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**(2001) 02 GUJ CK 0025**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 12661 of 2000**

Essar Steel Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

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**Date of Decision :** 06-02-2001

**Acts Referred:**

**Citation :** (2002) 4 GLR 3349

**Hon'ble Judges :** R.R. Tripathi, J;B.C. Patel, J

**Bench :** Division Bench

**Advocate :** Dushyant Dave, for Trivedi and Gupta, for the Appellant; Akshay H. Mehta and Asim J. Pandya, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

B.C. Patel

1. The petitioner No.1 - Company incorporated under the provisions of the Companies Act, 1956, is engaged in manufacture of Sponge Iron at its plant located at Hazira, Surat. The petitioners, by this petition, have challenged the arbitrary, unreasonable and illegal demand of duty as well as of interest without finalisation of the assessment under the provisions contained in the Customs Act, 1962.

2. The petitioner-Company purchased a Secondhand Plant on "as is where is basis " from Messers Teviot Investments Limited, ( "TIL" for short ) for manufacture of Hot Briquetted Sponge Iron by Midrex Process. The Plant was to be dismantled which was situated at Emden, Germany and after shipment, the same was to be re-engineered to erect and instal at Hazira, Surat. There was an agreement with Messers Voest Alpine Incorporation ( "VAI" for short ) and also an agreement with Midrex International whereunder the petitioner was to pay a sum of DM 2 Million, DM 10.10 Million and DM 23 Million towards the License fees and technical services to be rendered by VAI. After the shipment, for each consignment Bill of Entry for clearance for Home Consumption u/s 46 of the

Customs Act was filed. The contract was registered for import of the machinery under the Project Imports Regulations, 1986 ( for short "Regulations" ) for classification and assessment under heading 98.01 of the First Schedule to the Customs Tariff Act, 1975 ( for short "Tariff Act" ). Pursuant to the Registration of contract, the petitioner-company executed a Bond and furnished two Bank Guarantees dated 10/08/1998 and 06/05/1997 for Rs.1,86,19,350/- and Rs.30,86,200/- respectively. All assessments under the Project Imports were provisional and the petitioner extended and renewed the Bank Guarantes and Bond. Validity was upto the period as mentioned in the Bank Guarantees ( 24/12/2000 & 20/01/2001 respectively ). The Bill of Entry was accompanied with invoice issued by TIL and other relevant documents along with contract. Pro rata value of each consignment and calculated assessment of the customs duty on the basis of the value declared being the transaction value under Rule 4 of the Customs Valuation ( Determination of Price of Imports Goods ) Rules 1988 ( hereinafter referred to as "the rules" ) were before the Revenue.

3. A dispute arose with regard to the amount paid by the petitioner-company to VAI and Midrex, whether it should form part of the assessable value and should be added to the transaction value by virtue of Rule 9 (1) (b) (c) and (e) of the rules or not which was required to be decided. According to the petitioners, pending determination of the correct assessable value, the assessments were once again made provisional. The petitioner-company paid customs duty as assessed by the proper Officer and on payment thereof the proper Officer made an order whereupon the goods were allowed clearance for home consumption u/s 47 of the Customs Act. The whole of the plant imported by the petitioner has since been cleared and is presently erected and installed and operating at Hazira. In the year 1988, a Show Cause Notice was issued calling upon the petitioner-company as to why the amounts referred under the agreements to VAI and Midrex should not be added to the assessable value and why the said amounts should not be added / allowed to the value declared in the Bill of Entry which was assessed provisionally. In paragraph 10 of the notice, it was specifically stated as under :

" M/s Essar Gujarat Limited are therefore, called upon to show cause to the Assistant Collector of Customs, Surat as to why the bills of entry being filed by them on provisional basis be not loaded to the extent of 80% for each bill of entry. The loading factor of 80% is without prejudice to any further proposed enhancement of assessable value at the time of finalising the project import."

The said show cause notice dated 24/10/1988, is annexed to the petition at Annexure - B.

4. By a corrigendum dated 12/07/1989, the petitioner was again called upon to show cause as to why the said plant should not be confiscated u/s 11(m) of the said Act and why penalty should not be imposed u/s 112 of the Customs Act.

5. After considering the reply to the notice as well as corrigendum, the Collector

of Customs on 18/10/1989 made an order holding that the licence fees of DM 2 Million should form part of the assessable value. The order made by the Collector of Customs was subject matter before the Customs, Excise and Gold (control) Appellate Tribunal (for short " the Tribunal " ) at the instance of both the sides, namely; the Revenue and the petitioner-company. By an order dated 13/02/1991 (reported in 1991 (56) ELT 221 , the appeal preferred by petitioner-company was allowed as a consequence of which petitioner was declared entitled to refund of Rs.6,02,24,300/-. The appeal of the Revenue was dismissed. The order is annexed at Annexure C to the petition. The Apex Court has finally on 19.11.1996 disposed of the matter between COLLECTOR OF CUSTOMS (PREV.) AHMEDABAD Vs. ESSAR GUJARAT LIMITED and held as under in para 30 of the Judgment (reported in 1996 (88) E.L.T. 609 (S. C.) at p.622;

" Therefore, we are of the view that DM 2,000,000 being the process licence fee paid to Midrex Corporation, DM 10,100,000 being the cost of technical service provided by Midrex and a Sum of DM 2,310,000 being payment on account of engineering and consultancy fee payable to V.A., should be added to the value of the import plant."

6. In para 29, the Apex Court pointed out as under :

"But this apart, other services rendered cannot be treated as adding in any way to the value of the plant. Since there is no clear indication as to how the various services have been valued separately, 10% of the amount of DM 23,100,000 should be added to the value of the plant on this account."

The appeals were thus disposed of with no order as to costs by the Apex Court.

7. Mr. Satishkumar Shivilal Shah, Deputy Commissioner of Customs, Surat placed on record affidavit in reply on behalf of the respondents and in para 3 fairly stated as under:

"The petitioner imported second hand plant as stated in the petition under the Project Import Regulation, 1986. The Bills of Entry filed by the petitioner were assessed provisionally under the Project Import Regulations, 1986 on the basis of declared value."

In para 6, he further stated on oath as under:

"By the said judgment the Hon"ble Supreme Court held that certain amounts as indicated in the Page Nos. 26 & 27 of the order be added to the value of the plant. Pursuant to the order of the Supreme Court the value came to be added and provisional re-assessment was done on the bills of entry 21/01/1997. Provisional re-assessment was made because there were certain requirements to be completed by the petitioner under the Project Import Regulations, 1986. The requirements which are yet to be fulfilled by the petitioner are as under :

(a) Submission of the installation certificate from the jurisdictional Assistant / Deputy Commissioner of Central Excise.

(b) Proof of payment of imported plant and machinery."

In the said para 6, it is further pointed out as under:

"The reassessment of the bills of entry was therefore made provisionally by loading the assessable value as held by the Hon"ble Supreme Court. "

8. After the decision of the Apex Court, the respondent addressed a letter to the petitioner requesting to arrange to pay Rs.10,63,39,665/immediately, stating that the calculation is provisional as per the Supreme Court's judgement, however, amount due to be paid / as per the Customs Act, 1962 in addition to above, if any, would be intimated to them. The said letter dated 28/01/1997 is annexed at Annexure `E" to the petition.

9. The petitioner - company approached Delhi High Court by filing Civil Writ Petition No. 1159 of 1997 wherein the petitioner challenged the validity of provisions of Sub-section (1A) of Section 14 and Clause (a) of Sub-section (2) of Section 156 of the Act being ultra vires and that the essential legislative functions could not have been delegated to the Executive. It was submitted to the Court that the demands were illegal, invalid and unauthorised as the assessment has not been finalised. In support of the contention, reliance was placed on various decisions. The Delhi High Court hearing the matter held that there is no substance in the submission of the learned counsel but the provisions of the Rules 3, 4, 9(c) & (e) are not in conformity with the provisions of Section 14(1). The Court while rejecting the contention held that the said rules are not ultra vires the provisions of Articles 245, 246, 265 and 19(1)(g) of the Constitution of India.

10. The notice of the demand was challenged by the petitioner-company on the aforesaid ground that the provisions of Section 1(1A) and Section 156(2)(a) as also the Rules are invalid and ultra vires to the Constitution of India. No specific plea of the nature sought to be urged now were pleaded in the above Writ Petition and the petition was basically filed challenging the constitutional validity of the aforesaid provisions stated in paragraph 2 of the Writ Petition. The court further pointed out as under:

"If the petitioners have any statutory remedy in accordance with the provisions of the Customs Act and the Rules made thereunder, the same would be available to the petitioners. However, no direction can be issued to the respondents in the present case at this stage, as sought for by the petitioners, for finalising the assessment as sought for by them. The law has to take its own course and the statutory authority has to proceed in the matter in accordance with law. "

The Court further held as under :

"We have no hesitation in our mind that a statutory authority vested with statutory obligation would proceed in the manner provided for and would not act otherwise."

11. Soon after the aforesaid order was made by the Delhi High Court, i.e., on 28/11/2000, the Deputy Commissioner of Customs, Surat addressed a letter drawing attention of the petitioner-company about dismissal of the Writ Petition by the Delhi High Court and in view of dismissal of the petition, called upon the petitioner-company to pay Rs.19,18,06,732/-, as per the calculation sheet, with further interest at the rate of 24% which is payable from 29/11/2000 till the date of payment. Along with the letter, calculation sheet was forwarded. The petitioners have challenged this notice calling upon the petitioner to pay the amount as mentioned in Annexure - I which is dated 28/11/2000.

12. Learned counsel appearing for the petitioners submitted that an amount of Rs.6,02,24,300/- has been recovered by encashment of Bank Guarantee and a further amount of Rs.2,17,05,550-00 has been obtained by the Revenue by encashing another Bank Guarantee. According to the petitioner, only sum of Rs.2,44,09,815/- at the most, can be said to be outstanding without admitting the contents of the letter. Learned counsel for the petitioners has submitted that Rs.2.4 crore, as per the calculation sheet, can be demanded now. He submitted that though there is a serious dispute about amount demanded, the Revenue has not bothered to discharge its duty in accordance with law and on dismissal of the petition by the Delhi High Court, the Revenue has demanded the amount illegally. In reply as stated earlier, it has been made clear by the Deputy Commissioner of Customs that the Bills of Entry filed by the petitioner-company were assessed provisionally under the Project Imports Regulations, 1986 on the basis of declared value and in view of the order of the Apex Court, the amount indicated in Paragraphs 26 & 27 of the order came to be added and provisional re-assessment was done on Bills of Entry. Re-assessment of Bills of Entry was, therefore, made provisional by loading the assessable value as held by the Hon'ble Supreme Court. Thus, it is an admitted position that there is no regular assessment.

13. Learned counsel for the petitioners pointed out that without assessment in accordance with law, Customs authority issued demand notice demanding a sum of Rs.10,63,39,665/-. During the pendency of the writ petition on 29th April, 1997, the Revenue enhanced the said amount to Rs.16,60,35,971.44 by adding interest on the original demand. Learned counsel submitted that the Delhi High Court did not issue any direction for finalizing the assessment as the Court was of the view that;

"The law has to take its own course and the statutory authority has to proceed in the matter in accordance with law."

The Court had hoped that " A Statutory Authority vested with statutory obligation would proceed in the manner provided for and would not act otherwise."

However, without following the procedure, the Revenue straight way called upon the petitioner-company to make payment of Rs.19,18,06,732/- failing which, the petitioner was called upon to pay interest at the rate of 24% per annum from

29/11/2000 onward till the date of payment.

14. Learned counsel, Mr. Dushyant Dave, drew our attention to Section 18 of the Customs Act which refers to provisional assessment of duty. We are not referring the section in detail because it is an admitted position that till today there is no final assessment and only provisional assessment has been made. Learned counsel drew our attention to Section 17 which refers to the assessment of duty. The said Section reads as under :-

Section (17) :-

Assessment of duty :-

(1) After an importer has entered any imported goods u/s 46 or an exporter has entered any export goods u/s 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in Section 85, be assessed.

(3) For the purpose of assessing duty under Sub -section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment, which it is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequent on examination or testing of the good or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the, assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

15. With regard to the Entry of Goods on Importation, Section 46 provides as under :-

Section (46) :-

Entry of goods on importation :-

(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form;

Provided that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information permit him, previous to the entry thereof, (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed u/s 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) A bill of entry under sub-section (1) may be presented at any time after the delivery of the import-manifest or import-report, as the case may be :

Provided that Commissioner of Custom may in any special circumstances, permit a bill of entry to be presented before the delivery of such report.

Provided further that bill of entry may be presented even before the delivery of such manifest if the vessel by which the goods have been shipped for importation into India is expected to arrive within a week from the date of such presentation.

(4) The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(5) If the proper officer is satisfied that the interest of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

16. Section 47 refers to clearance of Goods for Home Consumption. The said Section reads as under :-

Section (47) :-

Clearance of goods for home consumption :-

(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same the proper officer may make an order permitting clearance of the goods for home consumption.

(2) Where the importer fails to pay the import duty under sub-section (1) within seven days from the date on which the bill of entry is returned to him for payment of duty, he shall pay interest at such rate, not below [ 10 percent ], and not exceeding thirty per cent per annum, as for is for the time being fixed by the Board, on such duty till the date of payment of the said duty :

Provided that where the bill of entry is returned for payment of duty before the

commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be date of such commencement of the purpose of this section.

Provided further that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.

17. Learned counsel submitted that sub-section (2) has been inserted by Customs (Amendment) Act (55 of 1991). Thus, before Sub - Section was inserted, there was no question of demanding the interest. In the instant case, the goods were cleared for Home Consumption prior to insertion of Sub-section (2) and, therefore, there cannot be any question of demand of interest. It was also submitted that sub - clause (1) refers to 'assessment' and not to the 'provisional assessment'. According to the learned Counsel, the Bill of Entry should have been assessed finally. Liability would have commenced only after making final assessment and not otherwise. Learned counsel drew our attention to Section 28(AA) of the Customs Act which reads as under :

Section 28(AA) :-

Interest on delayed payment of duty :-

Where a person, chargeable with the duty determined under sub-section (2) of Section 28, fails to pay such duty within three months from the date of such determination, he shall pay in addition to the duty, interest at such rate not below ten per cent, and not exceeding thirty per cent per annum, as is for the time being fixed by the Board, on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty :

Provided that where a person chargeable with duty determined under sub-section (2) of Section 28 before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

18. On the aforesaid relevant provisions of law, it was submitted before the Court that on import of goods, Section 46 of the Customs Act cast duty on the importer to file Bill of Entry. No dispute is raised before the Court that the petitioner has not filed Bill of Entry for Home Consumption. As indicated, in view of Section 17 of the Customs Act, on filing of Bill of Entry u/s 46, the proper Officer was required to assess the duty payable on the goods at the earliest. No doubt, in the instant case, provisional assessment has been made according the provisions contained in the Customs Act. It is required to be noted that in the instant case, assessable value as set out is reflected on the record of the Revenue as well as on record of registration of the Contract under the Regulations for assessment



under heading No. 98.01 of the Tariff Act. The regulations if read, it becomes very clear that before importation, the importer has to apply in writing to the proper Officer at the port where the goods are to be imported or where the duty is to be paid for registration of the contract. Rule (5) casts duty on the applicant to submit the documents as mentioned therein. The importer has to, within three months from the date of clearance for home consumption of the last consignment of the goods or within such extended period as the proper Officer may allow, submit a statement indicating the details of the goods imported together with necessary documents as proof regarding the value and quantity of the goods so imported in terms of these Regulations and any other document that may be required by the proper Officer for finalisation of the contract.

19. In view of the affidavit in reply before us, a letter dated 15th May, 1992 addressed to the Assistant Collector of Customs, Surat along with documents ( all xerox ) was produced to point out that documents were received by the Officer on 15/05/1992. It is clearly mentioned that reconciliation statement was not submitted in view of the order passed by the Tribunal in Appeal. However, as it was understood that as reconciliation statement was required to be filed without waiting for the decision, reconciliation statement was forwarded indicating Sr. No., Name of the Vessel, Bill of Entry No., Date, Numbers of Packages, Description of Goods, CIF value, Amount of Duty Paid, Duty Payable etc. It was also submitted that the machinery has been installed since long. Not only that but the Revenue is also collecting the excise duty on goods which are being manufacturing by the petitioner-company and that is within their knowledge and with a view to harass the petitioners, it is stated that Installation Certificate is not produced or the proof of import of plant and machinery is not produced. Further, we were told that the Assistant Commissioner of Customs has addressed a letter to the Assistant Commissioner of Central Excise, Surat on 03/08/1998 for verification of Machinery imported under 98.01 by M/s. Essar Steel Limited, Hazira making a grievance that till date that Office has not received verification letter from Assistant Commissioner of Central Excise, Div. IV, Surat. It was specifically mentioned that finalisation of concerned bills of Entry is pending for want of certificate. The petitioner-company has already installed the machinery and it is the Asst. Commissioner of Central Excise who is not forwarding to the Asst. Commissioner of Customs, the required details and a grievance is made in affidavit in reply that the petitioner is not submitting the Installation Certificate. After the aforesaid letter, on 18/08/1998 a letter was addressed to the petitioner, calling upon him to furnish Installation Certificate obtained from Central Excise Authority for the purpose of finalisation of contract in terms of para-7. When the Asst. Commissioner of Customs by writing a letter requesting Asst. Commissioner of Central Excise, Surat to send verification letter with regard to the machinery imported, the Asst. Commissioner, Central Excise was not forwarding information and yet the petitioner-company was called upon to approach the Asst. Commissioner of Central Excise and produce the certificate. We are told that offices of the Asst. Commissioner of Customs, Surat

and Asst. Commissioner of Central Excise are not only in the same city but in the same building. We fail to understand as to why there is no coordination between the two departments. It is clear case of avoidance of duty by the Officers. On behalf of the petitioners, it was submitted that on 22/12/2000, the Deputy Collector of Central Excise, Surat was requested for installation certificate, yet, they have not issued. It is required to be noted that as indicated above, it was the duty of this Department to issue Installation Certificate as per the Circular and yet, it is not being issued and even till today the matter is pending. Copy of the letter is ordered to be taken on record.

20. Before us, a Circular dated 14th June, 1991 addressed to all Collectors of Customs by the Ministry of Finance, on the subject of finalisation of Project contract, delay in submission of reconciliation of statements, improvement in contract procedures and Customs Control etc. is produced. Detailed letter was written in pursuance of recommendations contained in 16th report of Public Accounts Committee ( 1988-89, 8th Loksabha ), DGI ( Customs & Central Excise ). It was clearly pointed out that there are prolonged delays in the submission of reconciliation statement after the completion of the last importation. Plant site verifications to check proper utilization of imported goods are not being frequently done and for other items mentioned therein, the Board has taken a serious view of the matter and has indicated its desire that all Collectors of Customs should make continuous efforts to liquidate the pendencies in this area of the work. The Circular says as under :-

(1) On completion of the prescribed period after the last importation, Bond enforcement notices should invariably be issued to those importers who have failed to submit the reconciliation statements.

(2) Senior officers including Collectors should monitor in detail the pendency position at regular, say monthly, intervals.

(3) In those cases where the demands are confirmed, coercive steps should be taken and the provisions of Section 142 of the Customs Act, 1962 should be invoked if the amounts are not paid by the importer within a reasonable time.

(4) Plant site verification should regularly be done to ensure proper utilization of the imported goods for the projects for which these have been imported.

21. In view of this document, we put a pointed query to the learned counsel appearing for the Revenue that whether the officers of the Revenue are interested in delaying the finalisation of assessment or the petitioner is interested in delaying the finalisation of the assessment ? The learned counsel for the Revenue stated that within a period of 21 days, there will be a final assessment. We pointed out the date on which the petition was filed and notice was issued and requested the counsel to calculate the days from the date of filing the petition and date of hearing. There was no stay granted by the Court sofar as the final assessment is concerned. The learned counsel fairly stated that the Revenue could have made assessment finally. It appears that pendency of

the proceeding for one or other reason is taken very lightly and the department is not proceeding with the matter. The Revenue suffers a lot. If the assessment would have been made finally as required under the law, by the time, the matter is heard, probably the Court would not have been required to decide the matter on the merits. Mr. Dushyant Dave, learned counsel appearing for the petitioners submitted that so far as the petitioners are concerned, they complied with all requirements and it is for the Revenue to make final assessment. On behalf of the Revenue, it was submitted that no doubt, there was provisional assessment but they have power to re-assess that provisional assessment, and therefore, the impugned demand notice was issued by adding the service charges as per the directions of the Hon'ble Apex Court. Section 18 contemplates provisional assessment of duty. The manner in which the provisional assessment can be made is indicated. Section 18 does not refer to reassessment of the provisional assessment. Section 17 refers to assessment. In view of clear definitions and distinction between the assessment and provisional assessment and also the fact that law does not provide for mechanism of reassessment of provisional assessment, the learned counsel for the Revenue is not right in stating that the letter impugned can be considered as reassessment of the provisional assessment. After the provisional assessment was made, it was bounden duty of the Revenue to make final assessment. Learned counsel appearing for the petitioners drew our attention to the decision of the Apex Court in case of Samrat International (P) Ltd. Vs. Collector of Central Excise, Hyderabad, and submitted that unless and until there is final assessment, there is no question of demanding interest at all. In the instant case, the amount of duty paid by the petitioner-company to the Revenue was obviously provisional and subject to the result of the final assessment that may be made by the Officer and without final assessment being made, there is no question of fastening of the liability of interest.

22. Before making final assessment after the provisional assessment, notice must be issued to the person against whom the assessment is to be made. Natural justice requires that a person must be heard before making an assessment. An opportunity of being heard is in consonance with the principles and rules of natural justice. If notice is not given, the person is likely to be prejudiced when the order is made. Therefore, before the order is made, notice is a condition precedent. In the instant case, provisional assessment was made with regard to the service charge. There was a serious dispute in the instant case. There is a registration of contract. The application was required to be accompanied by original deed of contract together with a true copy thereof, the import trade control licence wherever required and an approval list of items from the concerned Sponsoring Authority. The applicant was also duty bound to furnish other documents as may be required by the proper Officer. After the installation or after the erection of a machinery, it was for the officer concerned to verify and yet nothing is done in the matter by the Revenue.

23. In case of UNION OF INDIA AND OTHERS Vs.MADHUMILAN SYNTEX PRIVATE

LIMITIED AND ANOTHERS reported in (1988) 3 SCC p.348, in para-7, the Apex Court considered the submission with regard to determination of the amount of short levy and not against the alteration in the classification list. The Court considered the same as under :-

" In this connection, it is submission of Dr. Chitale that this notice merely asked the petitioners to show cause against calculation or determination of the amount of short levy and not against the alteration in the classification lists on the basis of which short levy was alleged and hence, in respect of the said period from August 15, 1983 to February 6, 1984 the show cause notice is liable to be struck down. In our view, the submission of Dr.Chitale deserves to be accepted."

In para 8, the Court pointed out as under :

" The notice set out as an established fact that the classification lists submitted by the petitioners had been modified by the Assistant Collector, Central Excise, Ujjain and the only matter with respect to which the petitioners were asked to show cause was with regard to the quantification of the amount of the short levy and consequently, the amount which was liable to be recovered from the petitioner (1). This notice, therefore, cannot be regarded as a show cause notice against the modification of the classification lists in respect of the aforesaid period. In these circumstances, the show cause notice is bad in law and no legal effect as far as the earlier period is concerned."

The Court struck down the notice insofar as the period upto February, 1984 is concerned.

24. Learned counsel relying on this Judgment, submitted that in the instant case, no hearing is given to the petitioner-company before making a demand; no final assessment is made and as demand notice is issued without hearing the petitioner, the same is required to be quashed and set aside.

25. The learned Single Judge of Calcutta High Court, (Mrs. Ruma Pal, J, as She then was) in case of NAYEK INDUSTRIES PRIVATE LIMITED VS. UNION OF INDIA, reported in 1991 (56) E. L. T. 31 (Cal), in para 20, has observed as under :

"There was no final approved classification list. The condition precedent to the exercise of power u/s 11A(1) of the Act is absent."

For the reasons aforesaid, the learned Judge upheld the contention of the petitioner and held that the show cause notice was issued without jurisdiction.

26. Relying on this, the learned Counsel, Mr. Dushyant Dave, appearing for the petitioner submitted that it is a well accepted principle that unless and until the finality is reached, there is no question of making any demand. Therefore, he submitted that there is no question of recovery of any amount.

27. As discussed earlier, the petitioner-company placed before the respondents entire statement with details. All necessary documents were produced. Prices at which goods were purchased have also been indicated. Therefore, considering

the language of Section 14, it is difficult to understand as to why the Revenue has not made the assessment finally. Mr. Dushyant Dave, learned counsel appearing for the petitioners submitted, in view of the Judgment of a Constitutional Bench in case of J.K. SYNTHETICS LIMITED Vs. COMMERCIAL TAXES OFFICER reported in (1994) 4 S.C.C., 276, that the provisions relating to the charging of levy in a Statute are provision of substantive law.

28. The Apex Court in case of India Carbon Ltd. etc. Vs. State of Assam, , considered the various decisions on the subject and in para 7 pointed out as under :

"This proposition may be derived from the above; Interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf."

29. Learned Counsel submitted that in view of Section 18, it is clear that the assessment was provisional and bill of entry is to be returned to the importer for payment of duty only after making final assessment. As per Section 18, the proper Officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

30. Learned counsel for the petitioners submitted that in the instant case there was provisional assessment. There is no dispute that Bank Guarantees were furnished and a Bond was also executed towards the security for the payment of deficiency, if any arises. However, he further submitted that the Assessing Officer must assess duty finally and only after making final assessment, the Proper Officer is entitled to demand the difference of duty if the duty already paid as per provisional assessment is less. In the instant case, as the procedure is not followed for making final assessment, the demand cannot be raised and it is on such difference, if not paid, amount of interest is to be charged. After final assessment being made, the proper Officer could have returned the Bill of Entry for making payment and not before that.

31. In case of J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, , the Apex Court pointed out as under :

"When a statute levies a tax it does so by inserting a charging by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provision meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging of section which fixes the liability is strictly construed.

The penalty provisions in a statute have also to be strictly construed. The considerations which may weigh with the authority as well as the court in construing penal provisions would be different from those which would weigh in construing a provision providing for payment of interest on unpaid amount of tax which ought to have been paid. The rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must be so construed as would effectuate the object and purpose of the statute and not defeat the same."

32. On behalf of the Revenue, learned Counsel submitted that in view of the interim order made by the Apex Court, this court should not interfere insofar as the amount of interest is concerned. Mr. Dushyant Dave, learned counsel appearing for the petitioners submitted that whenever there is an interim order, it is always subject to the final order that may be passed in the appeal. He drew our attention to Para 14 of the Apex Court's Judgment reported in Haribhau Dagdu Tandale Vs. Industrial Co-operative Association Ltd. and others, for his submission that the Court hearing the appeal has right to decide the matter. The interim order is expressly liable to be confirmed or vacated by the authority who passed the interim order.

33. Learned counsel has submitted that the Court has expressly pointed out that the interim order is expressly liable to be confirmed or vacated by the authority who passed the interim order. He submitted that while admitting the appeal if any order is passed at the interim stage, the order is required to be confirmed or modified as the case may be. He submitted that in the instant case, the Court while rejecting the application, considering the facts and circumstances, even did not award the costs. He submitted that while disposing of the appeal, the Court has not made a reference to the interim order and according to the learned Counsel, as order is not confirmed in appeal, there is no question of interest.

34. Learned counsel for the petitioner further submitted that the order made by the Apex Court is placed on the record at Annexure D, page 50. After hearing the Counsel, the Court admitted the appeals. Order made by the Court reads as under :

"On the application for stay, we think, it is not appropriate to order stay of the refunds. The respondent shall be entitled to the refund subject to the furnishment of a bank guarantee for the amount of the refund, to the satisfaction of the Collector or Customs (Preventive) Ahmedabad. A fresh bank guarantee, in lieu of existing bank guarantee, shall be furnished respondent shall ensure that the guarantee shall for the entire period of the pendency of these appeals if necessary by renewal from time to time. The (sic) shall be strictly subject to this condition."

"The refunds shall be made within two weeks from the date of the furnishment of the bank guarantee or within a six weeks whichever is late. If the appellants succeed in appeals, the amount of refund obtained pursuant to order shall be

made good and restituted back to the appellants by the respondent together with interest thereon @ 18% per annum from the date of the refund."

"The appeals shall be listed for final hearing in 2nd week of January, 1992. Liberty to file additional papers, if any, within six weeks from today."

35. Thus on the application for stay, while disposing of the application, the Apex Court made the order and at the same time, the appeals were ordered to be fixed for hearing in 2nd week of January, 1992. It is for the petitioners to obtain clarification from the Apex Court since, the Highest Court has made the order on the application while disposing of the application. In view of the strict conditions made in the order and use of word `shall', we are not in a position to agree with the learned counsel for the petitioners. If petitioners want to get clarification, it will be for them to approach the Apex Court.

36. So far as Rule 7 is concerned, it requires finalisation of the contract within three months from the date of clearance for home consumption.

37. Learned counsel for the Revenue had to state very fairly that the statement indicating the goods together with the documents has been received by the Revenue and in view of this fact, the Central Board of Direct Taxes was required to issue certificate. It appears that the Asst. Commissioner of Customs and Asst. Commissioner of Central Excise have looked at the letter with a casual approach, despite the fact that every thing was with the Revenue. It is the Revenue which has not made the final assessment and the matter is kept pending. Therefore, it is a fit case wherein the Secretary, Ministry of Finance, New Delhi, should look into the matter and to make a report to this Court, and, if he finds that the Officers have not strictly complied with the circular, then, it will be for him to take appropriate action in the matter.

38. On behalf of the Revenue, the learned counsel submitted that the Apex Court having decided the matter, nothing was required to be done by the officers of the Revenue. According to his submission, the amount as indicated in the order is required to be added. He further submitted that the question whether amount as directed would be payable by the petitioner-company, since there is no reference in the Judgment, is not the question to be decided by this Court. Learned Counsel submitted that u/s 47(2) of the Act the moment bill of entry is returned for payment of duty, interest is payable. He further submitted that the petitioners with a view to avoid liability, is challenging the action on one or other ground and is delaying the matter and the petition is required to be rejected on the ground of delay and laches. It is required to be noted that in the instant case, before the Apex Court there was no question with regard to the provisional duty but the real question was with regard to the consultancy fees / service charges and the Court pointed out that;

"The expenditure was needed to be incurred for dismantling the plant and making it ready for delivery has to be added to the value of the plant. The specialist supervision for dismantling of the plant and also engineering and

consultancy services for this purpose will have to be added to the value of the imported plant. Since there is no clear indication as to how the various services have been valued separately, 10% of the amount of DM 23,100,000 should be added to the value of the plant on this account."

39. It is an admitted position even before this Court that only provisional assessment is made and the respondent has sworn an affidavit stating that there is provisional assessment and therefore, the learned counsel is not right in stating that in view of the order made by the Apex Court, straight way demand can be made but they have to make assessment finally as laid down in the Statute. We have indicated that the question of interest would arise only after duty is finally assessed and not before that. Section 18 makes it clear and we have discussed that earlier. Learned counsel is also not right in stating that the matter is required to be rejected on the ground of delay and laches as till today there is no final assessment as indicated in Section 18 of the Customs Act. There is only provisional assessment. Therefore, it will be for the respondents to make the assessment in accordance with law. The respondents will have to hear the petitioners and will have to make a final assessment in accordance with law.

40. Learned counsel for the Revenue further submitted that though there is no final assessment however reassessment of the provisional assessment made in 1997 being not challenged, this petition is not maintainable. It is required to be noted that the petitioners will have to pay the duty as per the final assessment and not as per the reassessment of provisional assessment. It is for the Revenue / Respondents to make the final assessment. It is required to be noted that even during pendency of this petition, the petitioner-company has made payment of Rs.50 lacs vide TR - 6 No.1301 / 5.1.2001. The petitioners have placed on record a letter along with Chalan in this behalf. This was with a view to show that the petitioner-company is willing to cooperate with the Revenue but for one or other reason, Officers of the Revenue are not proceeding with the matter and is straightway issuing notice without making final assessment. The impugned notice, at Annexure I, dated 28/11/2000, is quashed and set aside for the reasons stated hereinabove.

41. In view of what is indicated above, we are of the view that the Revenue must complete the assessment within a period of fortnight from today. We were told by the learned counsel that they will complete the assessment. But, we are of the view that a longer period should not be granted for making final assessment in the facts and circumstances of the case.

42. In the result, we allow this petition to the aforesaid extent.