(2011) 09 KL CK 0035

In the High Court Of Kerala

Case No : W.A. No''s. 1140, 1403, 1410, 1738 of 2006, O.P. No''s. 31262 of 2002, 2834 of 2003, W.P. (C) No''s. 37514 of 2009 and 6221 and 6537 of 2010

Commissioner of Customs, Cochin APPELLANT

Vs

Georgekutty N.V. RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:
Customs Act, 1962 — Section 128
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2012) 194 ECR 27 : (2012) 282 ELT 498

Hon'ble Judges : J. Chelameswar, C.J;Antony Dominic, J

Bench : Division Bench

Advocate : P. Parameswaran Nair, ASGI and John Varghese, SC, for the Appellant; Mathew John (K) and Baby Thomas, for the Respondent

Final Decision : Dismissed

Judgement

Antony Dominic, J.—Certain common questions of law arise in all these cases and therefore these cases were heard together and are disposed of by this common judgment. For narration of facts, we shall refer to OP No. 23272/2002, against the Judgment of which, WA No. 1140/2006 has been filed and WP (C) No. 37514/2009 and the parties are described as they are arrayed in the original petitions and writ petitions.

2. The petitioners are exporters of door mats, floor mats etc., which are made out of "Rubber Compounded Sheets" and the subject-matter of the litigations is their claim for the benefit of Duty Entitlement Pass Book. Scheme (hereinafter referred to as the ''DEPB Scheme'' for short). Three such Original Petitions were allowed by this Court and against the judgments, the Writ Appeals are filed by the respondents therein.

3. OP No. 23272/2002 was filed by 20 such exporters and the prayers sought are to :

1. Declare the clarification of the 1st respondent in Ext. P10 excluding door mats, foot mats etc, from the purview of D.E.P.B., Entry No. 547 can be enforced only by a suitable public notice amending Entry 547 expressly excluding door mats, foot mats etc. from the purview of rubber sheets.

2. Issue a writ in the nature of Mandamus or any other appropriate writ, direction or order commanding the respondents to register the shipping bills submitted by the petitioner under the D.E.P.B. Scheme till the 1st respondent, makes a suitable amendment to D.E.P.B. Entry No. 547 by the issuance of a public notice.

3. Issue a writ in the nature of mandamus or any other appropriate writ, direction or order commanding the respondents to finalize the adjudication of the provisionally registered D.E.P.B. shipping bills and disburse the benefit due to the petitioner in respect of those shipping bills.

4. The factual background of the litigation is that u/s 5 of the Foreign Trade (Development and Regulation) Act 1992, the Central Government is to formulate and announce by notification in the Official Gazette, the Expert and Import Policy and may also amend the said policy. In exercise of the said power, the Government of India frames the Export and Import policy from time to time, popularly known as EXIM Policy. In so far as the case is concerned, what is relevant is EXIM Policy governing the period between 1st April, 1997 to 31st March, 2002.

5. For the present, what is relevant is Chapter VII of the EXIM Policy dealing with the "Duty Exemption Scheme". Para 7.1 stipulate that the Scheme consists of two components, which are (i) Duty Free License and (ii) Duty Entitlement Pass Book. From para 7.25 onwards, the Policy deals with the Duty Entitlement Pass Book and this paragraph details the objective and benefit of the Scheme and it being relevant, is extracted below for reference :

Para 7.25 - The objective of Duty Entitlement Pass Book Scheme is to neutralize the incidence of basic customs duty on the import content of the export product. The neutralization shall be provided by way of grant of duty credit against the export product. The duty credit under the scheme shall be calculated by taking into account the deemed import content of the said export product as per Standard Input Output Norms and determine basic customs duty payable on such deemed imports. The value addition achieved by export of such product shall also be taken into account while determining the rate of duty credit under the Scheme.

Under the Duty Entitlement Pass Book (DEPB) Scheme, an exporter shall be eligible to claim credit as a specified percentage of FOB value of exports made in freely convertible currency. The credit shall be available against such export products and at such rate as may be specified by the Director General of Foreign Trade by a Public Notice issued in this behalf.

Any item except those appearing in the Negative List of Imports shall be allowed for import without payment of basic customs duty, special duty of customs as well as additional duty of customs, against the credit under a Duty Entitlement Pass Book (DEPB). The holder of Duty Entitlement Pass Book (DEPB) shall have the option to pay additional customs duty, if any, in cash as well.

6. The DEPB Scheme essentially allows import without payment of basic customs duty, special duty of customs as well as additional duty of customs on items except those appearing in the Negative List. Such an import without payment of customs duties is permitted against the credit entered in the Pass Book and such credit is to be calculated by taking into account the import content of the product exported as per the Standard Input Output Norms (SION) and also taking into account the value addition achieved by export of such product. The exporter is eligible to claim credit at a specified percentage of FOB value of the exports made. The various eligible export products and the specified percentage of credit vis-a-vis such products, are required to be specified by the Director General of Foreign Trade (DGFT) by a Public Notice and in exercise of such authority of the DGFT, Appendix 28A of the EXIM Policy Handbook (Vol. 1) is issued.

7. Para 4.11 of the EXIM Policy authorises the DGFT to specify the procedure to be followed by an exporter or an importer or a licencing authority for the purpose of implementing the provisions of the Foreign Trade Act, Rules and Orders made thereunder and also the EXIM Policy. Such procedures are mandated to be included in the Handbooks published by the Government of India by means of a Public Notice. It also provides that the procedures specified may in the like manner, be amended from time to time. Para 4.11 being relevant, is extracted for reference:

4.11 The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing competent or other authority for the purpose of implementing the provisions of the Act, the Rules and Orders made thereunder and this Policy. Such procedures shall be included in the Handbook (Vol.-1), Handbook (Vol. 2) and ITC (HS) Classifications of Export and Import items and published by means of a Public Notice. Such procedures may, in like manner, be amended from time to time.

8. Sub Para 2 of Para 7.25 authorises the DGFT to specify the rate which an exporter is eligible to claim credit with reference to the commodity exported. The various products with reference to which credit can be taken are classified under various heads, such as ''Engineering'', ''Chemical'' etc. Entry 547 occurring in the group of chemicals reads as "Rubber Compounded Sheets/Rings", thereby making the goods failing within the said description eligible for the benefit of DEPB Scheme calculated at 13% of the FOB value of the goods exported-Ext. P1 in the original petition is the relevant extract of Appendix 28A of the EXIM Policy 1997-2002.

9. According to the petitioners, right from the inception of the DEPB Scheme, they were permitted to register their shipping bills under the Scheme and were availing of the benefit of the Scheme. It is stated that while so, from August 2001 onwards the 2nd respondent denied the benefit of DEPB Scheme to the Doormats/Floor Mats exported by the petitioners on the ground that the product did not satisfy the description of the Entry 547; ''Rubber Compounded Sheets''. They were issued Ext. P2 show cause notice stating that the rubber mats are manufactured through vulcanization and moulding process and hence cannot be termed as ''Rubber Compounded Sheets'' and they were directed to show cause why the shipping bills should not be finalized without the DEPB benefit. On receipt of the show cause notice, Ext. P3 reply was submitted contesting the allegations in Ext. P2 show cause notice.

10. At that stage, some of the exporters filed OP Nos. 36082 and 36146/2001. In the original petitions, Ext. P4 interim order was passed by this Court directing the 2nd respondent to finalise the proceedings pursuant to Ext. P2 show cause notice and that in the meanwhile to provisionally register the shipping bills, giving the petitioners the benefit of DEPB Scheme.

11. Meanwhile, the Rubber Shippers Council, an organization representing the exporters, filed Ext. P5 application before the 1st respondent seeking a clarification on the issue. When the 1st respondent was thus seized of the matter, the 2nd respondent passed Ext. P7 order holding that Rubber Compounded Sheets and Rubber Mats are two different products and hence the subject goods are not eligible for DEPB Scheme under Serial No. 547 of Ext. P1. Appendix 28A of the EXIM Policy. On this basis, it was directed that the shipping bills are to be finalized without extending the benefits under the DEPB Scheme.

12. Subsequently, by Ext. P6 judgment dated 18th February 2002, OP No. 36082 of 2001 was disposed of relegating the petitioners therein to pursue statutory appellate remedies under the Customs Act, 1962 against Ext. P7 order of the 2nd respondent and clarifying that if the DGFT passes orders on Ext. P5, the petitioners can take advantages of the same. It was also directed that subject to the result of the statutory appeal to be filed, the shipping bills of the petitioners shall be provisionally registered. Accordingly, Ext. P8 appeal was filed before the Commissioner of Customs (Appeals) invoking his appellate power u/s 128 of the Customs Act, 1962.

13. During the pendency of the statutory appeal, the Rubber Shippers Council was issued a notice of hearing on Ext. P5 and accordingly they appeared before the 1st respondent and submitted Ext. P9 written submission. The case was considered by the DEPB Committee and the Committee took the following decision :

The Committee considered the case as per the agenda along with direction of the Hon''ble High Court of Kerala. The representatives of the Rubber Shippers Council appeared before the Committee and explained that what they are exporting, are covered under rubber compounded sheets. They also explained that Customs have rejected their case only on the ground that their products are not rubber compounded sheets as these are vulcanized. They contended that the vulcanization material - sulphur is covered under the corresponding SION and hence the contention of Customs that the product is not a rubber compounded sheets just because it is vulcanized is not correct and pleaded for giving a clarification to Customs that rubber compounded sheets whether or not vulcanized are covered under this entry.

The Committee noted that the DEPB description under Sl. No. 547 under Chemical product at the time of export was "Rubber compounded sheets/rings" and the corresponding SION description covered under Sl. No. A 1704 was "Rubber compounded sheets/rings/gaskets". The SION entry provided sulphur as one of the inputs. The representative of DIPP clarified that sulphur is used as a vulcanizing agent and a rubber compounded sheet may or may not be vulcanized. The Committee however observed that the product exported by the exporters is rubber mats/foot mats, floor mats etc, of regular shape and size. The Committee also noted that rubber compounded sheets are generally in running length and of irregular shape and against this the items exported are cut to size which are specifically known in the commercial parlance as door mats/foot mats etc. and cannot be considered as rubber sheets. Further the product - door mats etc. involve further processing beyond the stage of sheets. The association members confirmed that sizes are cut according to buyers requirement from the sheets. They however pleaded that this does not change the basic character of sheets.

The Committee after detailed deliberations decided to clarify that a rubber compounded sheet may or may not be vulcanized and vulcanized rubber compounded sheet was also covered under DEPB entry No. 547 under the Chemical Product Group. It was also decided to clarify that door mats, foot mats etc. which are a stage further to sheets and involve further processing and also known in the commercial parlance as "door mats", "foot mats" etc. are not covered under rubber compounded sheets and hence ineligible for DEPB, benefit under this entry.

14. This decision of the Committee was communicated to the petitioners under cover of Ext. P10 communication. It was thereupon OP No. 23272/2002 was filed and the main contention urged in Ground No. 2 reads as under :

This further finding of the DGFT. can be legally enforced only by an amendment to entry No. 547 which in turn can be done only by the issuance of a public notice. This has been so held by the Hon''ble Supreme Court in the decision reported in Union of India (UOI) and Another Vs. Shree Ganesh Steel Rolling Mills Ltd. and Another, . In the light of this decision of the Supreme Court the observation of the DGFT in. Ext. P9 cannot be enforced against the petitioner, till it is carried out by way of an amendment to Entry No. 547 by a public notice. Till it is so amended the shipping bills submitted by the petitioner are entitled to be registered under the DEPB Scheme.

15. In the counter-affidavit, filed by the 1st respondent, the stand taken was that the commodity exported by the petitioners was door mats/floor mats, which are items separately known in the commercial parlance and that therefore are not covered under Rubber Compounded Sheets included in item 547 of Appendix 28A. Therefore, they contended that the products exported by the petitioners were ineligible for DEPB Benefit. It was also contended that Ext. P10 was only a clarification issued interpreting the EXIM Policy and not an amendment requiring the issuance of a Public Notice, as per 4.11 of the Policy.

16. The original petition was heard along with two connected cases and by judgment rendered on 17-3-2006, a Learned Judge of this Court held that in the nature of the dispute, be it an amendment or clarification, the same can be done only by means of a public notice. On that basis the original petitions were allowed and it was declared that the exports of rubber mats shall be liable to be covered under Entry 547 unless the entry is duly amended by the Central Government or clarified by the DGFT by a public notice. The relevant portion of the judgment reads as under :

But the pleadings in the counter-affidavit as well as the submission made by the learned Assistant Solicitor General would show that there is a dispute rather a doubt as to whether the rubber compounded mats would be covered by the DEPB entry - rubber compounded sheets. If that be so, certainly the matter requires either an amendment or a clarification. Be it an amendment or a clarification, in the very nature of its impact on the Export Import Policy, the same can only be duly issued - by means of a public notice, lest, as has happened in the present case there should be different approaches in different Ports. Therefore, these writ petitions are allowed declaring that the export of the rubber mats shall be liable to be covered under entry 547 - rubber compounded sheets unless and until it is duly amended by the Central Government or clarified by the Director General of Foreign Trade by a public notice, if such clarification would meet the purpose. The accounts of the petitioners shall be settled accordingly within a period of three months from the date of production of a copy of the judgment.

17. It is aggrieved by the common judgment, the Writ Appeals are filed by the respondents in the original petitions and the issues raised in OP Nos. 31262/2002 and 2834/2003 are also similar.

18. According to the appellants, in pursuance to directions in the judgment under Appeal, during the pendency of these writ appeals, the issue raised by the petitioners in the original petition was considered by an Inter Ministerial Committee constituted by the 1st appellant and a decision was taken to issue a policy circular clarifying that door mats and floor mats etc., are not included in item No. 547 (which is now item No. 507 in the EXIM Policy of 2009-2014 and reads as rubber compounded sheets/rings/gaskets). It is stated that accordingly Annexure D Policy Circular No. 18/2009-2014, dated 8-12-2009 was issued by

the 1st respondent, which reads as under:

2. Accordingly, the matter was again taken up in the DEPB Committee (Inter-ministerial Committee having representatives of Technical Authority us well) meeting held on 29th October 2009 and after detailed deliberations, the following decisions was taken:

Committee discussed the case afresh in details. Technical members present in the committee were of firm view that the said DEPB entry is meant for the specific export product i.e. "Rubber Compounded Sheets/Rings/Gasket". Committee was of the view that "Doormats/Rubber mats" are further value added product and hence the export price of Doormats/Rubber mats, in normal case, shall be higher than the price of Rubber Compounded Sheets, it also noted that all Industry DEPB rates are calculated based on customs duties on specific inputs used, their import prices and the export price of the final product and hence more the value addition, the less the DEPB rate. Committee observed that the DEPB rate and the value cap notified against the product as indicated in the DEPB entry serial number 507 (earlier entry No. 547) of "Chemicals" product Group was based on the price parameters for the product "Rubber Compounded Sheets/Rings/Gasket" only and not for the value added products such as "Doormat/Rubber mats". Accordingly the Committee decided to recommend DGFT for issuance of clarification in compliance with Hon''ble High Court order, as stated above.

On the issuance of Annexure D Policy Circular, producing the same as Ext. P11, Writ Petition No. 37514 of 2009 was filed, with the following prayers :

(1) Declare Ext. P11 is legally insufficient to exclude door mats, foot mats etc. from the purview of Entry 547 (now 507) of Ext. P1 and the same can be enforced only by issuance of a suitable public notice amending the Entry expressly excluding door mats, foot mats from the purview of rubber compounded sheets.

(2) issue a writ in the nature of mandamus or any other appropriate writ, direction or order commanding the 2nd respondent to register the shipping bills submitted by the petitioner under the DEPB Scheme till the 1st respondent makes a suitable amendment to the DEPB Entry No. 547 (now 507) of Ext. P1 by issuance of a suitable public notice,

Similar prayers are also sought in WP (C). Nos. 6537/2010 and 6221/2010.

19. The main contention raised in WP (C) Nos. 37514/2009 and its connected cases is that the scheme introduced by a public notice, can be lawfully amended only by the issuance of another public notice issued complying with all the requirements for the issuance of the same. In the counter-affidavit filed in WP (C) No. 37514/2009, the contention raised by respondents is that Ext. P11 policy circular is not an amendment of the scheme, but only clarified the existing position that the products exported by the petitioners are not covered by the

DEPB Scheme.

20. We heard the detailed arguments of the learned counsel for the respective parties who have reiterated the contentions noticed above. The issue which mainly arises for consideration is the legality of Ext. P10 in OP No. 23272 of 2002, against the judgment of which WA No. 1140 of 2006 is filed and Ext. P11 Policy Circular No. 18/2009-2014, dated 8-12-2009 challenged in WP (C) No. 37514/2009 and connected cases. Incidentally the question whether the Door Mats/Floor Mats exported by the petitioners are eligible for the benefit of DEPB Scheme also will have to be considered.

21. To appreciate the correctness of the finding of the Learned Single Judge that in the absence of an amendment to Ext. P1 Public Notice issued in terms of the provisions contained in para 4.11 of the EXIM Policy 1997-2002, the products exported by the petitioners cannot be denied DEPB Benefit and therefore until an amendment or a clarification is issued by way of a Public Notice, the exporters are entitled to the benefit of DEPB Scheme, reference will have to be made to para 4.11 of the EXIM Policy which authorizes the DGFT to specify the procedure to be followed by an exporter or importer and para 4.13 authorising the DGFT to interpret the EXIM Policy. These provisions are extracted below for easy reference:

4.11. The Director General of foreign Trace may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing competent or other authority for the purpose of implementing the provisions of the Act, the Rules and Orders made thereunder and this Policy. Such procedures shall be included in the Handbook (Vol. 1), Handbook (Vol. 2) and ITC (HS) Classifications of Export and Import items and published by means of a Public Notice. Such procedures may, in like manner, be amended from time to time.

4.13. If any question or doubt arises in respect of the interpretation of any provision contained in this Policy or regarding the classification of any item in the book titled "ITC (HS) Classification of Export and Import items", the said question or doubt shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

If any question or doubt arises whether a licence has been issued in-accordance with this Policy or if any question or doubt arises touching upon the scope and content of a licence, the same shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

22. A reading of para 4.11 of the EXIM Policy shows that procedure to be followed by an exporter or importer or by any licensing authority for the purpose of implementing the provisions of the Foreign Trade Act, the Rules and Orders and the EXIM Policy are to be specified by the DGFT. Such procedures shall be included in the Hand Book and ITC (HS) Classifications of Export and Import items and shall be published by means of a Public Notice. The provision further

provides that the procedures so laid down, can also be amended in like manner. The expression ''Public Notice'' has been defined in paragraph 3.40 of the EXIM Policy as the notice published under the provisions of para 4.11 of the Policy. Thus a public notice is required to be issued by the DGFT when he prescribes the procedure as respects the matters specified in para 4.11 of the Policy and when such procedures are sought to be amended.

23. On the other hand, by paras 4, 13, the DGFT has been conferred with the power to interpret the provisions of the policy or to resolve any question regarding the classification of any item in the book titled ''ITC (HS) Classification of Export and Import Items'' and this paragraph also provides that the decision of the DGFT on such question or doubt shall be final and binding. What is important to be noticed is that while para 4.11 of the Policy requires a public notice for specifying the procedure or amending the same, when the power to interpret the policy is exercised in terms of para 4.13, there is no prescription that the decision taken shall be published in any specified manner. Therefore, if as held by the Learned Single Judge, an amendment to the policy is called for, necessarily such an amendment can be made only by a Public Notice issued in terms of para 4.11 of the Policy, whereas, if it is only a matter of interpretation there is no requirement that the decision taken shall be published by way of a Public Notice.

24. The necessity of an amendment to Ext. P1 Public Notice can arise only if there is any modification to any of the existing items contained in the said Public Notice. The relevant item is item No. 547 which reads as "Rubber Compounded Sheets/Rings", Admittedly what is exported by the petitioners are items such as door mats, floor mats etc. If door mats or Floor mats are items falling within the entry Rubber Compounded Sheets, to exclude door mats and floor mats necessarily the Entry 547 will have to be amended and such amendment can be only by way of a Public Notice, issued in terms of para 4.11 of the policy. Therefore it has to be examined whether door mats/floor mats are items which are included in the item Rubber Compounded Sheets as contended by the petitioners.

25. In Commissioner of Income Tax Vs. Kerala Rubber and Reclaims Ltd., , the process by which Rubber Compounded Sheets are manufactured, has been recorded as follows :

........that the raw materials used by the assessee is natural rubber is masticated for reduction of viscosity and to increase the plasticity. It was further submitted that this masticated rubber is then further mixed with carbon black, rubber processing oil and other rubber chemicals in "intermix" at 150?C and high pressure. The intermix is a closed mixing mill operated with a big compressor and hydraulic power pack. It was further brought to the notice by way of submission in the context that the machine is driven by a 300 HP motor to enable the mixing to take place at a very high pressure and because of the high pressure and temperature, the rubber, carbon black, rubber processing oil and other rubber chemicals, are masticated to form a homogeneous lump. It was submitted that this homogeneous lump is known as rubber compound. This rubber compound is then fed into an open mill by opening the drop door of the intermix. The material is again mixed in the rubber mixing mill for three to five minutes. The rubber mixing mill is driven by a 60 HP motor. The rubber compound is remilled and sheeted out into 3'' by 6'' length. After cooling and drying this rubber compound is taken from the cooling system and the compound is the final product produced by the assessee.

26. The process was again explained in the Division Bench judgment of this Court in Commissioner of Income Tax Vs. Forbes Ewart and Figgis P. Ltd., , which is as follows :

The raw materials used in the mixing of rubber in the assessee''s rubber mill are the following :

(i) Sheet rubber from natural rubber,

(ii) Synthetic rubber;

(iii) Carbon black;

(iv) Process oil;

(v) Chemicals -- zinc oxide, stearic acid renacit, wax, etc. The process of mastication is done in two stages. Stage I: The rubber supplied by the customers is masticated in the open mill along with renacit-chemical provided by the customer and crushed into pulp form or roller form. After cooling, this is carried for processing at second stage.

Stage II : The rubber rolls obtained after first stage operations are loaded into the intermix mill along with synthetic rubber. With the rubber, carbon, process oil and chemicals are added as per the instructions of the customers. Chemicals normally used are zinc, oxide, stearic acid renacit, wax, etc. It is reported that the mixing proportion and the kind of chemicals, used are known to the customer only who is supplying the same at the time of mixing. This mixture is heated to a temperature of 150?C to 160?C. The input is thoroughly mixed and after mixing, the same is transmitted into a roller and converted into sheet form. This is then cut into suitable sizes as directed by the customers. This is the product obtained after processing and used in the manufacture of tyre.

27. The rubber compound prepared has to be shaped as per the intended purpose and in the case of products like floor mats, this is done by cutting the compound to the desired shape. To make the shaped compound fit for practical use, these will have to be vulcanized and by this process, the product acquires the required performance properties, like strength, less wear and tear etc. Vulcanization is a chemical reaction occurring between the rubber and a curing agent at a higher temperature of around 140 to 150?C and in the case of natural rubber, usually sulphur with different accelerators act as the vulcanizing agent.

The further process has been explained in Ext. P5 representation of the Rubber Shippers Council, which reads thus :

6. After obtaining the Rubber Compound by mixing Rubber and chemicals, the compound is run through a mill to form sheets in running length/rolls. In this process Sulpher is used for vulcanizing. The above process is called the calendaring process. These sheets are in rolls depending upon the length requirement. In such case there is no problem and the customs are allowing DEPB. Of course, subject to, confirmation that EPDM rubber is not used (EPDM Rubber moulded items carry only 9% DEPB under Sl. No. 923);

7. However, for some customers, after compounded rubber sheets are taken through a mixing mill, instead of allowing the rubber sheets to be processed in running length, it is cut to certain regular geometrical shapes in rectangles and squares depending upon the buyers'' requirement. These sheets cut to size are further put to a moulding process to carryout certain surface working on these sheets like grooving, embossing etc. In other words, the surface working on the sheets of rubber cut to required size is carried out through a moulding process where the required mould release agent is used. The sheets are also vulcanized to retain its finished form. In this process sulpher is used. These products are used for as floor coverings, door mats etc. Based on buyers'' requirement these are invoiced accordingly.

28. The aforesaid process has been explained only to indicate that for a Rubber Compounded Sheet to become the final end product of door mats/floor mats, the sheet is subjected to various further processes and that these two products are having distinct and separate commercial existence, identity and utility.

29. Various products are made out of Rubber Compounded Sheets. If by reason of the fact that door mats and floor mats are made out of rubber compounded sheets, and therefore are entitled to DEPB benefit, applying the same reasoning, tyre and such other products, which are also manufactured utilizing Rubber Compounded Sheets, should also be held eligible for the said benefit. If that were so, the authorities would not have included such items separately in Appendix 28A to the EXIM Policy A perusal of Appendix 28A to the EXIM Policy shows that automobile tyres of various types have been included as Item Nos. 534 and 535, bicycle tubes and tyres are included as item Nos. 536 and 537 and pre-cured tread rubber has been included as item No. 545. Therefore, the fact that these products which are also manufactured out of compound rubber, are separately included in the Public Notice, whereas floor mats and doormats are not so included, demonstrates that it was never the intention of the policy makers to extend the DEPB benefits to floor mats, door mats etc., exported by the petitioners. For the aforesaid reasons, we conclude that the DEPB benefits, being product specific, products such as floor mats, doormats etc., are not items covered by the entry "Rubber Compounded Sheets" and that to deny DEPB benefit to such products, an amendment of the Public Notice, requiring the issue of another Public Notice is unnecessary.

30. In this context, the learned counsel for the exporters relied on the Apex Court Judgment in Union of India (UOI) and Another Vs. Shree Ganesh Steel Rolling Mills Ltd. and Another, to contend that, only by way of a Public Notice, can an amendment be effected to a Public Notice. This legal position is obvious from the provisions of para 4.11 of the EXIM Policy. However, the judgment shows that by way of a clarification, when the Public Notice was sought to be amended, that was stayed by the High Court and it was this order which was confirmed by the Apex Court. In our view, this judgment has no relevance to the facts of this case and cannot be of any assistance to the exporters.

31. We also reject the contention that Entry 547 of Ext. P1 Public Notice should receive a liberal construction, lest it will defeat the objective of encouraging domestic industries earning foreign exchange. The manner in which exemption notifications should be understood has been explained by the Apex Court in its judgment dated 6-7-2011 in Gammon India Ltd. Vs. Commissioner of Customs, Mumbai, , where it was held thus :

22. As regards the plea of the appellant that the Exemption Notification should receive a liberal construction to further the object underlying it, it is well settled that a provision providing for an exemption has to be construed strictly. In Novopan India Ltd. (supra), dealing with the same issue in relation to an exemption notification, a three-Judge Bench of this Court, stated the principle as follows :

16. We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals - and in Union of India v. Wood Papers referred to therein - represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the Assessee - assuming that the said principle is good and sound - does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect, must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave that such a notification has to be interpreted in the light of the wores employed by it and not on any other basis. This was so held in the context of the principle that; in a taxing statute, there, is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption.

23. Applying the above principles, we are of the opinion that since in the instant case the language of condition No. 38 in the Exemption Notification is clear and unambiguous, there is no need to resort to the interpretative process in order to

determine whether the said condition is to be imparted strict or liberal construction.

32. Here also the language of Entry 547 of the Public Notice is clear and unambiguous excluding scope for any interpretative process to include products, which were not included by the policy makers.

33. Pursuant to the directions of this Court on behalf of the 1st respondent, a further affidavit was filed in WP (C) No. 37514/2009, explaining the procedure for extending the benefit of the scheme. This affidavit, dated 27th July, 2011, being relevant, is extracted below for reference :

(2) That the DEPB Scheme aims to neutralize the incidence of duty on the inputs used in the export product. DEPB benefit is granted only on those items for which Standard Input Output Norms (SION) have been fixed. Fixation of SION is done by the Norms Committee set up in DGFT which is an Inter-Ministerial Committee and technical exports from the concerned Ministry/Department/Agency are also its members. Once the SION is fixed/amended, it is notified by a Public Notice. A compilation of SION as on 31-5-2009 is in the form of "Handbook of Procedures Vol. II"

(3) By Public Notice No. 10 [PNJ/1997-2002, dated 21-5-1997, the Director General of Foreign Trade notified the credit rates under the DEPB Scheme. There were 347 items under Product Group "Chemicals". It was followed by Public Notice No. 16 [RE-97] 1997-2002, dated 6-6-1997 adding items 348 to 522 in Appendix 28-A of Handbook of Procedures [Volume 1], in Product Group "Chemicals". By Public Notice No. 17/97 (PNJ/1997-2002 dated 13-6-1997, items 523 to 634 were added to the Product Group "Chemicals" in Appendix 28-A of Handbook of procedures. ''Rubber Compounded Sheets/Rings'' was introduced by this notification as item 547.

(4) The fixation of the Rate of Duty Credit under the Duty Entitlement Pass Book Scheme involves the following procedure, viz.,

(i) There has to be a Standard Input Output Norms (SION) on a product on which DEPB rate fixation is applied for.

(ii) The Deemed import content of the Export Product as per the Standard Input Output Norms [SION], as specified in the Handbook of Procedures-Volume II is taken into consideration;

(iii) The Basic Customs Duty payable on the CIF Value of such deemed imports and the likely FOB value of export product is determined on the basis of documentary evidence given by the applicant;

(iv) Taking into account the Value Addition achieved in the process, the DEPB rate is recommended.

(5) That DEPB rates are recommended by the Inter Ministerial DEPB Committee by taking into account the factors stated in the Para (4) above. DEPB rate is

specified by the Director General of Foreign Trade under para 4.3.1 of the Foreign Trade Policy 2009-14 (earlier under para 7.25 of the Export and Import Policy 1997-2002) SION is fixed on demand by the applicant and no SION is fixed suo motu.

(6) That for fixation of DEPB on any item, thus, having SION, is an essential precondition. An exporter is required to file an application to the DGFT for fixation of SION; In the case of entry SI. No. 547 (now 507) of the DEPB rate Schedule meant for the product "Rubber Compounded Sheets/Rings/Gaskets" the corresponding SION is as under :

It would be evident that the above SION entry does not include "Rubber mats/ Door mats" and hence the corresponding DEPB entry 547 (now 507, also does not include the same description.

The formula for fixing the DEPB rate is as follows :-

(7) Rubber Mats/Door Mats/Foot Mats etc. are further value added products and hence their FOB will be higher than the price of Rubber Compounded Sheets etc. It would have resulted in higher credits under the DEPB Scheme and thereby greater revenue leakage, if Rubber Mats/Door Mats/Foot Mats were also included in Appendix 28-A of HBPV1. The loss to the Exchequer would have been very high in such circumstances.

(8) That as per the records available, no request was received for fixation of SION or DEPB for "Doormats/Rubber Mats". It was open to the Exporters to prefer Applications for fixation of DEPB Rates for their Export Product in accordance with Paragraph 4.38 of the Handbook of Procedure Volume-1 which is reproduced below:

4.38 ANF 4C prescribes form regarding fixation of DEPB rates. All applications for fixation of DEPB rates shall be routed through the concerned EPCs which shall verify the FOB value of exports as well as international price of inputs covered under SION

True copy of ANF-4C [AAYAAT-NIRYAAT Form] is annexed herewith as Ext. R. 1(a),

(9) It was also open to the Exporters to prefer Applications to include their product with the corresponding import content in SION [Standard Inputs Output Norms] in ANF 4B. True copy of ANF 4B is annexed as Ext. R.1(b) Paragraph-4.4.2 of Handbook of Procedure Volume-1 is reproduced below:

4.4.2. in case where Norms have not been published, an Application in ANF 4B, along with prescribed documents, shall be furnished to concerned Norms Committee [NC] at DGFT Headquarters for fixation of Norms.

In such cases the original Application along with prescribed fee shall be filed with the RA Concerned and a self-attested copy of the same be filed with the NC.

Authorisation in such cases shall be issued by RA as per NC recommendation.

NC shall also function as a recommendatory authority for SION. DGFT may notify such norms

(9) That as per the DEPB Scheme, in case where SION is fixed but DEPB rates are not notified, 1.5% DEPB is available under residual entry Sl. No. 22-D on export of such products. The fact that there is no SION for "Rubber Mats/Door Mats" there is no DEPB available on this item even under the residual entry of 22 D.

34. The averments in the affidavit extracted above also supports our aforesaid conclusion. This affidavit further explains the procedure for allowing DEPB benefit and clarified that such procedures, have not been followed in the case of products such as those exported by the petitioners. In such a situation, there cannot be any doubt that door mats, floor mats, etc., are ineligible for DEPB benefits under the EXIM Policy.

35. We do take note of the contention of the exporters that in some of the ports in the country, the benefit is still being extended. Though such a past practice seems to be not disputed by the respondents, they have clarified that the practice has since been discontinued and that remedial action is being initiated. Even if the contention of the exporters is factually correct, such prevailing practices are contrary to the EXIM Policy and the DEPB Scheme and therefore, cannot be accepted as a precedent to perpetuate the wrong into the future. For the aforesaid reasons, judgment under Appeal is set aside, the Writ Appeals will stand allowed and all the Original Petitions and Writ Petitions are dismissed.

