

C.C. Vs. Dev Krupa Ship Breaking

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-03-2004

Reported in : (2005)(98)ECC327

Judge : S T S.S., T Anjaneyulu

Appellant : C.C.

Respondent : Dev Krupa Ship Breaking

Judgement :

1. Matter was heard on 5/1/04 pursuant to an Early Healing Request.

However, the same had to be re-listed for hearing, since the department could not produce the copy of the BE on which the Ship was originally cleared for Home Consumption from Hindustan Shipyard Vishakapattanam.

The matter was reheard, the photocopy of Ex Bond Bill of Entry was taken on record, the material considered and it is found - i) Respondent had purchased the vessel MV 'State of Hariyana' from Shipping Corporation of India Ltd. for scrapping. They had sought permission for beaching the same at their plot at Alang. The vessel was built in India at the Bounded Ship Yard of M/s Hindustan Ship yards Ltd. Vishakapattanam in the year 1982, cleared by them for Home Consumption; registered at Mumbai Port in 1983 by Shipping Corporation of India; they used it as ocean going / foreign going vessel and ultimately disposed the same, in 2001 for breaking. The same was purchased by a Tender filed by the

Respondents from Shipping Corporation of India, which it was in the Indian Waters and Port of Porbander Gujarat.

ii) By an order dated 3.10.2001, Dy. Commissioner Bhavnagar confirmed the duty, on a BE tiled, at that part for bringing the Vessel from Porbundar Port, where it was sold as Scrap for breaking.

The duty was demanded since the vessel was built in India somewhere 1982, under Section 65 of the Customs Act, 1962, and now Custom Duty was to be levied, in terms of provisions of notification 163/65-Cus dated 16.10.65 as amended by notification 129/86 -Cus dated 17.02.86.

iii) Commissioner Appeal, on 20.08.2002, remitted the matter back for DENOVO consideration, for a limited purpose i.e. to ascertain the fact with an evidence showing whether the payment of duty was effected at the time of manufacturing of the said vessel which was built at Vishakapattanam Bonded Warehouse Manufacturing facility.

iv) A refund claim was filed by the Respondent prior to this order of CC (Appeal). The same was not entertained on the plea that the matter then was subjudice before CC (Appeals). However, consequent to order dated 20.08.02, the refund application was taken up. An order dated 3.10.2002 was passed by Dy Commissioner, rejecting the refund and by confirming the duty amounts on BE filed on 24.01.2001 for clearing the ship for breaking.

v) Aggrieved by the order dated 3.10.2002, the Respondent filed an appeal. CC (Appeal) who vide order dated 22.07.2003 who passed an order in favour of the Respondent, holding as - " 21 It will be necessary to go through further facts to ascertain the status of Shipping Corporation of India. The said Shipping Corporation of India floated a Tender which was circulated by Gujarat Ship Breaker's Association vide their circular dated 15.12.2000. The Tender Notice is reproduced below: " Container oriented Tween Decker General Cargo Vessel m.v. "STATE OF HARYANA " (16800 DWT), 1983, Indian built and m.v, "BHAVABHUTI (15714 DWT), 1981, Yugoslavia built available for sale on "as is where is " basis.

Interested parties for purchase of the vessel for scrapping can obtain tender documents giving instructions, terms and condition from SCI office at the above address on payment of Rs. 500 -- per set or from SCI office at 4th Floor, Bell Court Home, 11, Blomfield Street, London ECIM 7AY (tel.: 207-628 8938, Fax: 44-207-628 6858) on payment of British Pounds Ten per set of from SCI Office at Pekehuan Building. 01-06. 116 Lavender Street. Singapore-1233 (tel:299 4535/345 3811: Telex: RS-34226 Ship In: Fax : +652-299 5007) on payment of Singapore Dollars Twenty per set as document fees.

22. After acceptance of the Tender, The Shipping Corporation of India, issued an Invoice No. 114 dated 16.01.2001 to the appellant.

The invoice is reproduced.

"Sub: Invoice for sale of m.v. "STATE OF HARYANA" for scrapping on "as is where is " basis at Porbundar.

We give below our invoice incorporating details of the payments made to us:1.

Sale Price Rs. 4.41.41.000.001.1 Amount paid by you towards 10% of Rs. 44.14.100.00 the Purchase Price by P. Os on1.2 Amount credited by you towards the Rs. 3.97.26.900.00 balance 90% of the Price by TT No. 12.

Amount credited by you towards Sales Tax Rs. 9.71.102.00 @ 2.2% on Sale Price by TT No. 1 into SCTs 23. The above two documents clearly shows that (i) the said vessel was sold for scrapping and (ii) the sale was in India as Sales Tax was charged from the buyer. If the sale was made in India, the importer will be M/s Shipping Corporation of India as they have sold the goods in India. The word importer has been defined in the Section 2(26) of the Customs Act, 1962 as-"Importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, include any owner or any person holding out to be the importer." 24. By charging Sales Tax, the Shipping Corporation of India has held themselves as importer. As per Tender document itself, and the invoice issued, they have sold the Vessel for scrapping. The fiction created by Notification No. 163/65 dated 16.10.1965 will clearly be applicable to

M/s Shipping Corporation of India. I rely on the decision of Hon'ble Tribunal in the case of CC v. Steel Industries, Kerala (supra) to hold that the appellant in this case is only a purchaser and not an importer. The duty is to be charged from the importer and not from the purchaser of the imported goods. I, therefore, hold that the appellant is not liable for payment of Customs duty on Vessel MV STATE OF HARYANA. a) the Vessels was beached, at Respondent Plot, at Bhavnagar it was attracting duty under Section 12 of Customs Act 1962 and no claim of exemption notification benefit as in the case of M/s Bhupinder Steel (P) Ltd. 2002 (143) ELT 189 was made.

b) Definition of Importer in Section 2(26) of Customs Act 1962 would include the transferee Respondents owner as they had sought clearance for breaking the same.

c) Memorandum of Sale agreement casts liability of duty on Respondent, mere charge of Sales Tax by M/s Shipping Corporation of India from the buyer. Respondents would not take the Respondent from the ambit of the definition of 'Importer'.

d) Vessels was foreign / ocean going on last voyage coining from AQABA. It was exported outside India after having been built in 1982 while notification 163/65-Cus was in existence.

e) Section 15 & 46 of the Customs Act 1962 would make Respondent the Importer.

vii) From the BE No. 219 dated, copy produced by the Ld DR, is for the clearance of this vessel, effected from the Custom Bonded Warehouse at Vishakapattanam i.e. it is an Ex Bond BE, filed by M/s Hindustan Shipyard Ltd. as the Importer. They were granted the benefit of notification 163/95. and no duty was assessed. The vessel was built as per contract between M/s Hindustan Shipyard Ltd. & M/s Shipping Corporation of India, who then got the vessel registered at Mumbai and were plying the same as foreign going and ocean going vessel. The vessel on its voyages was taken out of India and brought back and the last voyage from the foreign part of Aqaba was to Indian part of Cochin. Thereafter, it moved to another

Indian Port Porbander. While at Porbander Port, the vessel was sold by Tender for breaking. It thereafter, reached Alang for breaking after beaching. The vessels are sold for breaking since they are no longer ocean going or sea worthy. The voyage from Cochin to Porbander would be a voyage as ocean going vessel, the voyage from Porbander to Alang for breaking even if on its own steam, would be not a voyage of an Ocean Going Vessel.

viii) Notification 163/65 exempted any ocean going vessel, manufactured in a warehouse, in accordance with the provision of Section 65 of the Customs Act, 1962, from the whole of duty of custom leviable"... Therefore, the subject vessel would be exempted provided it was 'Ocean going'. The proviso to the said notification reads "Provided that the duty of Customs shall be levied on the vessel if it is broken up as it were then imported to be broken up".

Therefore, once the vessel was not "Ocean going & used as such vessel / and used in internal waters it would not be eligible to this duty exemption, it would pay duty as applicable to a vessel. However, if the said vessel was to be broken up, the vessel rate of duty was not called for, by fiction of law on conversion from Ocean going status and intended breaking up, it would be levied customs duty under heading for Vessels for breaking up which would be under heading 8908.00. The duty liability on the subject goods is therefore to be now decided and at what stage that has to be levied at Cochin, when the vessel came on foreign run for Aquaba or thereafter on words to Porbander or on way to Bhavnagar. The invocation of Section 20 of Customs Act at Cochin, as duty on goods exported from India and brought back can only be discharged by Shipping Corporation of India. However, since it was still Ocean going vessel when it left Cochin Port and up to Porbander Port, the duty exemption under notification 163/65 would continue upto the time the vessel was converted from Ocean going to for breaking while at Porbander docks / Anchorage. Since the vessel ceased to be an Ocean going vessel after arriving at Porbander and was converted and intended and therefore sold for Ship Breaking while at Porbander, the duty liability as per proviso clause to 163/65 would arise at Porbander port. The subsequent voyage being only for breaking up at Bhavnagar. The Recovery of duty liability as per proviso to notification 163/65 was therefore to be arrived at by the proper officer at Bhavnagar.

ix) The Respondents, who have purchased the vessel at Porbander from Shipping Corporation of India, have purchased the vessel after the said vessel had been cleared for home consumption on Ex Brand BE filed at Vishakapattanam by M/s Hindustan Shipyard, or and cleared at Cochin Port after it came from foreign Run. That time when it was owned by M/s Hindustan Shipyard the Shipping Corporation of India.

Therefore, there is force in the argument advanced by the Respondents that they would not be covered by the definition of 'Importer' under Section 2 (26) of the Customs Act, 1962. Thus definition reads as - "(26) 'Importer', in relation to any goods at any time between their importation and the time when they are cleared for home consumption, include any owner or any other person holding himself out to be the Importer." Since an owner, subsequent to imported goods ordered to be cleared for home consumption is not covered by the definition of the word 'importer' under Section 2(26) the goods having been cleared for home consumption Ex Bond Vishakapattanam in 1982 by M/s Hindustan Shipyard and thereafter ownership remaining with M/s Shipping Corporation of India till Porbander, and the voyage for Porbander Port to Bhavnagar port being not even a "domestic run" of and as a vessel after home clearance order, owner on that run and at Bhavnagar Port after purchase for breaking up cannot be found to be 'Importer' of the subject vessel. They have then been rightly held to be not liable to a duty demand in this case. Duty can be demanded only from an Importer under Section 28 of the Customs Act, 1962.

x) The assessment resorted to on a BE filed for Imported goods at Bhavnagar Port by the Respondent, will not entitle the Revenue to demand duty from the Respondents. Since the goods when they entered Bhavnagar Port were not as a vessel but 'vessel for breaking up' on a Coastal voyage from Porbander to Bhavnagar. Respondent was not an importer of goods, liable to duty under Section 12, requested to be cleared under Section 46 of the Customs Act 1962, or goods exported out of India re-imported at Bhavanagar to be liable to duty under Section 20 of the Central Act, 1962. There is a specific provision made under notification 16/2000 - Cus dated 1.3.2000 to the following effect.

"65. If the vessels and other floating structure are intended to be broken up after their importation, the importer shall present a fresh bill of entry to the Commissioner of Customs and therefore such goods shall be chargeable with the duty which would be payable on such goods as if they were entered for home consumption under Section 46 of the Customs Act, 1962 (52 of 1962), on the date of the presentation of such fresh bill of entry; for the purpose of breaking of such goods. " Such condition, stipulating the filling of a fresh Bill of Entry for breaking up and creating a legal friction of the vessel then being taken up again for having entered again for home clearance in absent from the notification 163/65 applicable in this case. The condition of notification 16/2000-Cus, creating a deemed fresh home clearance order and filling of fresh BE cannot be retrospectively extended and posted to be read in notification 163/65. The assessments made therefore under Section 17 & duty demands made on the Respondents and further orders of home clearance made at Bhavnagar were not under any provision of the Customs Act 1962. The same are not be therefore upheld. xi) When assessments made on the BE at Bhavnagar and duty demands consequent thereafter cannot be upheld, the grounds taken by the Revenue are not found to upset the order of the Commissioner to the effect "I therefore hold that the appellant is not liable for payment of Custom duty on Vessel MV STATE OF HARYANA" are upheld for the reasons arrived at by us.

xii) No merits are found in the grounds taken in appeal and the plea made by the Respondents that there was no case of charging duty on goods manufactured in the Shipyard of M/s Hindustan Shipyard Vishakapattanam and other plea made in view of the decision in case of Mustan Teherbhai 2003 (56) RLT 101 (CEGAT). Examining the plea of extending the fiction of law to hold the Import being effected on the date the vessel is broken up as held by the apex court in case of Jalon Udyog 1993 (68) ELT 9 SC cannot bring liability of an Importer on the Respondent. It is found the date on which the vessel is broken up would be the date on which it is taken for breaking i.e. the date of Transfer from the Shipping Corporation of India to the Respondent and not the date of beaching at Alang and that date the Importer would be Shipping Corporation of India.

2. Consequent to a finding that duty demand as assessed by the Dy Commissioner of Customs Bhavnagar on the BE filed by the Respondent cannot be upheld and the Respondents are not liable to pay the duty so assessed. The Commissioner (appeal) order is required to be upheld and the Revenue appeal is required to be dismissed.

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