149 of the Customs Act is to be exercised by him even in cases where there are time limits prescribed under circulars or public notices issued by the Government. The proper officer has to apply his mind to the facts and circumstances of the case on hand and come to a conclusion whether the request made by the petitioner is one which can be entertained by him in the light of the provisions of the Act as well as the EXIM policy applicable. The petitioner is also entitled to have a reasoned decision on the request made before the authorities. This is more so in view of the fact that some of the proper officers have actually exercised their discretion in favour of the petitioner. It is submitted by the learned counsel appearing for the petitioner that Exts.P33 to P48 bills and consolidated list of bills as Ext.P15 have been produced before the second respondent for consideration whether the conversion as requested by the petitioner can be granted.

In view of the long delay in consideration of the claims raised by the petitioner, I am of the opinion that it would be appropriate for the second respondent to consider the claim of the petitioner. In the above circumstances, the writ petition is disposed of directing the second respondent to take up the request made by the petitioner for claiming the benefits under the DEPB scheme, provided in the EXIM Policy for the period 1997-2002 in respect of the products exported by it during the period 01.04.97 to 15.4.1998 and to pass orders in accordance with law thereon within a period of two months from the date of receipt of a copy of the judgment. To enable compliance with the judgment the petitioner shall produce a copy of the judgment along with copies of appropriate requests made by it before the second respondent within a period of two weeks from the date of receipt of a copy of the judgment. Orders shall be passed by the second respondent as directed above and communicated to the petitioner.

sd/-

Anu Sivaraman, Judge

sj

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P.A.TO JUDGE