

(1999) 08 MAD CK 0042

In the Madras High Court

Case No : Writ Petition No. 3612 of 1991

Vikrant Tyres Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 27-08-1999

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Customs Act, 1962 — Section 14, 14(1A), 27, 38(3), 42B(1)

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 — Rule 9(2)

Citation : (2000) 68 ECC 60 : (2000) 115 ELT 306

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : Krishna Srinivasan, for S. Ramasubramaniam and Associates, for the Appellant; S. Sethuraman, ACGSC, for the Respondent

Judgement

V.S. Sirpurkar, J.—The petitioner herein challenges an order passed by the Collector of Customs and Central Excise (Appeals) dated 10-

1-1991 in Appeal No. C3/1031 to 1039/90. By the instant order, the Collector has disposed of all the nine appeals. The appeals were made for

refund of (1) differential duties on landing charges; (2) refund of interest charges; and (3) refund of duty seeking the benefit of Customs Notification

No. 60/87. The Appellate Authority rejected all the three heads. The present writ petition, however, is restricted only to the refund of differential

duty on landing charges. The Appellate Authority rejected the refund of differential duty on landing charges on the basis of order passed by the

Customs, Excise and Gold (Control) Appellate Tribunal (in short "CEGAT" dated 16-9-1988 vide : Order No. 475/1988 feeling bound by the

said order. The issue raised in this writ petition is about the correctness of the

order of CEGAT which was binding on the Appellate Authority; the order passed by which is impugned in this writ petition.

2. The petitioner has not chosen to file an appeal against the Appellate Authority before CEGAT as according to the petitioner, it would have been futile to file an appeal, since the CEGAT had already taken the view against it in the above-mentioned order, and, therefore, has chosen to file this petition direct. According to the petitioner, the CEGAT has taken an incorrect view regarding the duty on the differential landing charges and has denied the refund on entirely untenable grounds and that view needs correction by this Court.

3. The duty is charged and assessed u/s 14 of the Customs Act, 1962 on the value of the imported goods. Rule 9(2) as it stood in 1988 was as under:-

9 (2). For the purposes of Sub-section (1) and Sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include.

- (a) the cost of transport of the imported goods to the place of importation;
- (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and
- (c) the cost of insurance :

Provided that in the case of goods imported by air, the cost and charges referred to in clauses (a), (b) and (c) above,

(i) Where such cost and charges are ascertainable, shall not exceed twenty per cent of the free on board value of such goods.

(ii) Where such cost and charges are not ascertainable such cost and charges shall be twenty per cent of the free on board value of such goods,

Provided further that in the case of goods imported other than by air and the actual cost and charges preferred to in clauses (a), (b) and (c) above

are not ascertainable, such cost and charges shall be twenty-five per cent of the free on board value of such goods.

Thus, the duty is assessed on the actual value added by the cost of transport viz., loading, unloading and handling charges as also the cost of

insurance. The petitioner submits that since the landing charges (loading and unloading charges) were not ascertained at the time of actual

assessment of the duty, notional rate of 0.64% to 1% landing charges used to be added to the value of the goods for arriving at the assessable

value. It was only after the duty was assessed in the above-mentioned fashion that the same used to be paid by the importer and it was only

thereafter he could arrange for the clearance of the goods from the Port Trust along with the shipping documents and a duly assessed Bill of Entry.

It was at this stage of clearance that the importer used to file import applications and it was at that stage, the Port Trust authorities used to charge

the actual landing charges in contradistinction to the notional landing charges paid by the importer on the basis of which the duty was assessed. The

petitioner submits that in most of the cases, the notional charges at the rate of 0.64% to 1% on the basis of which the duty was charged used to be

much higher than the actual charges payable and actually paid by the importer and, therefore, there was a practice prevalent that, on completion of

the clearance formalities, the importer used to file refund application before the Customs Department for refund of difference of customs duty paid

on the notional basis and the actual basis. The petitioner states that if everything was in order and if in fact, the actual landing charges payable and

paid were lesser than the notional landing charges, then the refund used to be ordered by the Customs Department. The petitioner submits that the

petitioner imported various consignments of goods during the part of 1989 and finding that the actual landing charges being substantially lesser than

the notional landing charges, the petitioner preferred refund applications before the fourth respondent. However, the applications were rejected by

the fourth respondent relying on the judgment of the CEGAT reported in 1988 (18) ECC 132 . The petitioner filed nine appeals against the order

of the fourth respondent. However, those appeals have been dismissed by the Collector of Customs and Central Excise (Appeals), the third

respondent herein, necessitating the filing of the present petition.

4. The learned Counsel Mr. Krishna Srinivasan, appearing on behalf of the petitioner, pointed out that Rule 9(2) which was added in 1988 had

there-after undergone a change in the year 1990, which had the effect of providing loading, unloading and handling charges, as provided in clause

(b) of the aforementioned rule which would be 1% of the free on board value of the goods plus the cost of transport referred to in clause (a) plus

the cost of insurance referred to in clause (c). The amendment was to the following effect :-

For the existing proviso, the following provisos were substituted by the amendment Rules, 1990 :

Provided that,

(i) Where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the

goods;

(ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in

clause(a) plus the cost of insurance referred to in clause (c);

(iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods:

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) shall be twenty per cent of the free on board

value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of

the goods plus cost of transport for clause (iii) above.

The learned Counsel, however, argued that in so far as the present writ petition is concerned, it would be only the unamended Rule 9(2) which

would be taken into consideration as the imports have been effected only in the year 1989 when the unamended Rule 9(2) as amended by the

Amending Act of 1990 was not available. According to the learned Counsel, the amendment effected to Rule 9(2) providing the loading, unloading

and handling charges, would be 1% on the free on board value of the goods by Notification No. 39/90-Cus. (N.T.), dated 5-7-1990 which is not

retrospective and, therefore, could not cover the transactions in appeals decided by the third respondent and, as such, Rule 9(2) as it stood on the

date of import in the year 1989, prior to its amendment in the year 1990, would have to be depended upon for deciding the controversy involved

in the appeals. According to the learned Counsel, therefore, there would be no question of any notional landing charges at the rate of 0.64% or 1%

since the actual charges were ascertainable and actually ascertained by the Port Trust and, therefore, the assessment had to depend upon only

value of goods plus the ascertained and actual landing charges assessed by the

Port Trust and paid by the importer and if in the process of assessment, some more duty was charged on the basis of notional landing charges which were far too higher than the actual landing charges, then such difference had to be worked out and refunded to the importer. The learned Counsel points out that this is a taxing statute and, therefore, had to be strictly construed. The learned Counsel points out that the third respondent had rightly felt and bound by the order of the CEGAT, but the order of the CEGAT itself was a wholly incorrect order which required the correction.

5. As against this, Mr. Sethuraman, learned Counsel appearing for the respondents, pointed out that this writ petition was not maintainable as the petitioner had chosen to bye-pass the Appellate Authority remedy as provided in the Act. The learned Counsel urged that the Court could not entertain this Petition as the alternative statutory remedy was not exhausted. He further argued that since the order of the Tribunal was binding on the third respondent and since the third respondent has rightly followed the order, this Court could not correct that order by a writ of certiorari. In short, his contention is that, while correcting the impugned order, this Court could not go beyond the controversy involved in the order, which stood concluded by the Tribunal order and in the process, could not venture to upset the view of the Tribunal in the matter and even otherwise, according to the learned Counsel, the order of the Tribunal was a correct order.

6. Before the rival contentions are appreciated on merits, the objection to the tenability of the Petition will have to be considered. In this behalf, the learned Counsel for the petitioner heavily relied upon the Apex Court's judgment reported in *Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another*, . The learned Counsel pointed out that in that case the High Court had refused to entertain the Petition on the ground that the Commissioner, whose order was impugned, had the jurisdiction to pass the order and the remedy of statutory appeal was not exhausted by the petitioner therein. The Constitution Bench, while considering this aspect, has observed as under :

We are of opinion that the High Court should have examined the merits of the case instead of dismissing the writ petition in limine in the manner it has done. The order passed by the Commissioner of Sales Tax was clearly

binding on the assessing authority u/s 42B(2) and although technically it would have been open to the appellants to urge their contentions before the appellate authority namely, the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer namely, the Commissioner, has already passed a well considered order in the exercise of his statutory jurisdiction under Sub-section (1) of Section 42-B of the Act holding that 21 varieties of the compressed woollen felt manufactured by the appellants are not eligible for exemption under Entry 6 of Schedule I of the Act. Further, Section 38(3) of the Act requires that a substantial portion of the tax has to be deposited before an appeal or revision can be filed. In such circumstances we consider that the High Court ought to have considered and pronounced upon the merits of the contentions raised by the parties and the summary dismissal of the writ petition was not justified. In such a situation, although we would have, ordinarily, set aside the judgment of the High Court and remitted the case to that Court for fresh disposal, we consider that in the present case, it would be in the interests of both sides to have the matter finally decided by this Court at the present stage itself especially since we have had the benefit of elaborate and learned arguments addressed by the counsel appearing on both sides. The learned Counsel for the petitioner very heavily relies on the observation and points out that in the present case, filing of an appeal before the Tribunal would have been of no consequence as the Tribunal itself was bound by its own view. The learned Counsel additionally points out that now the matter is pending right since 1991, since this Court had entertained the matter and issued a rule nisi in the year 1991 itself. In view of the long pendency also, the learned Counsel suggests that to throw the petition, on the ground of alternative remedy after a period of almost eight years would be denial of justice to the petitioner. In addition to that, the learned Counsel for the petitioner submits that the controversy involved is likely to affect number of importers whose claims for refund have been pending since 1991. It is true that there is an appeal provided and as such there is an alternative remedy. However, the existence of an alternative remedy was never and is not treated to be an absolute bar for entertaining a Petition under Articles 226 and 227 of the Constitution of India. The jurisdiction is discretionary and cannot be said to be shunned only on account

of the availability of the alternative remedy, though of a statutory nature. It cannot be ignored that it is an order of the Tribunal consisting of three

learned Members, wherein the Tribunal has chosen to rely on the Division Bench judgment of the Gujarat High Court and as such, filing of the

appeal by the petitioner would have been futile as the Tribunal was bound by its own earlier order passed by its Special Bench. The law laid down

by the Apex Court in the aforementioned judgment of Filterco (cited supra) regarding the futility of the appeal applies to the present situation. That

apart, the Court has chosen to issue the rule nisi and the petitioner has spent for eight long years. Considering the controversy involved, the

importance of the subject and the long pendency, it would not be proper at this stage to throw the petition on the ground of alternative remedy.

7. Once the obstacle of tenability is over, the controversy would be narrowed down to the question as to whether the petitioner was entitled to the

refund as it has claimed. The learned Counsel points out that the refund could have been claimed u/s 27 of the Customs Act as it stood then. The

only reason for denying the refund applications given by the third respondent is the aforementioned judgment of the Tribunal in India Polyfibres

Ltd."s case. It will be therefore, interesting to see the judgment itself. Identical questions were involved in the Appeal before the Tribunal, as the

Collector therein had accepted the claim of the importers that the actual amount of landing charges alone should be added for arriving at the

assessable value. The only reason given by the Tribunal for not accepting the view of the Collector is the impracticability of the whole exercise. The

Tribunal proceeds to hold in paragraph 4 as under:

We cannot support the Id. Appellate Collector"s order for the simple reason that it would make the working of the assessment procedures almost

impractical. We have already stated in the preceding paragraph that the actuals are not known in advance when duties are assessed and paid. If

the respondents" point were to be accepted, lakhs of assessments all over the country would have to be made on provisional basis. The Statutory

provisional assessment procedure itself involves complicated formalities, including execution of a bond and giving of bank guarantee/security etc.

After the actuals become available, such lakhs of assessments would have to be re-opened, resulting in refunds or recoveries. Rare cases apart,

the amounts involved in each individual case would be very small. This is so because the landing charges themselves form only a fraction of the import price and the difference between the average amount and the actual amount would further be a fraction of that fraction.

The Tribunal thereafter has relied on the Division Bench judgment of the Gujarat High Court in *Prabhat Cotton and Silk Mills Ltd. v. Union of India* 1982 E.L.T. 203 (Guj.) and has proceeded to mention as under:

The considerations which had weighed with the Hon"ble High Court, inter alia, were enormous number of cases on the one hand (running into hundreds of thousands) and pettiness of the amounts involved in individual cases on the other.

The Tribunal thereafter went on to observe that while the amounts involved would be tiny, the number of consignments imported over the years had also grown. The Tribunal felt that in seeking the refund, the respondents were asking the Tribunal to support undoing of a simplification which, by a practice was accepted since over a century, had become an established part of the customs assessment. The Tribunal then observes,

We see nothing wrong or illegal in averaging of the landing charges. The interpretation of law has to be a practical one. Taken as a whole, neither

the Government nor the importers stand to lose or gain. We see no reason, therefore, to upset the existing procedure and thereby add enormous

amount of infructuous work for the custom houses as well as for lakhs of importers.

These are the only reasons given by the Tribunal to deny the refund.

8. The learned Counsel points out that, considering that it was a taxing statute and a right emanating from the same, the reason given by the

Tribunal cannot be said to be germane to the issue, nor could it be said to be a relevant one. The learned Counsel points out that merely because it

was apprehended that the lakhs of assessments would have to be made on the provisional basis and merely because the amounts involved would

be tiny, the letter of law cannot be ignored. The learned Counsel for the respondent, however, supports the order of the Tribunal. It will be seen

that the petitioner has approached this Court as according to the petitioner, the refunds eventually would run into enormous amounts involving lakhs

of rupees and that the petitioner had not approached by way of refund

applications u/s 27 of the Customs Act or before this Court pursuing the academic interests. In fact, the Counter filed on behalf of the respondents nowhere suggests that the petitioner's interest involved in the petition is negligible, petty or tiny. The learned Counsel asserts that considering the language of unamended Rule 9(2), there was no scope for the recovery of the landing charges on notional basis. The argument is undoubtedly right. Rule 9(2) of the Rules, as it stood in 1988 prior to its amendment in 1990, does not speak of any notional landing charges or any notional formula to arrive at the landing charges. Even if there was a practice to levy the landing charges notionally in order to complete the assessment of Customs duty, it cannot be forgotten that there was also a practice to refund the excess duty on account of the payment of lesser actual landing charges, as compared to the higher notional charges taken into consideration for arriving at the duty. In relying upon the practice to assess the duty on the basis of the notional landing charges, the Tribunal should also have been mindful of the further practice of refunding the excess duty claimed and paid by the importer. The petitioner in the clearest possible terms has asserted upon such a practice in paragraph 6 of the affidavit. Following is the pleading:

The practice hitherto was that on completion of the clearance formalities the importers file refund applications before the Customs Department for refund of the difference of Customs duty paid on the notional basis and the actual basis. These refund applications were entertained by the Customs Department if otherwise found in order and the difference of duty was being refunded without demur.

The Counter, which is filed on behalf of the respondents, is wholly silent on this assertion. The contentions raised in paragraph 6 of the affidavit have been dealt with in paragraph 4 of the Counter, where the practice pleaded by the "petitioner is conveniently avoided. It does not seem, however, that such a practice was brought to the notice of the Tribunal. It must be borne in mind in this behalf that the petitioner has not questioned the practice of making the first assessment of duty on the basis of the notional charges of landing. He has not demurred it at all. He is simply asking for the refund of the excess duty paid by him and for that purpose, relies on the unamended Rule 9(2), the reading of which clearly shows that it is

only the loading, unloading and handling charges associated with the delivery of imported goods which would be liable to be added to the value of

the imported goods. There is a proviso in the unamended rule to the following effect :-

Provided further that in the case of goods imported other than by air and the actual cost and charges referred to in clauses (a), (b) and (c) above

are not ascertainable, such cost and charges shall be twenty-five per cent of the free on board value of such goods.

The plea of the petitioner is that such charges were not only ascertainable but, later on were actually ascertained. Even this contention of the

petitioner that the charges were actually ascertained later on, has not been controverted by the Department in the Counter affidavit and indeed the

contention could not have been countered for the simple reason that the Port Trust has been ascertaining the said landing charges. Therefore, at

least, in cases where the landing charges were ascertained, the petitioner was perfectly justified in claiming any refund of the excess duty paid on

account of notional landing charges. The fact that the proviso speaks about the unascertainable landing charges, would naturally give a support to

the theory that the loading and unloading charges referred to in clause 9 (2) (b) were the actual loading and unloading charges (landing charges) by

necessary implication. It must be borne in mind that by the amendment, the element of notional charges was entirely removed and the relevant

proviso was re-written as below :-

the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause

(a) plus the cost of insurance referred to in clause (c);

It was for the first time provided as if whatever the actual loading, unloading and handling charges might have been, the department would be

entitled to add 1% of the value of imported goods as loading, unloading and handling charges (landing charges). In this Petition, this Court is not

called upon to decide upon the validity of the newly added proviso to Rule 9(2) and indeed the learned Counsel has not addressed the Court on

the question of constitutionality or the validity of unamended Rule 9(2) or the later amendments thereto. However, even the question of the validity

of creating of the notion of 1% in place of actuals is pending before the Apex

Court. However, that is not the subject in this writ petition. The subsequent amendments have been pointed out only to highlight the facts that while the notional landing charges were treated to be final charges by creating a fiction, such fiction was not available in the unamended Rule 9(2) which alone was available and applicable to the transactions in question for which the refund was being claimed by the petitioner. Reading of the unamended Rule 9(2) as introduced in 1988, therefore, would leave no manner of doubt that there was no scope for finalising the assessment on the basis of notional loading, unloading and handling charges alone and even if there was such a practice, the practice was clearly contrary to law. Since the Tribunal has chosen to rely on the Division Bench judgment of the Gujarat High Court in Prabhat Cotton and Silk Mills Ltd. case (cited supra), it would be interesting to see the observation regarding the so called practice aspect. In paragraph 7, the Division Bench has said :-

So also the mere circumstance that for more than 100 years none of the hundreds of thousands of importers has objected to this relatively tiny impost is no good ground for presuming that the duty must be valid if on a true interpretation of the relevant provisions it were to appear to us plain that it is not lawful.

Unfortunately, these observations have been missed by the Tribunal. The question pending before the Gujarat High Court was quite-different.

There, the petitioner contended that the Customs were not bound to include the landing charges in making the computation of the assessment

value. Till then, the value of the imported goods was being added with 3.4% of cost, insurance and freight value as the landing charges and on such

an amount, the assessment of the customs duty was made. This was the practice going till then and it was for the first time contended that the

landing charges amounted to post importation expenses and as such had to be excluded from the assessable value. Gujarat High Court held them

not to be the post importation expenses and held that they were not excludable from the assessable value.

There is no doubt that Gujarat High Court had referred to a practice, but as it has already been shown, there was a practice of refunding the

excess duty also which cannot be ignored. Again, the tiny nature of the refund

was not the only consideration felt by the Gujarat High Court for rejecting the claim of the petitioner therein. The observations mentioned above clearly bring out this position. It is, therefore, obvious that the Tribunal has chosen to follow only the stray observations in the Gujarat High Court judgment and that too sans the background of those observations. The order of the Tribunal could not, therefore, be said to be a correct order in law. Merely because it increased the work of the department, the rightful claims of a tax-payer could not be bye-passed. If the tax-payer, who had paid his excess duty was entitled to refund u/s 27 of the Customs Act, then, such an entitlement cannot be sacrificed on the complacent plea of increased work load and tiny nature of the claim. It would have to be held, therefore, that when the applications were made, the petitioner herein was entitled to have the refunds claimed. The order to that extent, will have to be set aside. However, further amendments cannot be granted in view of the amended provision of Section 27 of the Customs Act. Section 27 of the Customs Act now is retrospective in operation and unless it is shown that the liability has not been passed on to some one else, the petitioner would not be entitled to the refunds. For this purpose alone, the matter would have to be remanded to the third respondent. He would grant opportunity to the petitioner afresh to show that the petitioner is still entitled to the said refunds. The petitioner may, if he so chooses, appear before the concerned authority and justify the claims of refund if necessarily by putting fresh materials and plea before the said authority. The petition succeeds to this extent alone.

9. In the result, the impugned order is set aside, and the concerned authority is directed to re-hear the petitioner and decide the claims in the light of the observations made in this judgment. No costs.