

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No. 11543 of 2013- DB

(Arising out of OIA-26/2013/CUS/COMMR-A-/KDL dated 21/02/2013 passed by Commissioner of CUSTOMS-AHMEDABAD)

Bharat Petroleum Corporation Ltd

Kandla Installation, P.b.no. 33, Gandhidham
Kutch, Gujarat

.....Appellant

VERSUS

C.C.-Kandla

Custom House,
Near Balaji Temple,
Kandla, Gujarat

...Respondent

APPEARANCE:

Ms. Padmavati Patil & Shri Kiran Chavan, Advocates for the Appellant
Shri G.Kirupanandan, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 10471 /2023

DATE OF HEARING: 21.11.2022
DATE OF DECISION: 17.03.2023

RAMESHNAIR

The issue involved in the present case is that the bulk liquid cargo imports of Motor Spirit [MS, for short] ,on 22.06.2011, whether custom duty is payable on the value determined on the quantity received in Shore Tanks as claimed by the Appellants or on transaction value based on invoice price of the overseas suppliers, as held in the impugned order dated 21.02.2013, irrespective of whether the cargo is chargeable to ad valorem rate of duty or to specific rate of countervailing duties.

2. Ms. Padmavati Patil, Learned Counsel along with Shri Kiran Chavan, Learned Advocate appearing on behalf of the appellant submits this issue has already been decided by the Hon'ble Supreme Court in the case of Mangalore Refinery & Petrochemicals- 2015 (323) ELT 433 (S.C) and relying on the said judgment this Tribunal in the appellant's own case also allowed the appeal holding that in the facts of the case the Customs duty is leviable on the actual receipt of the shore tank quantity and not on the basis

of invoices. She also placed reliance on the following judgments and board circulars:-

- Mangalore Refinery & Petrochem – 2015 (323) ELT 433 (SC)
- Mangalore Refinery & Petrochem - 2006 (205) ELT 753 (Tri.)
- Mangalore Refinery & Petrochem – 2006 (233) ELT 528 (Tri.)
- Mangalore Refinery & Petrochem – 2014 (307) ELT 119 (Tri.)
- Bharat Petroleum Corporation – 2017 –TIOL-2316-CESTAT-AHM
- M.F.C.A.(D.R) Circular No. 96/2002 – Cus dated 27.12.2002 [2003 (151) ELT T-21
- M.F.(D.R.) Circular No. 6/2006 – Cus dated 12.01.2006 [2006 (193) ELT T-40
- Circular No. 34/2016- Cus dated 26.07.2016

3. Shri. G. Kirupanandan, Learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that the issue is no longer *res integra* as the same has been decided by the Hon'ble Supreme case in the of Mangalore Refinery & Petrochemicals- 2015 (323) ELT 433 (S.C) wherein the following judgment was given:-

"8. Having heard learned counsel for the parties it is important to first set out the relevant provisions contained in the Customs Act as under :-

"Section 2. Definitions. -

(22) *"goods" includes -*

- (a) *vessels, aircrafts and vehicles;*
- (b) *stores;*
- (c) *baggage;*
- (d) *currency and negotiable instruments; and*
- (e) *any other kind of movable property;*

2(23) *"import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;*

2(25) *"imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;*

Section 12. Dutiable goods. - (1) *Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs*

Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

Section 13. Duty on pilfered goods. - *If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage.*

Section 23. Remission of duty on lost, destroyed or abandoned goods. -

(1) Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost otherwise than as a result of pilferage or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Custom or Deputy Commissioner of Customs shall remit the duty on such goods.

(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon."

Section 47. Clearance of goods for home consumption.- *(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.*

(2) Where the importer fails to pay the import duty under sub-section (1) within two days, excluding holidays from the date on which the bill of entry is returned to him for payment of duty, he shall pay interest at such rate, not below ten per cent and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette on such duty till the date of payment of said duty :

Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically :

Provided further that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section :

Provided also that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section."

9. Rules 2(1)(f) and 4(1) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 read as follows :-

"2. Definitions - (1) *In these rules, unless the context otherwise requires :*

(f) *"transaction value" means the value determined in accordance with Rule 4 of these rules"*

Rule 4. Transaction value. - (1) *The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules."*

10. *On a reading of the aforesaid provisions, it is clear that the levy of customs duty under Section 12 is only on goods imported into India. Goods are said to be imported into India when they are brought into India from a place outside India. Unless such goods are brought into India, the act of importation which triggers the levy does not take place. If the goods are pilfered after they are unloaded or lost or destroyed at any time before clearance for home consumption or deposit in a warehouse, the importer is not liable to pay the duty leviable on such goods. This is for the reason that the import of goods does not take place until they become part of the land mass of India and until the act of importation is complete which under Sections 13 and 23 happens only after an order for clearance for home consumption is made and/or an order permitting the deposit of goods in a warehouse is made. Under Section 23(2) the owner of the imported goods may also at any time before such orders have been made relinquish his title to the goods and shall not be liable to pay any duty thereon. In short, he may abandon the said goods even after they have physically landed at any port in India but before any of the aforesaid orders have been made. This again is for the good reason that the act of importation is only complete when goods are in the hands of the importer after they have been cleared either for home consumption or for deposit in a warehouse. Further, as per Section 47 of the Customs Act, the importer has to pay import duty only on goods that are entered for home consumption. Obviously, the quantity of goods imported will be the quantity of goods at the time they are entered for home consumption.*

11. *Even under Section 14 of the Customs Act, when goods are to be valued for the purpose of assessment, such valuation is only when the goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade. It is thus seen that under the Customs Act, the levy of import duty cannot take place until goods are imported, that is, brought into India. Obviously, therefore, it is the quantity of goods brought into India alone that attracts the levy of import duty.*

12. *The Customs Valuation Rules which defines "transaction value" also speaks of the price that is actually paid or payable only for "imported goods". Unless goods are imported, that is, "brought into India" no such price is actually paid or payable. Further, under Rule 4 of the Customs Valuation Rules, such transaction value must be adjusted in accordance with the provisions of Rule 9. Rule 9(2), the import of which has been missed by the Tribunal in the impugned judgment, states as follows :-*

"Rule 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 the 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 -

(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) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods :

Provided also that where the free on board value of the goods is not ascertainable, the costs 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.

Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container freight Station shall not be included in the cost of transport referred to in clause (a)."

13. *This Rule merely restates what is already stated in Section 14, namely, that the value of imported goods has to be the value of such goods for delivery only at the time and place of importation. Therefore, it is clear that even a reading of "transaction value" under the Rules would necessarily arrive at the same result, namely, that the quantity of goods to be seen for purposes of valuation can only be after they are imported, that is, brought into India and have to be so at the time and place of importation.*

14. *The Tribunal's judgment dated 6th February, 2006 gives several reasons for arriving at the conclusion that the bill of lading quantity alone is to be looked at for the purpose of determining the value of goods imported. The first reason that it gives is that duty has to be on the total payment made by the assessee irrespective of the quantity received. The second reason given is that an ad valorem duty would necessarily lead to this result but duty levied at the specific rate would not, the quantity of goods in the latter case being only on the basis of the quantity of crude oil received in the shore tank. The third reason that it gives is that Section 14 kicks in when the duty is on an ad valorem basis and Sections 13 and 23 do not stand in the way because it is not the question of demanding duty on goods not received, but it is the demand of duty on the transaction value. In spite of the "ocean loss", the appellant has to make payment on the basis of the Bill of Lading quantity.*

15. *We are afraid that each one of the reasons given by the Tribunal is incorrect in law. The Tribunal has lost sight of the following first principles when it arrived at the aforesaid conclusion. First, it has lost*

sight of the fact that a levy in the context of import duty can only be on imported goods, that is, on goods brought into India from a place outside of India. Till that is done, there is no charge to tax. This Court in Garden Silk Mills Ltd. v. Union of India, 1999 (8) SCC 744 = [1999 \(113\) E.L.T. 358](#) (S.C.), stated that this takes place, as follows :-

"It was further submitted that in the case of Apar (P) Ltd. [(1999) 6 SCC 117 = JT (1999) 5 SC 161] this Court was concerned with Sections 14 and 15 but here we have to construe the word "imported" occurring in Section 12 and this can only mean that the moment goods have entered the territorial waters the import is complete. We do not agree with the submission. This Court in its opinion in Bill to Amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944, Re [AIR 1963 SC 1760 = (1964) 3 SCR 787 sub nom Sea Customs Act (1878), S. 20(2), Re] SCR at p. 823 observed as follows :

"Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers, i.e., before they form part of the mass of goods within the country."

It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed." [at paras 17 and 18]

16. *Secondly, the taxable event in the case of imported goods, as has been stated earlier, is "import". The taxable event in the case of a purchase tax is the purchase of goods. The quantity of goods stated in a bill of lading would perhaps reflect the quantity of goods in the purchase transaction between the parties, but would not reflect the quantity of goods at the time and place of importation. A bill of lading quantity therefore could only be validly looked at in the case of a purchase tax but not in the case of an import duty. Thirdly, Sections 13 and 23 of the Customs Act have been wholly lost sight of. Where goods which are imported are lost, pilfered or destroyed, no import duty is leviable thereon until they are out of customs and come into the hands of the importer. It is clear therefore, that it is only at this stage that the quantity of the goods imported is to be looked at for the purposes of valuation. Fourthly, the basis of the judgment of the Tribunal is on a complete misreading of Section 14 of the Customs Act. First and foremost, the said Section is a section which affords the measure for the levy of customs duty which is to be found in Section 12 of the said Act. Even when the measure talks of value of imported goods, it does so at the time and place of importation, which again is lost sight of by the Tribunal. And last but not the least, "transaction value" which occurs in the Customs Valuation Rules has to be read under Rules 4 and 9 as reflecting the aforesaid statutory position, namely, that valuation of imported goods is only at the time and place of importation.*

17. *The Tribunal's reasoning that somehow when customs duty is ad valorem the basis for arriving at the quantity of goods imported changes, is wholly unsustainable. Whether customs duty is at a specific rate or is ad valorem makes not the least difference to the above statutory scheme. Customs duty whether at a specific rate or ad valorem is not leviable on goods that are pilfered, lost or destroyed until a bill of entry for home consumption is made or an order to warehouse the goods is made. This, as has been stated above, is for the reason that the import is not complete until what has been stated above has happened. The circular dated 12th January, 2006 on which*

strong reliance is placed by the revenue is contrary to law. When the Tribunal has held that a demand or duty on transaction value would be leviable in spite of "ocean loss", it flies in the face of Section 23 of the Customs Act in particular, the general statutory scheme and Rules 4 and 9 of the Customs Valuation Rules.

18. *We therefore, set aside the Tribunal's judgment and declare that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty. Consequential action, in accordance with this declaration of law, be carried out by the customs authorities in accordance with law. All the aforesaid appeals are disposed of in accordance with this judgment.*

4.1 Following the above Hon'ble Supreme Court judgment, this Tribunal in the appellant's own case held that the Customs duty is leviable on actual receipt shore tank quantity and not quantity mentioned in the invoices. The decision in the appellant's own case is reproduced below:-

"Heard both sides and perused the record. All these appeals are filed against respective orders passed by Commissioner Customs(Appeals),Kandla. Since common issues are involved in these appeals these are taken up together for disposal.

2. *Ld. Advocate for the appellant submits that during the relevant time, the appellants had imported few consignments of motor spirit and high speed diesel and cleared the same through Kandla Port. They had filed into-Bond Bills of Entry and the imported consignments were stored in warehouse without payment of duty u/s 58 of the Customs Act, 1962. The same were later allowed clearance against Ex-bond Bills of Entry for home consumption.*

3. *She submits that there are two issues involved in the present Appeals. The first issue is, whether duty is payable on the imported goods on the basis of shore tank quantity or on the transaction value based on the invoices of the overseas supplier. The second issue is, whether additional duty of Rs.2/- per litre under Finance Act has to be included in the basic customs duty for the purpose of calculation of CVD on the imported petroleum products. She submits that the first issue is now settled in their favour by the Hon'ble Supreme Court in recent judgment in the case of Mangalore Refinery & Petrochemicals Ltd. - 2015 (323) ELT 433 (SC). Regarding the second issue, she fairly submits that this Tribunal in the case of Indian Oil Corporation Ltd. vs. C.C., Kandla vide order No.A/10965/2015 dated 07.7.2015 following the earlier judgment in the case of Hindustan Petroleum Corporation Ltd. vs. C.C., Kandla - 2012 (384) ELT 534 (Tri-Ahmd.) rejected the contention of the assessee that duty levied under Finance Act not to be added to the basic customs duty for the purpose of computing additional duty of customs under Section 3 of the Customs Tariff Act, 1975.*

3. *Ld. A.R. for the Revenue reiterated the findings of the Id. Commissioner (Appeals).*

4. *We find that as far as the first issue is concerned that is whether the imported Motor Spirit/High Speed Diesel be assessed to duty on the basis of shore tank quantity or on the transaction value*

mentioned in the invoice, it has been decided against the Revenue by the Hon'ble Supreme Court in the case of Mangalore Refinery & petrochemicals Ltd. (supra). Their Lordships observed at Para 18 of the said judgment is as follows:

18. We therefore, set aside the Tribunal's judgment and declare that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty. Consequential action, in accordance with this declaration of law, be carried out by the customs authorities in accordance with law. All the aforesaid appeals are disposed of in accordance with this judgment.

5. Regarding the second issue, we find that this Tribunal after considering the earlier judgment in Hindustan Petroleum Corporation Ltd.'s case(supra) observed that additional duty of customs levied @Rs.2/- per litre is required to be added to the basic customs duty for computation of CVD payable. This issue is decided against the appellant. However, to ascertain the correct amount of CVD, the matter needs to be remanded to the original authority. Accordingly, for the said limited purpose the matter is remanded to the adjudicating authority. The appeals are thus partly allowed to the extent above. Appeals disposed."

5. In view of above decision of Tribunal which is based on the Hon'ble Supreme judgment, we are of the considered view that appellant's claim of payment of Customs duty on quantity received in shore tank is correct and legal and revenue claim of duty payment on transaction value based on invoices of all overseas suppliers is not sustainable. Accordingly, we set aside the impugned order and allow the appeal.

(Pronounced in the open court 17.03.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)