
(2005) 04 GUJ CK 0079

In the Gujarat High Court

Case No : Special Civil Application No. 16129 of 2004

Shiv Marine Industries Pvt. Ltd.

APPELLANT

Vs

Asstt. Commissioner

RESPONDENT

Date of Decision : 08-04-2005

Acts Referred:

Customs Act, 1962 — Section 17, 17(3), 46, 50, 85

Citation : (2005) 2 GLR 1808

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Y.M. Thakkar, for the Appellant; Jitendra Malkan, for Respondent
Nos. 1-2, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—This petition has been filed challenging the order of final assessment stated to have been made on 16.12.2002 and communicated to the Petitioner on the same day as per Annexure - "D".

2. The Petitioner Company who is carrying on business of dismantling and demolishing of condemned ships at S.B.Y., Alang, entered into a memorandum of agreement dated 28.11.2002 to purchase a vessel named M.V. LINCOLNSHIRE. In pursuance of the said agreement, a notarized bill of sale came to be issued to the Petitioner on 29.11.2002. It is the case of the Petitioner that for ensuring that the vessel is beached timely it agreed to a provisional assessment and accordingly paid custom duty on 5.12.2002. Thereafter, the Petitioner Company was served with the aforesaid communication dated 16.12.2002 intimating that final assessment has been framed on the same day i.e. 16.12.2002. The petitioner Company corresponded with Respondent Authorities seeking an opportunity of hearing, but the request was turned down on the ground that as the bill of entry has been finally assessed, the Petitioner could not be granted any opportunity of hearing. It is in the aforesaid back drop of facts that the Petitioner has approached this Court.

3. Heard Mr.Y.M. Thakkar, Id. Advocate appearing on behalf of Petitioner and Mr. Jitendra M. Malkan, Id. Advocate appearing on behalf of Respondent Authorities. Taking into consideration the controversy between the parties, the matter is taken up for final hearing and disposal today. Rule. Mr. Malkan waives service of rule.

4. The facts narrated hereinbefore are admitted. In the affidavit in reply, the Respondent No. 1 Assistant Commissioner of Customs, Bhavnagar, states that the only reason provisional assessment was carried out was non-production of original import documents like original legal bill of sale and original invoice, etc. That the Petitioner had neither disputed payment of duty during the course of provisional assessment nor raised any protest at the time of submission of the original documents before the proper Officer. The said Respondent has also disputed the averments made on behalf of the Petitioner that provisional assessment was made for timely beaching of the vessel. The Respondent further goes on to state that "under the circumstances also, the final assessment is not contrary or adverse to the Petitioner". In the affidavit in reply, it is further stated that the Petitioner has not pointed out on merits how the assessment is incorrect. According to the Respondent, therefore, there was no violation of principle of natural justice for the act of making final assessment by the Superintendent was not in any way violative of any Articles of the Constitution or any provisions of the Customs Act, 1962, (the Act) or the Rules framed thereunder.

5. In paragraph No. 8 of the affidavit in reply, the following averments are made by the Respondent :

It is most respectfully submitted that it appears that the Petitioner has primarily preferred this Petition to circumvent the time bar specified in Customs Act, 1962 for filing appeal against assessment order before the statutory authority specified in Customs Act, 1962. The Petitioner has rushed to invoke writ jurisdiction of Hon"ble Court without exhausting the provided statutory remedies. The grounds narrated in paragraph 4 of the petition are eyewash for the purpose of somehow covering up their failure to timely file appeal within the mechanism provided in the Customs Act, 1962 by offering vague grounds to explain this failure. The grounds being advanced are of general nature and are not supported by any concrete evidence so as to attract writ jurisdiction in the matter. Thus, the limited purpose of the present petition is only to get over the limitation bar.

6. Section 17 of the Act deals with Assessment of Duty and 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 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 re-assessed to duty.

7. On a plain reading of the provisions, it is apparent that assessment of duty has to be carried out in accordance with the procedure prescribed by Section 17 of the Act. It could not be disputed on behalf of the Respondent that any such assessment is an appealable order. In fact, in the affidavit in reply, Respondent himself accepts that the Petitioner has a statutory right of appeal when he refers to the limitation and the further averments that the petition is filed to get over the period of limitation.

8. In response to such averments made in the affidavit in reply, the Petitioner has categorically stated in paragraph No. 5 of the affidavit in rejoinder that the Petitioner was not in a position to prefer the appeal as the order of final assessment had not been communicated to the Petitioner. As can be seen from Annexure - "D" which is communication dated 16th December 2002, it is only an intimation that final assessment has been framed on 16.12.2002. This is more than clear from the last sentence of the said communication.

9. On merits, the Petitioner has stated in paragraph No. 2.3 of the petition that it was not liable to pay the duties in relation to bunkers, fuel and oil contained in vessel, machinery, etc., and the same was required to be classified under the Head 89.08. Whether the Petitioner is correct or not on merits, is not required to be decided by this Court at this stage. The appropriate stage would have been before the Respondent Authority prior to making of the final assessment. The Petitioner could have done this only in the event it was called upon to tender its explanation as required by provisions of Section 17(3) of the Act. In absence of any such opportunity, the Petitioner could not place any facts or evidence on record, nor could it make any submission in this regard.

10. The Respondent Authority is a quasi-judicial authority and the act of framing the assessment is definitely a quasi-judicial function whereby he is required to apply his mind to the facts and evidence on record and, after providing adequate and reasonable opportunity to an assessee, frame an assessment in accordance of law. In the present case, it is apparent that not only there is violation of principle of natural justice, but the final assessment is framed contrary to the provisions of the Act.

11. The Respondent Authority also does not state that the final order of assessment has been served on the Petitioner. It only reiterates that the Petitioner was intimated about the final assessment. In these circumstances, apart from the absence of opportunity of hearing, even if the Petitioner wanted to challenge the order of final assessment, in absence of service of the order, the Petitioner is virtually denied the statutory right which it has by way of appeal before the appropriate forum.

12. In these circumstances, it is apparent that the final assessment which is stated to have been framed on 16th December 2002 cannot be permitted to stand and the same is hereby quashed and set aside. The intimation dated 16th December 2002 is also as a consequence quashed and set aside. It will be open to the Respondent Authority to frame final assessment in accordance with provisions of Section 17 of the Act after giving a reasonable opportunity of hearing to the Petitioner. Needless to state that such final assessment order shall be served upon the Petitioner after the same is framed in accordance with law.

13. In the result, the petition is allowed to the aforesaid extent. Rule made absolute. There shall be no order as to costs.