

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE**

Appeal(s) Involved:

C/683/2008-DB

[Arising out of Order-in-Appeal No. 208/2008 dated
20/06/2008 passed by Commissioner of Customs (A),
Cochin]

C/2331/2012-DB

[Arising out of Order-in-Appeal No. 124/2012
dated 06/06/2012 passed by Commissioner of
Customs (A), Cochin]

C.C-COCHIN-CUS

CUSTOM HOUSE
COCHIN
KERALA
682009

Appellant(s)

Versus

KINGSWAY TRAVEL AGENCIES

PVT LTD

GROUND FLR, THE ESTATE, 121, DICKENSON
ROAD, BANGALORE 560 042

Respondent(s)

Appearance:

Mr. Chandramohan, AR

For the Appellant

Mr. Abraham, Advocate

JOSEPH & KURIYAN
42/2260, PROVIDENCE ROAD
KOCHIN
KERALA
682018

For the Respondent

Date of Hearing: 13/07/2018

Date of Decision: 18/07/2018

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20966-20967/2018

Per : P.ANJANI KUMAR

The respondents, M/s. Kingsway Travel Agency Pvt. Ltd., have filed a Bill for Entry No. 150 dated 11.04.2007 for clearance of an Excursion boat of Model "Bayliner 325 SB" and sought to classify it under CTH 89011030 attracting nil rate of duty. During the Custom's examination, it was found that the boat was not one designed for ferrying/transporting passengers on scheduled trips but was the one designed for leisure or pleasure boating and the importers did not dispute the same. Accordingly, the Department has classified the boat under CTH 89039990.

2. The respondents have filed an appeal before Commissioner (A) stating that Department has not spelt out any reason to reject the commercial invoice, the Bill of Lading and the appellant's claim; the respondent is registered, recognized and accredited travel agency and the import in question was for the purpose of undertaking excursions for the tourists; CTH 8903 is a general heading covering yachts for personal pleasure or sports whereas CTH 8901 has a specific entry covering specific "excursion Boats". The existing authority has failed to appreciate

the decisions in the following cases:

- (i) *Bharat Shipyard (P) Ltd. Vs. Collector of Central Excise, Pune- 1998 (101) ELT 33.*
- (ii) *Vipul Shipyard, Bombay Vs. Collector of Central Excise, Bombay- 1998 (19) ELT 122.*
- (iii) *Dredging Corporation of India Ltd. Vs. Collector of Customs, Bombay- 1991 (179) ELT 262.*

3. The Commissioner (A) has decided the issue in favour of the respondents and classified the boat as an "excursion Boat" under 89011030 and held that the exemption under Notification No. 21/2002 dated 01.03.2002 S.No. 352 was applicable. Aggrieved by the above said order, the Department is in appeal. The Department has enumerated the following grounds of appeal".

(i) on examination of the boat, it was found that the boat is a well-furnished with accessories like carpets, tables, cots with mattresses, refrigerators, heater, micro wave oven, ice boxes, CD players and power generators and hence it was clear that the vessel was not designed for ferrying/transporting passengers on scheduled trips; it was designed for leisure or pleasure boating; the explanatory notes to heading CTH 8901 clearly indicated that the heading covers all vessels for the transport of persons or goods other than vessels of heading 8903, Heading 8903 covers

“Yachts and other vessels for pleasure or sports; rowing boats and canoes”.

3.1 It is not the case of importer that they were going to use the boat for transport of persons or goods; it was meant for transport of persons or goods from one point to another point. By their own admission, the boat is used for conducting excursions in the back waters; therefore, the purpose of having luxurious fittings was to make the excursion trip, actually, a luxury or pleasure trip.

3.2 The Bombay Bench of Hon'ble Tribunal in the case of ***M/s. Urmila & Co. Pvt. Ltd. Vs. Collector of Customs, Bombay- 1998 (104) ELT 97 (Tribunal)*** held that “**it is the basic design of the vessel that determines its classification**” and that “**a pleasure boat will not cease to be a pleasure boat when it is used for survey purposes**”.

3.3 Excursion boats are used for sight-seeing purposes and the trip lasts only for a short duration; such boats do not have

luxury items which were found in the impugned boat; a mere terming of the boat as “excursion boat” does not render any right for classification under CTH 8901; the catalogue described the boat as “Bayliner’s flagships for fun”; the catalogue reveals that the boat imported is not an ordinary “excursion boat” intended for transport of persons for a short while but a luxury boat for high end pleasure travel.

3.4 The Commissioner (A) has placed reliance on the facts that the importer is the travel agency and the boat is registered as “Tourist boat”; however, he has failed to appreciate the relevant facts and the judgment of Bombay Bench of the Tribunal cited *supra*.

4. The learned Commissioner, AR, appearing on behalf of the Department submitted that the Commissioner (A) has allowed the appeal of the respondents on the following grounds which are countered as follows:

4.1 The Commissioner (A) has opined that the classification

was changed with assigning any reason whereas the invoice and Bill of Lading described the items as "excursion Boats"; it is submitted that the classification was changed only after due examination and only after the importer has agreed with the change of classification; the importer has not filed any contest letter and the duty has not been paid under protest; the importer did not ask for professional assessment and has also not requested for any special order; under the circumstances, it is relevant to state that the assessment and approval of assessment has been completely accepted by the importer; the Hon'ble Supreme Court in the case of ***Escorts Ltd. 1998 (97) ELT 211 (SC)*** held that the Act does not prescribe any particular form in which the order or assessment is to be made; no formal order of assessment can be expected when there is no dispute to the classification, it is more like 'across-the-counter' affair; in the case of *Midland Plastics Ltd. 2002 (14) ELT 235 (Tri. Del)*, it was held that when assessee did not contest the assessment under Section 47 of the Customs Act, 1962 and paid duty without even lodging a protest, there could be no question of passing a Speaking Order; it is to win the notice that only on 08.04.2011, it was mandated that the assessing officer should issue a Speaking Order in terms

of Section 17 (5) of the Customs Act, 1962; in view of this, the Commissioner's (A) findings are not legal.

4.2 The Commissioner (A) has taken a plea that the boat is registered with Cochin Port Trust as Tourist Port" and the Kerala Irrigation Department has also registered the same and the Chief Inspector of Boats has certified that that is a boat. It is submitted that Customs Tariff Act is independent of other acts and rules ISI classification exemption Notification FTP etc., are not binding of customs; the classification is to be done in terms of Customs Tariff Act, 1985.

4.3 The Commissioner (A) has opined that the dimension and capacity of the boat were not big and length being 10.7 and breadth 3.3 and the passenger capacity being 15 cannot be considered as a Yacht. It is submitted that the difference between boat and Yacht is not made on the base of size, dimension and capacity etc; the particular boat refers to any floating vessel; any Yacht can also be called a boat; the particular Yacht refers to a pleasure vessel; therefore, Yacht is defined by the purpose and amenities rather than the size; as per the

Brochure and literature pertaining to “Bayliner Crusier 325 SB”, the impugned boat, is equipped with modern amenities as indicated in the examination report and includes the Swiveling helm seat, Stove, Stainless steel sink, microwave, fridge, coffeemaker and solid surface counter tops; the photographs of the instant model Yacht confirmed the luxury and modern comforts; therefore, as per the ratio of the following judgments, the impugned boat needs to be classify under CTH 89.03:

- (i) *Urmila & Co. 1998 (104) ELT 97 (Tri. Delhi).*
- (ii) *Commissioner of C. Ex Goa Vs. Waterways Shipyard Pvt. Ltd. 2013 (297) ELT 77 (T-Mum).*
- (iii) *Drishti Adventures Pvt. Ltd. 2017 (357) ELT 877 (T-Mumbai).*

4.4 The Commissioner (A) erred in holding that 89 CTH, 89.03 is applicable to Yacht and vessels for pleasure and sports which is private in nature whereas the impugned boat is an all-purpose luxury “Tourist Boat”. It is submitted that in the case of ***Commissioner of Central Excise, Goa Vs. Waterways Shipyard Pvt. Ltd. 2013 (297) ELT 77 (T-Mum)*** wherein it was held that international definitions of “pleasure vessel” prevalent in U.K., Australia and Canada pertaining to privately owned vessels for personal use, not applicable in instant case as

such definition not incorporated in Indian Merchant Shipping Act.

4.5 The learned AR has further submitted that in terms of Rules for interpretation and the Classification Rule 3 when by application of sub-rule (b) or Rule 2 or for any other reason, goods are, prima facie, classifiable under two or more Headings, classification shall be effected as follows:

(a) The Heading which provides the most specific description shall be preferred to Headings providing a more general description. However, when two or more Headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, those Headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to (a), shall be classified as if any consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified to (a) or (b), they shall be classified under the Heading which occurs last in the numerical order among those which equally merit consideration. Since the Rule 1,2 & 3- (a) or (b) are not applicable in the present situation, we find that under Rule 3 (c) when the goods cannot be classified by reference to Rule 3(a) & (b) they shall be classified under Heading which occurs last in the numerical order among those which equally merit consideration. Therefore, following this Rule of Interpretation the vessel in question is more appropriately classifiable under Heading 8903 of the Central Excise Tariff. We hold accordingly.

5. The learned counsel for the respondents has reiterated the submissions made before Commissioner (A) has stated that the invoice with Bill of lading and the Brochure described the boat to an "excursion boat" therefore it should be classified under CTH 89.01. The Rule of Interpretation is not warranted as the Heading 89.01 specifically covers the "boats for excursion".

6. Heard both sides and perused the records of the case.

7. We find that the impugned boat imported by the respondents is equipped with modern amenities like Swiveling helm seat, Stove, Stainless steel sink, microwave, fridge, coffeemaker and solid surface counter tops; it also contains arrangement for shower, sleep and relaxation; it is no important as to the manner in which the impugned boat is used, it is rather important as to how the boat is built which should be a guideline for determining the classification of boat; in fact, we find that the catalogue describes the impugned boat as "Bayliner 325 Cruiser" and the Bayliner have claimed themselves to be manufacturers and marketers of recreation boats and Cruisers; there is a prima facie evidence that the boat is intended for the luxury uses; we find that the case of **Urmila & Company Pvt. Ltd** cited Supra is similar to the impugned case; we find that Heading 8901 covers the vessels for transport of persons or goods that vessels design primarily for the conveyance of persons or goods are covered by this Heading; it is not the case of the respondents that it was for the conveyance of persons or goods and looking into the fittings available in the boat and the amenities it offers, there is no doubt to believe that the boat is intended to a "pleasure boat".

Therefore, whatever be the actual use of the said boat, it is required to classify as per the making of the vessel; it is seen that the impugned boat is not principally designed and manufactured for the purpose of transport of persons and goods, it cannot be classify under Heading 8901; we find considerable force in the argument of the learned AR and find relevance in the ratio of the cases cited by them.

7.1 Regarding the refund application, the learned advocate for the respondents has claimed that the refund claim filed by their CHA is valid as per the ratio of ***Jayant B.Shah Vs. Collector of Customs Bombay- 1996 (81) ELT 669***; the learned AR submitted that as per the ratio of Hon'ble Supreme Court in the case of ***Collector of Customs, Cochin Vs. Trivandrum Rubber Works Limited 1999 (106) ELT 9 (SC)*** clearing agent's dues under Customs Act ordinarily come to an end with the clearance of imported goods and delivery to the importer/owner and therefore, we find claim filed by M/s. National Trading Agency, Cochin; the CHA for M/s. Kingsway Travel Agency is not a proper refund claim.

7.2 We find that we have decided the classification of the impugned boat under heading 8903 of CTH, the refund claim does not sustain on merits. Therefore, there is no need to go into the other aspects of the refund claim.

8. In view of the above, we have no hesitation in upholding the classification of the impugned boat under CTH 8903. Accordingly, we allow the appeals filed by the Department.

(Order was pronounced
in Open Court on **18/07/2018**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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