IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. C/841/2009

(Arising out of Order-in-Original No. 70/2009 CC(I) JNCH dated 2.4.2009 passed by Commissioner of Customs (Import), JNCH, Nhava Sheva)

Commissioner of Customs (Import), Nhava Sheva **Appellant**

Vs.

Dredging Corporation of India Ltd. **Respondent**

Appearance:

Shri Chatru Singh, Assistant Commissioner (AR), for appellant
None for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 4.9.2018
Date of Decision: 4.9.2018

ORDER No. **A/87435/2018**

Per: Sanjiv Srivastava

This appeal has been filed by the revenue against the order in original dated 02.04.2009 of Commissioner of Custom (Import) JNCH Nhava Sheva, Mumbai. Commissioner has by the said order held as follows:

"(1) In view of the fact that import of dredgers classifiable under CTH 89051000 is duty free and hence no duty will be chargeable on up gradation cost.

(2) The impugned goods are not liable for confiscation under section 111 of the Customs Act, 1962.

(3) I drop the penal proceedings against the importer in view of the facts that there is no mis-declaration or suppression of facts."

2.0 Facts leading to the said decision and appeal are as follows:

i. M/s Dredging Corporation of India (Respondents) are Government of India Undertaking. Their dredging vessel "Dredge Aquarius" (vessel) an Indian Flag Vessel, registered in Indian Registree, was given on Charter Hire Agreement (contract) to M/s Dredging International Belgium (foreign party) for a period of 150 weeks extendable further by 104 weeks. In pursuance of the contract the vessel was converted from *"Coastal Run Vessel"* to *"Foreign Run Vessel"* by Mumbai Customs on 1.10.2002.

ii. As per the conditions of contract, Dredging International Belgium was to incur an expenditure of Euro 7 Million on upgradation of the said vessel and respondents were not required to pay anything for the same, provided the vessel was with the foreign party for full period of time.

iii. Since the vessel was urgently needed for the *Sethu Samudram Project* of Government of India, the vessel was recalled prematurely. The vessel was re-delivered by foreign party and was thereafter again converted into coastal run after necessary inspection and formalities by Mumbai Customs.

iv. Since the vessel was recalled prematurely, respondents paid to the foreign party, an amount of Euro 11,66,800 as a compensation on the undepreciated cutter power and the fact that vessel was not used by the foreign party for the full period of contract.

v. Respondents agreed to pay the duty on the amount actually paid by them to the foreign party i.e. Euro 11,66,800 and not the actual cost of upgradation i.e. Euro 7 million as per the contract.

vi. Since as per the contract, the vessel has been upgraded/ repaired by the foreign party, during the period it was with them i.e. during the period when vessel was foreign run vessel, in terms of Notification No 94/96-Cus custom duty was required to be paid on the fair value of the fair cost of repair including the cost of material used in the repair, insurance and freight charges both ways.

vii. The foreign company has incurred the expenditure of Euro 7 million towards repair and upgradation of the vessel, and have also used the vessel for nearly four (4) years, the Custom duty was required to be paid on the value equivalent to depreciated value of the expenses incurred toward repair and upgradation. Thus as per department duty was payable on depreciated value i.e. Euro 3.78 million.

viii. A show cause notice was issued to the respondents demanding duty on the depreciated value (Euro 3.78 Million). Show cause notice also proposed confiscation of the goods under Section 111(m) of the Customs Act, 962 (Act) read with Para 2.17 of the Foreign Trade Policy, 2007-2009, section 3(3) of the Foreign Trade Development and Regulation Act, 1992 and Section 11(2)(a) of the Act. Penalty under Section 112 was also proposed.

ix. Show Cause Notice was adjudicated by holding that the vessel was classifiable under 89051000 and was exempt from payment of duty under Notification No 21/2002-Cus (Sr No 353). Since the vessel was exempt from payment of duty, Commissioner dropped the proceedings,

x. Aggrieved, by the order of Commissioner, department has filed this appeal. As per the department on the date of importation, i.e. 22.11.2006, the date when vessel arrived in India at J N Port, duty at the rate of 5% was leviable in terms of Notification No 21/2002-Cus (Sr No 353). The said rate of duty was made nil by a later Notification No 20/2007-Cus dated 01.03.2007.

xi. Further Commissioner has failed to determine the correct assessable value for demanding the duty in terms of the above mentioned notification, the order of Commissioner is not legally sustainable.

3.0 The matter has been posted for hearing on 2.01.2018, 29.01.2018, 28.02.2018, 3.04.2018, 9.05.2018, 29.05.2018, 25.06.2018, 24.07.2018 & 4.09.018. Despite notice respondents did not appeared for the hearing. We have heard Shri C Singh, Assistant commissioner, Authorized Representative for the revenue.

4.0 Section 15 and 47 of the Act provides as follows:

"Section 15: Date for Determination of Rate of Duty and Tariff Valuation of Imported Goods. –

(1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force, -

(a) in the case of goods entered for home consumption under section 46, on the date on

which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under section 68, on the date on which the goods are actually removed from the warehouse;

(c) in the case of any other goods, on the date of payment of duty :

***Provided** that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.*

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, either in full or in part, within two days (excluding holidays) –

(a) from the date on which the bill of entry is returned to him for payment of duty; or

(b) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf,

he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not below ten per cent and not exceeding thirty-six per cent per annum, as maybe fixed by the Central Government, by notification in the Official Gazette

Provided 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 further 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."

From the above section it is quite evident that the duty liability has to be determined on the date and time of entry of goods for importation into the country. Undoubtedly the date of entry inwards of the vessel in this case is 25.11.2006 as is evident from the documentary evidences as follows:

In the present case the identity and date of entry inwards of the vessel can be established by the following documentary evidences such as –

a) The letter F No S/6-57/2002 Exp dated 11.10.2002 issued by the Superintendent of Customs on conversion of vessel from *"Coastal*

Run Vessel” to *“Foreign Run Vessel”* by Mumbai Customs on 1.10.2002.

b) Certificate issued by Boarding Superintendent, JNCH Nhava Sheva stating that vessel has arrived at J N Port Nhava Sheva from Suey, Egypt on 21.11.2006 and the same has been converted from a *“Foreign Run” to “Coastal Run”* at this 16.10 hrs on 25.11.2006.

c) Copy of Delivery of vessel.

5. Serial No 353, of the Notification No 21/2002-Cus as it existed on the date of importation, read as indicated below.

S No	Chapter or Heading No or Sub Heading No	Description of Goods	Standard Rate	Additional Duty Rate	Condition
353	89.02, 89.04, 8905.10 or 8905.90	All goods (excluding vessels and other floating structures as are imported for breaking up)	5%	Nil	72

The said Notification has been amended by the Notification No 20/2007-Cus dated 01.03.2007, by incorporating Sl No 353A in the said Notification which reads as follows

353A	89051000	All Goods	Nil	-	-

6.0 From the above it is quite clear that the order of Commissioner holding that exemption under Notification 21/2002-Cus Sl No 353, is admissible in the present case is not sustainable and needs to be set aside for redetermination of the quantum of duty payable in terms of the said notification as it existed on the date of importation of the said vessel.

7.0 Thus the appeal filed by the revenue is allowed by remand to the adjudicating authority for re-determination of all issues including confiscation and penalty afresh in light of our observations in para 6.0 above. Since the issue is of 2006, adjudicating authority should complete the remand proceedings within three months of the receipt of this order.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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