

(2000) 07 GUJ CK 0086

In the Gujarat High Court

Case No : Special Civil Application No. 167 of 2000

Hindustan Coal Movers Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-07-2000

Acts Referred:

Citation : (2000) 07 GUJ CK 0086

Hon'ble Judges : P.B. Majmudar, J;B.C. Patel, J

Bench : Division Bench

Advocate : Vikram Nankani and Kamal Trivedi, for Trivedi and Gupta, for the Appellant; Akshay H. Mehta and Asim J. Pandya, for the Respondent

Final Decision : Allowed

Judgement

B.C. Patel, J.—Petitioner No. 2, a shareholder of petitioner No. 1 Company, known as "M/s. Hindustan Coal Movers Private Limited", a Company incorporated under the Companies Act, 1956, having its registered office at Jamnagar, has filed this petition under Article 226 of the Constitution of India, raising a grievance about illegal assessment of value of the consignment of metallurgical coke imported by the petitioner no.1 - Company.

2. Short facts, which are relevant to decide this petition, are as under.

3. The petitioners imported metallurgical coke (hereinafter referred to as "the Coke") in October, 1999. The Bill of Entry indicated the price at US\$ 92 per Metric Tonne. It appears that the Revenue was of the opinion that the assessee has not properly valued the goods. In the opinion of the Revenue, value of the Coke should be US\$ 65 per Metric Tonne. The petitioner being in urgent need of the Coke, furnished bank guarantee and the goods were cleared. The second consignment arrived at Okha port in January, 2000. The Revenue stuck to the earlier opinion and as the goods were not cleared, the present petition came to be filed.

4. During the hearing of the matter, ex parte order was passed, however, later on

Union of India placed an order passed by the Central Excise & Gold Appellate Tribunal, New Delhi (hereinafter to be referred to as "CEGAT") in appeal nos. C/692 to 697/98-AD and considering submission on that basis, the Court, modified the order. On behalf of the Revenue, relying on the aforesaid order, submissions were made before the Court. It was stated that anti-dumping duty will be levied as per the decision rendered by the CEGAT as referred in para 12 of its judgment. The Division Bench expressed an opinion at that stage that the petition is not required to be entertained. The Bench made it clear that in case of difficulty, either side can move the Court by filing an appropriate application. It was stated on behalf of the Union of India that the anti-dumping duty will be charged as per the decision of the Tribunal and necessary instructions will be issued accordingly. It was also stated that if the decision is challenged further, the parties will have to abide by the decision. After passing the aforesaid order of 28th January, 2000, an application was submitted to revive the petition, which was ultimately granted. The Division Bench heard the matter on 6.3.2000 and issued a rule. By way of ad-interim relief, the Court directed the respondent authorities to assess the Bills of Entry at Annexure B to the petition on the basis of the duty imposed by notification under Rule 18 of the Customs Tariff (Anti-dumping Duty on Dumped Articles) Rules, 1995. as may be applicable to such bills. It appears that thereafter Civil Application No. 2957/2000 was preferred. The assessing authority was required to consider the question of release of portion of the goods on the basis of the payment of Anti-dumping duty which may be provisionally fixed under the Customs Act. The Court observed that this will be done without reference to the amount of the customs duty paid on the basis of the valuation declared by the applicant. The Court also observed that the provisional assessment for the purpose of anti-dumping duty will be made as agreed at the value of US\$ 65 per Metric Tonne.

5. The parties have placed on record affidavits and other documents on which reliance is placed.

6. On behalf of the petitioners, it is submitted that the office of the Assistant Commissioner of Customs, Jamnagar, on 4.2.99 addressed a letter to the Commissioner of Customs, Gujarat, Ahmedabad in the subject mater. The letter clearly reveals that earlier there were cases wherein several parties imported Coke, value of which as indicated was varying from US\$ 87.5 to US\$ 93 per Metric Tonne. It was also mentioned in the letter that except M/s. Arihant Trade Limited, the bills of entry were assessed finally, whereas in the case of M/s. Arihant Trade Limited, the bills of entry were assessed provisionally without any bank guarantee. Considering the facts, the Assistant Commissioner of Customs expressed an opinion that if the insistence upon the bank guarantee is there, the same would cause financial hardship to the importers. The bills of entry are being assessed provisionally without any bank guarantee keeping the latest trend of Coke value and the same is to be finally assessed at its correct value as may be determined by Director of Valuation, Mumbai. In the month of February, 1999, it was clear to the Revenue that there were several importers who imported Coke

at a price varying from US\$ 87.5 to US\$ 93 per Metric Tonne. It is also clear that the Assistant Commissioner was waiting for the value that may be determined by the Director of Valuation, Mumbai. Till today, no material is placed before the Court about the valuation fixed by the Director of Valuation, Mumbai.

7. It appears from the record that one Rashtriya Ispat Nigam Limited imported Coke in February, 1999. Taking into consideration the value indicated by the Rashtriya Ispat Nigam Limited, the officer at Ahmedabad addressed a letter on 30.9.99, directing to assess the bill of entry of Coke of Chinese origin provisionally taking the bank guarantee towards anti-dumping duty on the basis of US\$ 65 per Metric Tonne as the import price. It is required to be noted that in the letter dated 30.9.99, it is specifically mentioned that the investigations are under progress to find out the actual price. Without any finding, it seems that this letter was written and the subordinate officers were directed to follow this letter by passing the provisions of the Customs Act, 1962.

8. The Revenue has not placed on record as to from which Company, the Rashtriya Ispat Nigam Limited imported the Coke. There is no material on record as to what was the nature and quality of the Coke. There is nothing on the record that the Revenue compared the Coke imported by the petitioner with the Coke imported by Rashtriya Ispat Nigam Limited. Monetary value of the Coke depends on various chemical constituents of the Coke. If the Coke imported by the Rashtriya Ispat Nigam Limited and the Coke imported by the petitioner both were compared by an expert and thereafter an opinion was rendered to the effect that the Coke is of the same nature and quality then some doubt can be raised. Natural Coal is the main ingredient of the Coke and therefore, the value of the Coke will depend on the value of the natural Coal. Hence, in the absence of any opinion of an expert about the quality of the Coke, one cannot jump to a conclusion that because the Rashtriya Ispat Nigam Limited imported at the rate of US\$ 65 per metric tonne, the value of the Coke which was imported by the petitioner should be the same.

9. Who is "Proper Officer" is stated in sub-section (34) of Section 2 of the Customs Act, which is as under.

"Proper Officer" in relation to any functions to be performed under this Act means officer of Customs who is assigned those functions by the Board or the Commissioner of Customs."

Section 17 refers to 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, for 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, brokers' 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 relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods 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 reassessed to duty."

Thus, for the purpose of assessment, it is absolutely necessary to see that without undue delay, the goods are examined and if the officer is of the opinion that the same is to be tested then the same may be got tested. It is open for the proper officer to call upon the importer to produce the relevant material for the purpose of coming to a conclusion as to what should be the exact value of the material. In the instant case, section 17 has not been followed.

10. It is contended by Mr. Pandya that in the instant case, there is provisional assessment of duty u/s 18 of the Customs Act, which reads as under.

Sec.18: Provisional Assessment of Duty :

(1) Notwithstanding anything contained in this Act, but without prejudice to the provisions contained in section 46-

(a) Where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as the case may be; or

(b) Where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or

(c) Where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further inquiry for assessing the duty, 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 payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then -

(a) In the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short, or is in excess of (the duty finally assessed), the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(b) In the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty."

On behalf of the petitioners, it was submitted that proper officer has not called upon the petitioner to produce any document or to furnish any information necessary for assessment of the duty on the imported goods. It is not the case of the Revenue that the proper officer was of the view that the imported goods are required to be tested for the purpose of assessment of the duty. The importer has produced necessary material and has furnished whatever information he had for the assessment of the duty. What Mr. Pandya contends is that in a given case, it may not be possible for the proper officer to examine the goods himself. He may not be an expert and therefore, it is open for him to seek the assistance of an expert. Mr. Pandya therefore submitted that in the instant case, the assistance of Valuation Officer was sought for. Against this, on behalf of the petitioners it is submitted that prior to February, 1999, Valuation Officer was requested in this behalf to send his opinion. It is further submitted that it is not the case of the Union of India that a sample of the Coke imported by the petitioners was forwarded to the Valuation Officer as also the sample of the Coke imported by Rashtriya Ispat Nigam Limited to compare the quality and to determine the valuation thereof. It seems that merely on the mandate of the Joint Commissioner of Customs, Gujarat, dated 30.9.99, the officers of the Revenue are insisting for anti-dumping duty and not on the basis of his own assessment.

10. When the legislature has cast a duty on the proper officer to assess the assessee, then he has to assess in accordance with the provisions. The proper officer has not called upon the petitioner to produce documents under Sub Clause (a) or (c) of Sub Section (1) of Sec.18. The proper Officer has neither held inquiry nor has submitted the goods to the expert for opinion. Proper Officer has in fact not taken any steps and is waiting for price to be determined by Valuation Officer. Relying on the letter dated 30.9.99, the officers of the Revenue are insisting for anti-dumping duty and not on the basis of his own assessment.

11. When the legislature has cast a duty on the officer to assess an assessee, then he has to decide the matter himself. If he is of the opinion that the assistance of expert is required, then it is for him to send the goods for valuation and in the absence of that merely relying on the mandate of some superiors, he cannot call upon the assessee to pay the duty. In the instant case, the Joint Commissioner himself was not certain about the value and though investigation was under progress to find out the actual price, the letter was written to levy anti-dumping duty. There must be material before the competent officer to write a letter. In the instant case, apart from the letter of which we have made a reference addressed by the Assistant Commissioner of Customs to the Commissioner of Customs, dated 4.2.99, in the petition at pages 29 and 30, the petitioner has pointed out that in all 20 importers including Tata Iron and Steel Limited, Birla VXL Ltd. and others imported Coke on different dates. Annexure :D, contains 15 names of the parties who imported the Coke, the price of which was fixed between US\$ 87.5 to US\$ 93 per metric tonne CIF. The port of the import is not the same. Some parties imported through Haldiya Port, some imported through Okha and Kandla port. Even at Pune and Bangalore where there are Import Container Depot, the goods were cleared at the price indicated above. Annexure D refers to five other parties who imported Coke, the price of which, was between US\$ 86.71 to US\$ 92.62 per metric tonne. The ports are also different. What is interesting is that after the aforesaid letter dated 4.2.99, in some of the cases, Coke was imported and yet they were permitted to clear without any anti-dumping duty accepting the price at US\$ 86.71 to 93. It is submitted before us that there is no question of anti-dumping duty as the price is more than Rs. 4673/per metric tonne. The petitioner would require to pay anti-dumping if the price is less than Rs. 4673/per metric tonne.

12. So far as the valuation is concerned, ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs. Where the Revenue has succeeded in showing that the apparent tenor is not real and the price shown in the invoice does not reflect the true sale price, only then the question of exercise would arise. Learned counsel, relying upon the Apex Court judgment in the case of *Mirah Exports Pvt. Ltd. Vs. Collector of Customs*, , submitted that that was the case of under-valuation and the principle laid down by the Apex Court in that decision will apply in the instant case also. The Apex Court pointed out in para 12 as under.

"The legal position is well settled that the burden of proving a charge of under-valuation lies upon Revenue and Revenue has to produce the necessary evidence to prove the said charge. "Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs" and what is to be examined is "whether the revenue has succeeded in showing that the apparent is not the real and that the price shown in the invoices does not reflect the true sale price. [See: *Union of India v. Mahindra & Mahindra*, (Supra), at P. 487]"

We are aware that it is a matter wherein the Union of India is eager to collect the revenue from the importers. The question is whether proper officer has applied his mind, his own mind for the purpose of assessment either provisionally or final. Even after admission of this matter, proper officer has not thought it fit to complete the assessment. He could not collect the price determined by the Directorate of Valuation. On a specific question put to the learned advocate as to whether the proper officer has forwarded any sample to the Valuation Officer or not, the learned advocate fairly stated that no such sample has been forwarded. He fairly submitted that the Revenue relies on the price as indicated by Rashtriya Ispat Nigam Limited.

13. It is required to be noted that the quantity imported by Rashtriya Ispat Nigam Limited is not indicated anywhere. It is a matter of common knowledge that when there is a transaction of bulk, the price would be different. Merchants who are not dealing in bulk but are dealing in small quantities have to pay more price because they do not get several concessions. One has to look at market trends. If there is excess stock with the supplier, he would like to see that by disposal of the stock, he gets the amount at the earliest so as to see that before the quality of the goods deteriorate, he can get the price of the goods. We do not enter into various aspects of the trend of the market which play more important role in fixing the price. It is an agreement between the buyer and the seller and to say that both are dishonest, there must be sufficient evidence on record. In this matter, sufficient opportunity was with the Revenue. Yet nothing has been produced before the Court.

14. At the fag end, it was submitted that the Valuation Officer will determine the value and the Court should give direction to the Valuation Officer. A request is made to the Court to give direction if the officer is not acting in the interest of the Revenue, it is for the Revenue to take appropriate action against their own officer as he is not active and prefers to remain inactive.

15. In view of these facts and circumstances, we direct the Union of India to release the goods on taking a bond from the petitioners and we further direct the petitioners to file an undertaking in this Court. We further direct that the exercise of assessment will be completed by the Revenue officers within a period of 15 days from the date of receipt of the writ. The undertaking shall be filed by all Directors of the Company within a week. At the time of making assessment, the observations made by this Court in this judgment shall not be born in mind by the Proper Officer and he shall make assessment independently without being influenced by the order passed by this Court.

16. Copy of undertakings filed in this Court shall be given to the counsel for the Union of India and the officer concerned under the signature of learned advocate on record.

17. The petition stands allowed. Rule is made absolute accordingly.