CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

C/38/2010-DB

[Arising out of Order-in-Appeal No. 118-2009 dated 22/09/2009 passed by CC(Appeals), Bangalore]

HINDUSTAN PETROLEUM CORPORATION LTD
MANGALORE LPG IMPORT FACILITY VILLAGE
BALA, VIA KATIPALLA, MANGALORE

Appellant(s)

VERSUS

Commissioner of Customs MANGALORE-CUS
NULL NEW CUSTOMS HOUSE
PANAMBUR
MANGALORE - 575010
KARNATAKA

Respondent(s)

Appearance:

Shri Syed Peeran, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH FLOOR, SOUTH WING BRIGADE GATEWAY CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Dr. J. Harish, Jt. Commissioner(AR) — For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. V. PADMANABHAN, TECHNICAL MEMBER

Final Order No. 20329 / 2019

Date of Hearing: 04/04/2019
Date of Decision: 04/04/2019

Per : S.S GARG

The present appeal is directed against the impugned order dt. 22/09/2009 passed by the Commissioner(Appeals).

2. Briefly the facts of the present case are that the appellant is a Government of India undertaking engaged in the business of refining of crude oil and marketing of various petroleum products. Appellants have an installation at Mangalore (MLIF) wherein they have appropriate registration as a private bonded warehouse to receive and store imported LPG as well as indigenous LPG in bulk frm MRPL / RIL. As and when the LPG consignments are being imported, appellant filed into-bond Bill of Entry for warehousing the LPG cargo in the bonded shore tanks at MLIF and later on withdrawals are made from the bonded warehouse by filing ex-bond Bill of Entry for home consumption on payment of duty. LPG cleared for distribution in accordance with the provisions of Section 68 of the Customs Act, 1962. The appellant further alleged that due to insistence from the Customs Department, appellant had no option but to file into-bond Bill of Entry as per Ship Ullage quantity which the appellant did under protest. Whereas the assessee was of the view that shore tank receipt quantity should be considered for the purpose of valuation. The Department was also of the view that the demurrage charge incurred prior to import should therefore be included in the value of imported goods for the purpose of charging duty.

3. Learned counsel for the appellant submitted that both the issue involved in the present case have been settled in favour of the assessee by the judgment of the Hon’ble Apex Court. He further submitted that the issue is no more res integra and has been settled in favour of the appellant. The issue of whether assessment of liquid bulk cargo should be based on the quantity received in the shore tank has been decided in favour of the assessee in the case of Mangalore Refinery & Petrochemicals Ltd. [2015(323) ELT 433 (SC)]. As far as the second issue is concerned, he submitted that the Hon’ble Supreme Court has held that demurrage charges are post-importation in nature and hence not includable in the value. In this regard, he relied on the

judgment of the Hon’ble Supreme Court in the case of CCE Vs. Mangalore Refinery & Petrochemicals Ltd. [2015(325) ELT 214 (SC)].

4. On the other hand, the learned AR reiterated the finding of the impugned order.

5. Heard both sides and perused records.

6. We find that the issues involved in the present case are no more res integra and have been settled in favour of the assessee by the judgments of the Hon’ble Supreme Court cited supra. Further we find that both the issues involved in the appeal have been considered by this Tribunal in the case of BPCL Vs. CC, Cochin [2018-TIOL-1739-BANGALORE] and have been allowed in favour of the assessee. For reference, we may reproduce the relevant findings:-

> *6. After hearing both the sides, we find that the issues involved in the above appeals are: (i) The levy of duty of customs on the liquid cargo not received in the shore tanks; (ii) the inclusion of demurrage charges for the purpose of valuation under the Customs Act, 1962. As rightly pointed out by the Learned Advocate, on both the issues the Hon'ble Supreme Court has declared the law in favour of the assessee. On the issue of levy of duty of customs on the liquid cargo not received in the shore tank, the Hon'ble Supreme Court in the case of Mangalore Refinery & Petrochemicals Ltd. vs. CCE, Mangalore (supra) has held as below: "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 for in 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. 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."*

By following the above judgment of the Hon'ble Supreme Court, we hold that the assessment is to be made on the basis of quantity of crude oil actually received in the shore tanks in the port of arrival in India. 6.1 On the second issue of inclusion of demurrage charges for the purposes of valuation of crude oil, the Hon'ble Supreme Court in the case of CCE, Mangalore vs. MRPL(supra) has held as below: "5. We have heard the counsel for the parties at length. It is not even necessary to go into the various nuances of the matter as we are of the opinion that these appeals are bound to fail on one simple ground. The demurrage charges are admittedly incurred after the goods reached at Indian ports and, therefore, it is a post-importation event. Such charges, therefore, cannot form part of the transaction value. Issue in this behalf is settled by this very Bench in the case of Commissioner of Customs, Ahmedabad v. M/s. Essar Steel Ltd., 2015 (319) E.L.T. 202 (S.C.)." By following the above judgment, we hold that demurrage charges are not includable in the transaction value of the crude for the purposes of assessment.

6.2 In view of the foregoing, the orders of the Commissioner (A) are not sustainable and the same are set aside. C/22971-22980/2014-DB

7. In the result, the appeals are allowed.

7. By following the ratio of the above said decision, we allow the appeal of the appellant.

(Operative portion of the Order was pronounced
in Open Court on **04/04/2019**)

S.S GARG
JUDICIAL MEMBER

V. PADMANABHAN
TECHNICAL MEMBER

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