Sharayu.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2468 OF 2016

M/s. Titanium Ten Enterprise Private Ltd.,
Shop no 901/914, Rajhans complex,
9th floor, Ring road,
Surat – 395 002 **...Petitioner**

Versus

1. **Union of India,**
   Through the Secretary,
   Ministry of Finance,
   Department of Revenue,
   North Block,
   New Delhi.
2. **Member (Customs),**
   Central Board of Excise & Customs,
   North block,
   New Delhi – 110 001
3. **Commissioner of Customs (Imports), JNCH,**
   Nhava Sheva, Taluka Uran,
   District Raigad,
   Maharashtra
4. **The Deputy Commissioner of Customs,**
   Imports (Group VI), JNCH,
   Nhava Sheva, Taluka Uran,
   District Raigad **...Respondents**

Mr. Dhiren Akbari, for the Petitioner.

Ms. P.S. Cardoza, for the Respondents No. 3 and 4.

CORAM : ABHAY S. OKA AND
RIYAZ I. CHAGLA, JJ.

DATE : 16 August 2017

ORAL JUDGMENT : *[Per Abhay S. Oka, J.]*

1. Rule.

2. Advocate on record for the Respondents No. 3 and 4 waives service.

3. Forthwith taken up for final disposal.

4. A preliminary objection is raised by the learned Counsel appearing for the Respondents based on the availability of statutory Appeal under Section 128 of the Customs Act, 1962

(for short "***the said Act***"). The learned Counsel appearing for the Petitioner relies upon a decision of the Division bench of this Court in the case of ***Zuari Agro Chemicals Ltd. Vs. Union of India***[1] and submits that the issue is no more *res integra.*

5. With a view to appreciate the submissions canvassed across the bar, it will be necessary to make a brief reference to the facts of the case.

6. According to the case of the Petitioner, the said Company regularly imports polyester filament spin drawn yarn falling within the Chapter 54 of the Customs Tariff. The import is made through Jawaharlal Nehru Port Trust in Nhava Sheva, District Raigad.

7. The challenge is to the *exparte* assessment orders incorporated in the Bills of Entry dated 5 April 2016, 16 April 2016, 28 April 2016, 28 May 2016 and 30 May 2016. The contention of the Petitioner is that the act of unilateral loading

1 ***2014(307) E.L.T. 874 (Bombay)***

on invoices value is contrary to the law and in particular, the Circular dated 8 April 2011. It is contended that the assessment of duty made payable by the Petitioner is in gross breach of the principles of natural justice.

8. The learned Counsel appearing for the Petitioner submitted that as held by the Division Bench in case of ***Zuari Agro Chemicals Ltd.*** (supra), a direction may be issued to pass a speaking order. As stated earlier, the learned Counsel appearing for the Respondents raised a preliminary objection regarding the maintainability of the Writ Petition on the ground that the Petitioner has an efficacious remedy of an appeal under Section 128 of the Customs Act.

9. We have carefully considered the submissions. In the case of ***Zuari Agro Chemicals Ltd.*** (supra), two questions were framed by the Division Bench for the consideration which are noted in paragraph 3 of the Judgment. Paragraph 3 reads thus :-

"3. The issues arising for our consideration in the present petition are :-

(I) Whether an endorsement made on the bills of entry on finalization of a provisionally assessed bills of entry on a basis different from that claimed by the importer would require the following the principles of natural justice and including a speaking order justifying the variation made on the bill of entry?

and

(II) Whether a speaking order justifying the variation made on the bills of entry at the time of its finalization to the prejudice to the importer is a sine qua non to enable a filing of an appeal under the Customs Act, 1962 ("the Act")?"

10. In paragraph 14 of the said decision, the contention of the revenue is also noted that in view of the availability of an efficacious alternate remedy of an Appeal under Section 128, a Writ Petition should not be entertained.

In paragraph 14, the said contention was negatived by the Division Bench of this Court, which reads thus :-

> *"14. The contention of the revenue that this Court should not entertain this petition as an alternative remedy of an appeal is available under Section 128 of the Act and the petitioner has chosen not to avail it. The said bills of entry were finalized in December 2011. The petitioner was informed of the same in May 2012. The petitioner accepted it as is evident from not having filed an appeal to the Commissioner of Customs (Appeal) or any other authority. An Appeal under Section 128 of the Act to be an efficacious appeal must be from an order with reasons. It is for this reason that Section 17(5) of the Act itself provides that on a bill of entry being assessed finally in a manner contrary to the claim of the importer, then within 15 days of making the final assessment of the bill of entry, a speaking order will be issued. In this case, there is a mere endorsement of variation on the said bill of entry and no reasons which led to the*

enhancement of the value have been disclosed. In the absence of reasons being mentioned on the said bills of entry itself or by issue of a separate communication containing the reasons for the same an importer would be at loss to the manner in which the same could be challenged. In fact, in such cases an appeal to the appellate authority would be futile as it would be impossible for the petitioners to contend why the enhancement of value done by the Customs Department is unjustified and/or bad in law nor would it be possible for the appellate authority to decide on the merits of the final assessment of the bills of entry. Therefore, there has been failure on the part of the Customs Department to carry out its mandatory obligation as provided under Section 17(5) of the Act. It is only when a speaking order is issued to the importer that an efficacious appeal can be made to the Commissioner of Customs (Appeals) under Section 128 of the Act. The petitioners have correctly relied upon the decision of the ***Kerala High Court in HDFC Bank Ltd. v. Union of India - 2011 (271) ELT 175*** *wherein it has* *been held that where an assessee objects to the assessment being made contrary to its claim, the Assessing Officer is obliged to issue a speaking order in terms of Section 17(5) of the Act. The Court held that it is only on passing of a speaking order that the period for filing an appeal under Section 128 of the Act commences. As the Apex Court in* ***Asstt. Commissioner, Commercial Tax Department v. Shukla & Brothers Bombay - 2010 (254) E.L.T. 6 = 2011(22) S.T.R. 105 (S.C.)*** *has observed that "Reasons are the soul of orders. Non-recording of reasons could lead to duel infirmities, firstly, it may cause prejudice to the affected party and secondly more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements"*

Further it quotes from H.W.R. Wade's book Administrative Law, 7th Edition, as under:-

A right to reasons is therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice...

Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice they are also a valuable discipline for the tribunal itself..?"

(underline supplied)

11. In paragraph 15, the Division Bench has dealt with the argument of revenue raising an objection to invocation of Section 17(5) of the Customs Act. Paragraph 15 reads thus :-

"15. The objection of the revenue to invocation of Section 17(5) of the Act is that in this case the assessment was made provisional under Section 18(1) of the Act and were also being finalized under Section 18(2) of the Act. Therefore, it is submitted that Section 17(5) of the Act requiring an issuance of a speaking order will

not apply. According to us any quasi judicial decision which could be subject matter of appeal would require reasons to be given. However, in this case in any view of the matter Section 18(2) of the Act at the relevant time read as "when the duty leviable on such goods is assessed finally in accordance with the Act then" certain consequences on finalization of assessment are set out. However, the final assessment of the goods which have been provisionally assessed has to be in terms of Section 17 of the Act. This is so as Section 18(2) of the Act itself does not provide for finalization of assessment but merely states the action to be taken by the Assessing Officer consequent to the finalization of provisionally assessed bill of entry under Section 17 of the Act. Thus the objection of the revenue is unsustainable."

12. The directions issued by the Division Bench and the findings in paragraphs 16 and 17 read thus :-

"16. In the above view of the matter, we set aside

the final assessments made on the said bills of entry in December 2010. The consequent demand notices and further notice calling upon the petitioners to pay an amount of Rs.17.51 crores are also set aside. We direct that a fresh order of finalization of assessment of the said bills of entry be made by the Assistant Commissioner of Customs after following the principle of natural justice i.e. indicating to the petitioner the reasons why the bills of entry as filed by the petitioners is not acceptable before hearing the petitioners on its objections and thereafter passing a reasoned order within 15 days of having made an endorsement on the said bills of entry finalizing the assessment. In case the petitioner is aggrieved by the final assessment order as indicated in the reasoned assessment, it would be open to the petitioner to file an appeal to the Commissioner of Customs (Appeal) under Section 128 of the Act.

17. In the above view, we answer both the issues raised in this petition as under:-

(I) Yes. The principles of natural justice including

a speaking order in cases where provisionally assessed bills of entry are being finally assessed differently from that claimed by the importer;

and

(II) Yes. A speaking order is necessary wherever the bills of entry are finally assessed differently from that claimed by the importer."

13. In view of law laid down by the Division Bench, which is squarely applicable to the facts of the case in hand, in our view, the Petition must succeed and we pass the following order:-

(i) We set aside the final assessment made on the Bills of Entry (copies of which are annexed at *Exh.A* to the Petition) and in particular, Bills of Entry specified in paragraph 2 of the Petition;

(ii) We direct that a fresh order of finalization of the assessment of the Bills of Entry be made by the appropriate officer of the Department of Customs after following the principles of natural justice in the light of the directions issued in paragraph 16 of the decision of this Court in the case of ***Zuari Agro Chemicals Ltd.*** (supra);

(iii) As directed in the case of ***Zuari Agro Chemicals Ltd.*** (supra), a reasoned order shall be passed within 15 days from the date on which this order is uploaded;

(iv) After the reasoned order is passed, if the Petitioner is aggrieved by the final assessment order, it will be open for the Petitioner to take recourse to Section 128 of the Customs Act, 1962;

(v) All contentions on merits are kept open;

(vi) Rule is made absolute with no order as to costs;

(vii) All concerned authorities to act upon authenticated copy of this order.

[RIYAZ I. CHAGLA J.] **[ABHAY S. OKA, J.]**