

(2013) 05 GUJ CK 0007

In the Gujarat High Court

Case No : Special Civil Application No. 8659 of 2013

Binani Cement Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 09-05-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 111(d), 111(m), 112(a), 18(2), 18(3)

Citation : (2013) 21 GSTR 383

Hon'ble Judges : S.G. Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Sudhir Gupta, with Abhishek M. Mehta, for the Appellant;

Judgement

Akil Kureshi, J.—Though this petition contains several prayers, principally the grievances of the petitioner are two fold. Firstly, the petitioner challenges a notice dated March 26, 2013 as at annexure D to the petition, in which the Commissioner of Customs, Kandla has called upon the petitioner to show cause why the petitioner's classification of the imported coal as steam coal not be rejected and the same be classified as bituminous coal. On such basis, the Commissioner called upon the petitioner to show cause why: (i) Their claim for classification of impugned goods (as detailed in annexures A1 and A2) under Customs Tariff Item/Heading 2701 19 20, should not be rejected and why the same should not be re-classified under Customs Tariff Item/Heading 2701 12 00 of the First Schedule to the Customs Tariff Act, 1975;

(ii) The bills of entry as detailed in annexure A1 should not be finalized u/s 18(2) of the Customs Act, 1962 along with applicable interest at the prescribed rate u/s 18(3) *ibid*, considering the correct classification of the impugned goods under Customs Tariff Heading 2701 12 00 and the customs duty thereon should not be computed at Rs. 2,96,37,650 on the basis of the classification under Customs Tariff Heading 2701 12 00;

(iii) The 4,56,782.63 M.T.s imported coal valued at Rs. 2,61,64,78,627 as

detailed in annexures A1 and A2 should not be confiscated/held liable to confiscation under the provisions of section 111(d) and 111(m) of the Customs Act, 1962;

(iv) The differential customs duty amounting to Rs. 25,15,54,602 (rupees twenty-five crore fifteen lakhs fifty-four thousand six hundred two only) on the 4,15,782.63 M.T.s, of impugned coal as detailed in annexure A2 (the finally assessed bills of entry) to this notice, should not be demanded and recovered from them u/s 28(1) of the Customs Act, 1962;

(v) Interest should not be recovered from them on the said differential customs duty, as at (iv) above, u/s 28AA of the Customs Act, 1962;

(vi) Penalty should not be imposed on them u/s 112(a) of the Customs Act, 1962.

The second challenge raised in the petition is to the exemption notification dated March 1, 2013 as at annexure C to the petition. Since admittedly the impugned show-cause notice, annexure D, concerns the petitioner's consignment of imported coal for which bill of entries were filed before March 1, 2013, such notification at annexure C has no bearing on the impugned show-cause notice. These two challenges, therefore, being independent and unconnected, we have confined our inquiry in the present petition only with respect to the petitioner's challenge to the show-cause notice. The petitioner would, however, be at liberty to file a separate petition challenging Notification No. 12/2013, dated March 1, 2013 See [2013] 19 GSTR (St.) 91 (annexure C to the petition), if the requirement so arises. 2. With respect to the impugned show-cause notice, the counsel vehemently contended that the same has been issued in total disregard to the relevant facts. He contended that the petitioner has been importing steam coal for its power plant and other requirements since many years. The petitioner has, all throughout, declared such import as steamed coal and such declarations have been accepted by the customs authorities. He further submitted that in terms of the Finance Minister's speech in Parliament on March 17, 2012 the Government of India had issued exemption Notification No. 12/2012 See [2012] 14 GSTR (St.) 28 exempting imports of steam coal from payment of basic customs duty and limiting the additional customs duty at one per cent. He contended that only in order to deprive the petitioner of such benefits flowing from the said exemption notification, the Department has issued the impugned show-cause notice in which the stand of the Department is that the coal imported by the petitioner is bituminous coal and not steam coal. In paragraph 16 of the notice, the Department has asserted that the petitioner had knowingly made a misdeclaration declaring the import as steam coal instead of bituminous coal. He submitted that there was no misdeclaration on the part of the petitioner. Full details were provided to the Department.

3. We are, however, of the opinion that the challenge of the petitioner being at the stage where a mere show-cause notice has been issued by the Department, at this stage no interference is called for. It is by now well-settled that the court

would not encourage litigation at the stage of show-cause notice. The noticee would have sufficient opportunity to meet with all the allegations and produce such material on record as may be required. In the case of *The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another*, it was held and observed as under (page 667 of 2 RC):

This court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning the legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show-cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into the facts, the writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted.

4. In the case of *Commissioner of Customs and Central Excise and Others Vs. Charminar Nonwovens Ltd.*, the Department had challenged the excise judgment of the High Court. There was a dispute between the manufacturer and the Department with respect to classification of certain goods. The Department had issued a detention order and also a show-cause notice why the same may not be classified under a particular sub-heading. The manufacturer filed a writ petition before the High Court challenging the show-cause notice and the detention order on the ground that on an earlier occasion on similar adjudication the appellate authority had upheld the claim of the assessee. The High Court allowed the petition. The Supreme Court in appeal held and observed as under (page 10 of 3 RC):

The High Court proceeded on the basis that the appellate order had become final and expressing agreement with the same, quashed the notice. The argument on behalf of the appellant was that if the view of the High Court is correct a classification cannot be reviewed and any such classification once made cannot be reviewed even if the earlier view is erroneous, and such a course would result in great loss of revenue was not accepted and the High Court allowed their petition and quashed the show-cause notice. Hence this appeal.

The matter relating to commodity classification whether it falls under one

heading or the other or attracts higher or lower duty has to be decided on facts arising in each case. Even though, the decision may have been taken earlier at one point of time but on further investigation new facts are discovered or the law has changed, as is the stand in the present case, the matter has to be re-examined. It is not at all proper for the High Court to interfere in such matters at the stage of issue of the show-cause notice. We, therefore, set aside the order made by the High Court and remit the matter to the concerned authority for adjudication.

5. In the present case, we are all the more reluctant to entertain this litigation at the stage of show-cause notice since in our opinion, several questions of facts as well as law would arise. What exactly the nature of classification between steam coal and bituminous coal, what are the properties of the coal imported by the petitioner, whether such parameters would classify the coal as steam coal and not bituminous coal, etc., are questions which cannot be judged by us even without first adjudication by the Departmental authorities. Further, whether there was any misdeclaration is also a pure question of fact. It may be that in the reply to the show-cause notice the petitioner may be in a position to produce on record material to contend that the imported coal is steam coal and none other and/or that there was no misdeclaration on the part of the petitioner. In any case these issues involve highly disputed questions of facts. We would therefore, be well advised not to undertake such exercise in a writ petition.

6. All the more so, since after the show-cause notice is adjudicated, the order that may be passed by the Commissioner if adverse to the petitioner could be challenged by way of a statutory appeal first before the Tribunal and thereafter before the High Court or the Supreme Court in further tax appeal depending on the subject matter. When the statute provides for such detailed mechanism for adjudication of disputes between the Department and the importer, we would not like to short-circuit such proceedings and plunge straightaway into examining such questions in a writ jurisdiction at the first instance. In a recent decision, in the case of Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., , the apex court while commenting on the tendency of the High Court to entertain a writ petition where against the judgment of the Tribunal appeal to the Supreme Court was maintainable, held and observed as under (page 510 of 19 GSTR):

In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The excise law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under article 226 of the Constitution. Therefore, the learned single judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned single judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/assessee.

In view of the above discussion, when several questions of facts are involved, and in particular, when the petitioner has neither contended nor established any inherent lack of jurisdiction or gross violation of principles of natural justice on the part of the adjudicating authority, the petition which is directed against the show-cause notice is rejected.