**(2010) 01 BOM CK 0008**

**In the Bombay High Court**

**Case No :** Customs Appeal No. 26 of 2006

Commissioner of Customs (Import) APPELLANT

Vs

Wartsila India Ltd. RESPONDENT

**Date of Decision :** 27-01-2010

**Acts Referred:**

**Citation :** (2010) 254 ELT 406

**Hon'ble Judges :** V.C. Daga, J;K.K. Tated, J

**Bench :** Division Bench

**Advocate :** P.S. Jately, for the Appellant; V. Sridharan and Prakash Shah, instructed by PDS Legal, for the Respondent

## Judgement

V.C. Daga, J.—This appeal at the instance of the Revenue is directed against the order dated 3rd August, 2005 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai ("CESTAT" for short) holding that the second-hand reconditioned Wartsila Vasa Basic Engine would qualify as a "capital goods" for the purpose of para 9.12 of Foreign Trade Policy 2004-2009 and can be imported without a licence as per para 2.17 of Foreign Trade Policy 2004-2009 though it becomes operational only after it is attached or fitted/ coupled with equally important machine namely an alternator.

Question of Law:

2. The said appeal was admitted by this Court vide order dated 8th June, on 2006 to consider following substantial question of law:

Whether an old, used and reconditioned Wartsila Vasa Basic Engine will quality as "capital goods" for the purpose of para 9.12 of Foreign Trade Policy 2004-2009 and can be imported without a licence as per para 2.17 of Foreign Trade Policy 2004-2009 though it becomes operational only if attached or fitted/coupled with equally important machine namely an alternator?

The Facts:

 

3. The facts giving rise to the present appeal are that the respondent filed bill of entry on import of reconditioned "Wartsila Vasa Basic Engine". The respondent claimed that it was a complete fuel fired engine by itself, hence a complete machine in itself and that, it was not a spare part of a bigger machine. The respondent claimed that it could run a whole factory by being attached to a proper transmission attachment to the clutch and gear box. It can run a whole rolling unit. That is how the respondent claimed that engine was an independent machine complete by itself. It could be put into direct use depending upon its use. As such, the engine could not have been classified as a spare part.

4. Revenue entertained just contrary view than taken by the importer. According to the Revenue, the imported diesel engine appeared to be a prime mover, as such not capital goods. The importer-respondent was asked to produce import licence as per para 2.17 of the Foreign Trade Policy 2004-2009 and para 2.33 of the Hand Book Procedure Vol. I. The importer-respondent did not possess any valid licence, as such, could not produce the same. The Revenue, finding violation of provisions of para 2.17 of the EXIM Policy held that the goods were liable for confiscation u/s 111(d) of the said Act with penal action u/s 112(a) of the said Act as such issued a show cause notice seeking explanation of respondent/importer.

5. The respondent filed their reply dated 11th March, 2005 and 8th April, 2005. After affording personal hearing to the petitioner, the Commissioner of Customs (Import) vide its order dated 3rd May, 2005 confiscated goods u/s 111(d) of the Act giving respondent an option to redeem the same on payment of Rs. 60 lacs. The Commissioner imposed penalty of Rs. 10 lacs u/s 112(a) of the said Act. The Commissioner held that the imported diesel engine/prime mover cannot be considered as "capital goods" as it was not covered by the definition of "capital goods" under para 9.12 of the Foreign Trade Policy. The Commissioner observed that the diesel engine was not a power generating set on its own and could become so only if attached to an alternator. The Commissioner held that the diesel engine was merely a part of diesel generating set. It is nothing but a part of "capital goods" as such it were restricted goods as per para 2.17 of the Foreign Trade Policy 2004-2009. The show cause notice was confirmed vide order-in-original dated 3rd May, 2005.

6. The respondent challenged the above impugned order-in-original by filing appeal before the Tribunal. The Tribunal was pleased to allow the appeal filed by the respondent vide its order dated 3rd August, 2005 observing that the engine was undisputedly required for production of electricity and held that the engine did qualify for import as capital goods without a licence.

7. Not satisfied with the aforesaid order, the appellate jurisdiction of this Court u/s 138 of the Act is invoked by the petitioner to raise substantial question of law reproduced in the opening part of this order.

Submissions:

8. Mr. Jately, learned Counsel appearing for the Revenue strongly criticized the order of the Tribunal, contending that none of the contentions raised by the Revenue were discussed in detail by the Tribunal and that by a cryptic and unreasoned order, their appeal was rejected.

9. Mr. Jately also made submissions on merits of the matter reiterating the grounds raised in the memo of appeal. In support of his contention that the impugned order is cryptic and unreasoned, he took us through the one-page impugned order and tried to demonstrate absence of reasons in support of the view taken by the Tribunal. He further went on to submit that the impugned decision of the Tribunal runs counter to the judgment of the Tribunal itself in the case of 2004 (177) ELT 431 . He submits that no reference to the said judgment is to be found in the impugned order though, according to him, heavy reliance was placed thereon.

10. Per contra, Mr. Sridharan, learned Counsel appearing for the respondent tried to support the impugned order contending that the said view is in consonance with the view taken by the Apex Court in the case of COMMISSIONER OF Income Tax, MADRAS Vs. MIR MOHAMMAD ALI. ARUNA MILLS LTD. : INTERVENER., , wherein, the Apex Court ruled that the diesel engine is clearly "machinery" Borrowing support from the said judgment, Mr. Sridharan tried to justify the view taken by the Tribunal. He also placed reliance on the judgment of the Apex Court in the case of Vikram Cement Vs. Commissioner of Central Excise, Indore, , in support of his submission.

Consideration:

11. Having heard both the parties and having gone through the impugned order, Mr. Jately is perfectly justified in contending that the impugned order is in breach of principles of natural justice. Having examined the impugned order, one has to conclude that there is no discussion with respect to rival submissions made by the parties. There is no consideration much less any discussion with regard to the nature of goods imported, Exim policy or clauses thereof.

12. The first paragraph of the order is nothing but a preamble to the order, whereas the second para of the order refers to the findings given by the adjudicating Commissioner, whereas third para takes notice of the definition of word "goods" and finally in fourth para conclusive finding without there being any threadbare discussion is recorded. Such order can hardly be said to be a reasoned order with application of mind.

13. Mr. Jately brought to our notice the earlier judgment of the Tribunal in the case of Khurana Exports (Supra), wherein the view was taken by the Tribunal that the second hand diesel was not capital goods. When the said judgment was cited before the Tribunal, it was expected on the part of the Tribunal either to consider the said judgment or distinguish it or to refer it to the Larger Bench if contrary view was warranted.

 

14. A similar contingency was required to be considered by this Court in the case of Mercedes Benz India Private Limited Vs. Union of India (UOI) and Others, wherein, we were required to set aside the impugned order and remit it back to the Tribunal for consideration afresh, borrowing observations made by the Apex Court in the following words:

We are not happy to observe but constrained to say that one must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter should be referred to a Larger Bench. It is a subversion of judicial process not to follow this procedure. In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of the judges of the courts and members of the tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know-how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it, ultimately, falls into disrepute. (See Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, ).

15. For the reasons stated in the said judgment, impugned order is also liable to be quashed and set aside.

16. The Tribunal is expected to bare in mind that the judgments of the Tribunal are subject to scrutiny by High Courts, especially, in exercise of appellate jurisdiction and/or writ jurisdiction. The Higher Courts are expected to read the mind of the Lower Authority. In absence of reasons, it become difficult for the higher Courts to consider the issue involved in the case and the view taken therein. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason in an indispensable part of sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi judicial performance.

 

17. According to Mr. Jately, the Apex Court judgment in the case of Moh. Ali (supra) does not deal with the subject goods. He tried to distinguish the same. In his submission each it of import is required to be considered on its own merits. Since, we are remanding matter to the Tribunal for consideration afresh; we do not propose to dwell on the merits of the issue any further. We think it fit to leave the said question for the consideration of the Tribunal on its own merits since we are remitting this matter to the Tribunal for consideration afresh.

18. In the aforesaid view of the matter, the impugned order is quashed and set aside and the matter is remanded back to the Tribunal for consideration afresh leaving the question of law open for consideration afresh. The appeal is restored to the file of the Tribunal with direction to decide the appeal by a reasoned order following principles of natural justice. All rival contentions on merits are kept open. No order as to costs.

 