

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1224 of 2010

For Approval and Signature:

HONOURABLE MR.JUSTICE V. M. SAHAI

HONOURABLE MR.JUSTICE N.V. ANJARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment?	
2	To be referred to the Reporter or not?	
3	Whether their Lordships wish to see the fair copy of the judgment?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?	
5	Whether it is to be circulated to the civil judge?	

AMOD STAMPINGS PRIVATE LIMITED - Appellant(s)
Versus
COMMISSIONER OF CUSTOMS - Opponent(s)

Appearance :

M/S TRIVEDI & GUPTA for Appellant(s) : 1,
MR RJ OZA for Opponent(s) : 1,

CORAM : HONOURABLE MR.JUSTICE V. M. SAHAI

and

HONOURABLE MR.JUSTICE N.V. ANJARIA

Date : 26/06/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE V. M. SAHAI)

1.0 We have heard Mr. Uday Joshi, learned counsel for M/s. Trivedi and Gupta for appellant and Mr. R. J. Oza, learned counsel assisted by Ms. Rujuta Oza, learned counsel appearing for the respondent.

2.0 This tax appeal has been admitted by the Court on the following substantial questions of law arise in this tax appeal.

“A. That can any order be passed by a majority, which includes the third member, when the third member admittedly holds that

“I find that no specific point of difference has been placed before me. It appears from 'DIFFERENCE OF OPINION' framed by the Regular Bench that I have to concur with one of the member”

B. That the difference arose between Hon'ble Mmber (Judicial) who ordered for the matter to be remanded to examine the questions of limitation, applicability of the benefit of alternate Notification and consideration of deemed exports to be counted towards export obligation and the Hon'ble Member (Technical) who has ordered the rejection of the appeal in toto. In the circumstances, is it not incumbent upon the Hon'ble third member to consider all the aspects instead of concurring simpliciter with the Hon'ble Member (Technical)?

C. Are not the judicial precedents on like issues required to be followed?”

3.0 The facts are not disputed that there was difference of opinion between two learned members of division bench. In view of section 129C(5) of the Customs Act, 1962 ('the Act' for sake of brevity) in case of difference of opinion between two members of the tribunal, the point of difference of opinion was required to be stated by the members and thereafter the matter was to be decided by a third member.

4.0 To be precise, the relevant part of Section 129C(5) of the Customs Act, 1962 reads as under:

“129C(5). If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other

members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it.”

5.0 The opinion of the third member would form part of majority decision. In the facts of the instant case as aforesaid, when the learned third member of the tribunal before whom the matter went, the differing member had not framed the point of difference of opinion. When the matter was being heard by learned third member, in his judgment, in para-15, he recorded his finding as under:

“I find that no specific point of difference has been placed before me. It appears from 'DIFFERENCE OF OPINION' framed by the regular Bench that I have to concur with one of the Members.”

6.0 Once the learned third member found that point of difference of opinion has not been formulated by the two members of the Bench then the learned third member was required to send the matter back to the Division Bench for formulating the point of difference of opinion and only after the point of difference of opinion was formulated, decide that question. The learned third member could not say that though difference of opinion has not been framed, he has to agree or disagree with the member and accordingly he has agreed with the judicial member. In our opinion, the approach of the learned third member was not correct in law and he was required to send the matter back to the Bench of the two members who had differed, for formulation of the point of difference of opinion afresh so that question can be considered and decided by the learned third member.

7.0 A Division Bench of this Court in *Colourtex vs. Union of India* [2006 (198) ELT 169 (Guj.)] has held that exact differences has to be

formulated by members of the Division Bench of the Tribunal and it is not open to them to formulate a question as to whether the appeal is to be rejected or remanded for a fresh decision for determination of duty, confiscation and penalty etc. In the present case it is seen that the question formulated by the Division Bench does not specify the requirement of sub-section (5) of Section 129C of the Act. Therefore, the order passed by learned third member as well as the difference of opinion expressed, generally, by differing member without precise formulation of the point of difference of the Tribunal cannot be entertained. In the result, this appeal succeeds and is allowed. The orders of the learned third member as well as the difference of opinion formulated by the differing members of the Division Bench are set aside.

8.0 The matter is remanded back to the differing member of the Tribunal to formulate point of difference in a manner required under the law and thereafter refer the matter to learned third member for decision. As contemplated in Section 129C(5), after the point of difference of opinion is formulated by Division Bench , it may be sent the matter to the President who may either decide or refer the matter to learned third member as per provisions of Section 129C(5) of the Customs Act, 1962. We make it clear that we have not entered into the merits of the case.

9.0 This tax appeal is accordingly disposed off.

[V. M. SAHAI, J.]

[N. V. ANJARIA, J.]

Amit