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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CUSAA 41/2014

KEDIA (AGENCIES) PVT. LTD ..... Appellant
Through: Mr. Anand Jha with Mr. Mohammad Ali and Mr. Abhiram Naik, Advocates.

versus

COMMISSIONER OF CUSTOMS ..... Respondent
Through: Mr. Sanjeev Narula, Sr. Standing Counsel with Mr. Abhishek Ghai, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

<u>O R D E R</u>

% **07.12.2016**

1. The following question of law arises for consideration: **-**

> "Did the CESTAT fall into error in upholding the denial of the petitioner's claim for amendment of its shipping document under Section 149 of the Customs Act."

2. The appellant had exported 155 consignments Cutch Block (Acacia Catechu) during the period from 1.6.2008 to 16.03.2009 as free shipping bills. These did not contain a declaration which was required by virtue of a Notification dated 1.4.2008, which mandated such condition, for claiming export incentive. The appellant thereafter applied to the Range Office of the Directorate General of Foreign Trade in Kolkata for duty credit entitlement under the relevant scheme, i.e., Vishesh Krishi Gram Upaj Yojna (VKUY/VKGUY). The application was denied and an objection was raised by the Custom Officer on the basis of paragraph 3.23.8 of the Handbook of Procedure that the absence of declaration was fatal and that

the appellant was not entitled to the benefit vis-a-vis customs duty under the scheme.

3. The Commissioner of Appeals, however, set aside the order upon an examination of the relevant provisions of the Act as well as entries in Appendix-37A to conclude that the exported goods conform to what was prescribed. The revenue appealed.

4. The CESTAT by its order set aside the appellate Commissioner's decision observing as follows: -

> *"6. The revenue has contended that in terms of section 149, the shipping bill can be amended only on the basis of documentary evidence, which was in existence at the time of export of the goods, the same would be held to be made by the respondents. We find no merits in the above contention of the Revenue. Admittedly, section 149 allows amendment to the documents. Such amendment has to be on the basis of documentary evidence available at the time of export. As such the documentary evidence "appearing in the said section 149" cannot refer to the "amendment" itself. If the same refers to the amendment, as the Revenue has sought to contend, the provisions of the said section would become futile and no amendment would admittedly be available after the time of export itself.*
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> *7. As regards the merits, the revenue is not contesting the available of the benefit of scheme to the respondents. Such declaration were not required to be made in terms of exports prior to 31.05.08. The exports made by the appellants are immediately after the said period. Learned advocate for the respondents have relied upon various decisions to impress upon his stand that on such a scenario conversion of shipping bills is permissible. However, without referring to the said decision, we hold that it is only a case of filing a declaration, a condition which was introduced recently and the benefit if otherwise available to the exporter, should be extended. With the above observation, we find no infirmity in the view taken by the Commissioner (Appeals). Revenue's appeal is accordingly, rejected."*

However, there was a difference of opinion. The second member expressed that opinion, as follows: -

> "*28. In the facts and circumstances of the case, -*
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> *Whether it is proper to make amendments in the shipping bills to include the declaration as desired by the respondent as recorded by Judicial Member?*
> *OR*
> *Whether it is proper to refuse such amendments as held by the Technical Member?*

The third Member to whom the appeal was referred concurred with the view of the second member stating that the amendment was not possible. It was held as follows: -

> *"45. Plea of respondent that there was curable defect in shipping bills is inconceivable and does not call for exercise of power of customs authorities under section 149 of Customs Act, 1962 at the post export stage. When no evidence is available to appreciate the claim of the respondent at the time of export it is difficult to accede to his request subsequent to export. If contention of respondent is agreeable, there shall be excessive exercise of jurisdiction which is not permissible under law. What that is not permitted to be done directly cannot be done indirectly. Therefore, learned Technical Member has rightly observed that the amendment sought after export is not entertainable. Admitted case of the respondent is that he did not lead any evidence at the time of export in respect of the claim made after export which made his claim fatal. Requirement of law not being fulfilled respondent has no right to press the authority to go beyond the scope of law. There is no scope to disagree with the conclusion of learned Technical Member for the statutory mandate of section 149 of Customs Act, 1962 requiring existence of evidence at the time of export to amend shipping bills. In the result, it is proper to refuse the amendment sought by the respondent. Reference is answered accordingly."*

5. The appellant contends that it had been consistently exporting the goods concerned for over three years on free shipping basis and on account of inadvertence the declaration was not made. It is contended that having regard to the circumstances, the omission to file a declaration was a curable defect.

Counsel relied upon the previous conduct and the pattern of exports to say that the goods are covered by the relevant entries in the schedule and that in the past the requirement of filing declaration did not exist. In these peculiar circumstances, since the goods stood exported, it would be possible to avail the benefit.

6. Counsel for the revenue submitted that the matter is concluded in favour of the Customs authorities in a Division Bench ruling in *Terra Fills Pvt. Ltd. v. Commissioner of Customs,* 2011 (268) ELT 483 (Del.), which concerns export benefits to a manufacturer. The question in this case was whether an amendment could be made in the shipping bills about the scheme from "DEPB/DECC" to "DEPB/DECC cum duty drawback". The Court held as follows: -

> *"6. As per proviso of this Section 149, no amendment of a shipping bill was to be allowed after the export goods have been exported except on the basis of the documentary evidence, which was in existence at the time the goods were exported. The submission of the learned counsel for the appellant/exporter in this regard was that the exporter was in possession of all the documents at the time of export to show that it was entitled to claim under the DEPB/DECC cum drawback scheme. From the plain reading of Section 149, it may be seen that exporter could not claim amendment in routine and as a matter of right. The discretion vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house. Though this discretion was to be exercised judiciously, but it was qualified with the proviso that the amendment could be allowed only if it was based on the documentary evidence in existence at the time the goods were exported. The Commissioner in the remand case has rightly observed that the present case in fact relates to the request for conversion of shipping bills from one export promotion scheme into another and was not merely of an amendment in the shipping bill. The request was made for conversion from one scheme to another after the lapse of long period of more than one year. It was a case of request for "conversion" and not of "amendment" inasmuch by converting from one scheme to another, it was not only addition of word "cum" duty drawback, but change of entire status and character of the documents. Even if it was to be taken as a case of amendment, the proper officer may not be in possession of the*

documents sought to be amended after lapse of such a long period, particularly when the goods already stood exported. For enabling an exporter to draw the benefits of any scheme, not only physical verification of documents would be required, but as is noted by both the authorities below, the verification of the goods of export as also their examination by the Customs was necessarily required to be done. In the given factual circumstances, that was rightly held to be impossible. The Commissioner in the remand case rightly distinguished the cases cited on behalf of the exporter from the facts of the present. The finding of fact as arrived at by the Commissioner has been rightly upheld by the CESTAT."

7. In the present case, the appellant had been consistently dealing with the same goods and exporting them previously for over three years. 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 Procedure. 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 conform to the requirements of law. Without making a deeper analysis of these legal provisions, the facts of this case reveal that the export goods are essentially agricultural produce and continued to be covered as an item eligible for benefit. At the time, just prior to 1.4.2008, the goods had been exported as free shipping bills. The exporter/appellant's fault here is that it did not file the requisite declaration. In all other respects, i.e., as to whether they conform to the description in the shipping documents and the value etc continues to be ascertainable because the concerned bills, invoices and other shipping documents are available with the customs authorities.

8. Having regard to these, we are of the opinion that in the peculiar circumstances of the case, the omission to file the declaration of the kind we are

concerned with, when all other relative materials are present was not vital to the appellant's case. The material which did and does exist is substantial; the appellant should, therefore, be permitted to amend its shipping bill. The respondents are directed to give effect to this order within the next two months. The appeal is consequently allowed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

DECEMBER 07, 2016
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