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Not the final stamp on stamp duty?

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The Hon’ble Bombay High Court in **Saurer Textile Solutions Pvt. Ltd. Versus State Of Maharashtra (2024)** was dealing with a slew of petitions which challenged the levy of stamp duty, by the State of Maharashtra, on Delivery Orders (‘DO’), under Article 29 of Schedule I to the Bombay Stamp Act, 1958 (‘the Act’).

In such petitions, it was contended that the said levy encroached upon power of the Union of taxing imports, in view interpretation of certain provisions of the Constitution[1], related to import of goods into India.

The Bombay High Court however upheld the legislative competence of such levy. Understandably, from the said ruling, a special leave petition has been filed before the Supreme Court. In this article, we analyse the key findings of the Bombay High Court and attempt to take the readers through certain propositions and interpretations which hold relevance in the next and final leg of litigation around this issue.

Is DO not integral to the import process and whether it springs into existence beyond the customs frontier?

While upholding the levy of stamp duty on the DOs, the Bombay High Court, employing the doctrine of pith and substance, formulated the following legal proposition:

“what is to be ascertained is whether the DO is an integral part of the chain of events in the course of import of goods or is independent of the import albeit incidental thereto. If it is the latter, and not an integral part of the import, the State is well within its powers to levy stamp duty on it as per the pith and substance rule since the primary object and the essential purpose of Article 29 read with Section 2(l) of the MSA is then identified as distinct and not an integral part of an import but more as consequence of import”.

Thereafter, it notes that since the DO is issued by the shipper upon proof of payment of customs duty by the importer and its own charges, it does not form part of the import process and that the taxing event of levy of stamp duty occurs beyond the course of import. To support this contention, the Bombay High Court inter alia observes that-

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"Viewed from another perspective, the Petitioners appear to be equating the phrase 'customs frontier' with a geographical boundary. Correctly understood, and as clearly explained by the Supreme Court in more than one decision, the 'customs frontier' is a concept in a time sequence, viz., that point in the process where the taxing and jurisdictional remit of the customs ends.... The 'customs barrier' is, therefore, not a physical 'barrier' but speaks of a point in time after the role of customs has ended."

However, a view could be that mere payment of import duty may not necessarily mean that the 'customs frontier' has been crossed and there is no direct jurisprudence to state that customs frontier is a 'concept in time' and hence not related to the physical frontier. The judgments cited in **Saurer Textile (Supra)** nowhere state that the 'customs frontier' is a concept in time sequence. In fact, one of the judgments cited i.e. **Vellanki Frameworks v. Commercial Tax Officer, Vishakapatnam 2021** echoes the findings in **Hotel Ashoka (Indian Tourism Development Corporation Limited) v. Assistant Commissioner of Commercial Taxes and Another**

'The basic question in the case of Hotel Ashoka (supra) was as to whether the sales at duty-free shops would attract levy of sales tax. ***As noticed earlier, the definition of 'customs station' clearly refers to customs airport as defined in Section 2(10) of the Customs Act. As the duty-free shop is situated in airport area, the sale of goods at the duty-free shop was deemed to have taken place in the course of import of the goods into the territory of India*** *and before the goods crossing customs frontiers of India.'*

The concept of 'customs frontier' is generally associated with the actual physical limits of a customs area where imported goods are stored until customs duties are paid and the goods are cleared. Reference may be made to Section 2(ab) of the Central Sales Tax Act, 1956, which defines the term 'Crossing the customs frontier' as under:

"crossing the customs frontiers of India' ***means crossing in the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities."***

Furthermore, the term 'customs area' is defined under Section 2(11) of the Customs Act, 1962 as the area of the customs station *(i.e. the customs port, customs airport, International Courier terminal, foreign post office or land customs station)* where the goods are ordinarily kept before clearance by the customs authorities.

In **Kiran Spinning Mills v. Collector of Customs** , the Supreme Court observed that the taxable event qua customs is the crossing of the customs barrier, **and not the date when the goods land in India, or enter the territorial waters and that the goods cannot be regarded as having crossed the customs barrier until the duty is paid and the goods are brought out of the limits of the customs station.**

The above principle was followed in **Garden Silk Mills Ltd v. Union of India 1999**, wherein the Apex Court held that the import of goods into India would commence when the same cross the territorial waters but continues and is completed when the goods become part of the mass of goods within the country. Further, the Apex Court ***Hotel Ashoka (Supra)*** observed that CST cannot be levied qua sales made from duty free ***'as it is not in dispute that the duty free shops of the appellant situated at the International Airport of Bengaluru are beyond the customs frontiers of India i.e. they are not within the customs frontiers of India'***

Therefore, payment of import duties may not automatically lead to crossing of customs frontier even while good physically remain therein. Therefore, the aforementioned proposition may be subject to scrutiny before the Apex Court. Hence, the invocation of the doctrine of pith and substance so as to uphold the power of the State of levy of stamp duty on a DO issued and executed before the imported goods physically cross the customs frontiers may certainly be re-examined in light of the above. This is specifically so as in terms of the findings of the Bombay High Court, it is the DO that 'entitles the person named therein to take delivery of the goods after discharging the dues of a shipper'. In other words, unless the DO is issued to the importer/ consignee, the latter would be unable to get the imported goods cleared beyond the customs frontier.

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DO as an instrument recognised under the scheme of customs provisions

It is also pertinent to note that the DO as a concept is well entrenched in the Customs laws and procedures. **Circular No. 24/2015-Cus., dated October 14, 2015**, which inter alia provides for provision of an electronic DO instead of a paper based one, specifically notes that before importers or their customs brokers are allowed to pick up their import cargo, they are required to pay the shipping line/airlines or consol agents, the freight and the DO Charges (or D.O. charges) and that once 'these charges are collected, the latter will in turn send to the Custodian the **delivery order** while also advising the importer or the Customs Broker of the issuance of the **delivery order**'.

Vide **Notification No. 38/2018-Customs (N.T.), dated May 11, 2018**, the Sea Cargo Manifest and Transhipment Regulations ('SCMTR'), 2018 were notified, seeking to bring about transparency, predictability of movement and advance collection of information for expeditious cargo clearance. Clause 10 of the SCMTR specifically stipulates that an authorised carrier *inter alia* must ensure electronic transmission of the DO's to the importer or the consignee and intimation of the same to the custodian and the proper officers.

Therefore, the inference that DOs only play an incidental part in the entire course of import may need a re-look.

Customs and stamp duty laws operate in separate domains

Nevertheless, the Bombay High Court seems to have rightfully referred to the judgment in the case of **CCRA vs. Maharashtra Sugar Mills**, so as to inter alia hold that 'stamp duty is imposed on the instruments and not the transactions'.

However, the Bombay High Court has not explored this contention further. Significantly, Article 286(1)(b) of the Constitution restricts the power of States to tax **a sale or purchase of goods arising in the course of the import of the goods into India**. Further, entry 83 to List 1 of Schedule VII of the Constitution provides exclusive power to the Union to impose duties of customs including export duties. The Bombay High Court has not examined in detail the distinction between tax on imports vis-à-vis stamp duty on any instrument.

Separately, the Union has the power to levy stamp duty on instruments specified in Article 246 read with Schedule VII, List I, Entry 91 and the State Governments have the power to levy stamp duty on instruments falling under Article 246 read with Schedule VII, List II and Entry 63. The relevant entries are extracted below-

- *'List 1- Union List- 91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, **bills of lading**, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts'*
- *'List II-State List- 63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty'*

Seen from this perspective, it could be argued that since the levy of stamp duty is on execution of an instrument and not on the transaction of sale or import, and since the DO does not encroach upon or overlap with items specified in entry 91 to the Union list, the levy of stamp duty on the DOs is well within the taxing powers of the State of Maharashtra. If this principle is to be applied, it could be argued that the point in time the DO arises or comes into existence (i.e. whether before or after the goods cross the customs frontiers) may not really matter.

Is DO an extension of Bill of Lading ('BoL')?

In relation to this proposition, the question that begs is whether the DO could be an extension of the BoL and hence would it be outside the scope of the State list (note: it is also therefore excluded from the definition of 'instrument' under the Act).

While the Gujarat High Court in the case of **State of Gujarat vs. Reliance Industries 2011** held that a BoL is also to be regarded as a DO, the Bombay High Court noted that the said finding, based upon a

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provision of Gujarat Maritime Board (Landing and Wharfage) Regulations, 1956, does not justify the claim of the petitioners that the 'DO' is an extension of a 'BoL'.

The Supreme Court, in its several judgments, delivered in the context of determining the liability of steamer agents, has accorded an identical status and effect to both:

1. Endorsement of the BoL in favour of the consignee, or,
2. Issuance of a DO in favour of the consignee.

Such judgments have however not been referred in the Bombay High Court ruling.

Reference is drawn to **Forbes Forbes Campbell & Co Ltd. v. Board of Trustees (2015)** , wherein it was held that the steamer agent was liable to pay demurrage charges to port trust only until **BoL was endorsed or DO was issued to consignee i.e. the importer.**

Similarly in **Board of Trustees, For the port of Cal v. India Trident Maritime (P.) Ltd 2017,** it was observed that the liability of steamer agent/shipping line is not unlimited but confined only till cargo is off-loaded and **DO is issued, or, BoL is endorsed in favour of consignee or its agent.**

Thus, the aspect of whether DOs are merely extensions of the BoL, depending on the nature of practice and procedure followed in each State, may also require examination by the Supreme Court, when, in substance, its remit is the same.

To conclude, owing to various issues of interpretation, the Supreme Court would certainly involve itself with the matter and hence this issue would be re-looked. Therefore, the final stamp on the dispute revolving on applicability of stamp duty on the DOs will have to wait.

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[1] Specifically Articles 246(1), 286(1)(b), and 286(2), alongside Entries 41 and 83 of List I of Schedule VII

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