
(2012) 07 GUJ CK 0031
In the Gujarat High Court
Case No : Tax Appeal No. 932 of 2006

Bedi Shipping Ltd.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 26-07-2012

Acts Referred:

Customs Act, 1962 — Section 111, 111(a), 111(h), 112, 112(a)(ii)

Citation : (2012) 286 ELT 661

Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; A.Y. Kogje, for the Respondent

Judgement

Akil Kureshi, J.—The appeal is filed by the assessee which is a shipping company challenging order dated 12-4-2006 [2006 (206) E.L.T. 788 (Tri.)] passed by the Customs, Excise & Service Tax Appellate Tribunal ("the Tribunal" for short). By such judgment, the Tribunal confirmed the order of the Adjudicating Authority dated 30-6-2004 as upheld by the Appellate Authority by his order dated 28-2-2005. At the time of admission of appeal, following substantial questions of law were framed :

(A) Whether 40 M.T. of scrap generated during repairing of barges was "imported goods" as defined u/s 2(25) of the Customs Act, 1962 in the facts of this case?

(B) Whether 40 M.T. of scrap generated during repairing of barges was liable for confiscation under the provisions of the Customs Act, 1962?

(C) Whether the order of the Appellate Tribunal upholding confiscation of scrap and imposition of penalty on the appellant is legally correct in the facts and circumstances of this case?

2. The appellant is in the business of providing port related services. For such business, the appellant-company had purchased four barges. Such barges required periodical repairs. During such repairs, several parts of the barges

would have to be replaced, generating substantial scrap. The department, on visit by the officers of the preventive division carried out at the site of the repairers, noticed that 40 metric tones of iron scrap valued at Rs. 3,60,000/- was lying. Such scrap was seized on 24-8-2003 on the premise that same was cleared without payment of customs duty. A show cause notice came to be issued on 28-1-2004. In such notice, on the premise that such scrap was exigible to customs duty, despite which the same was cleared without payment, the assessee was called upon to show cause why the same should not be confiscated under the provisions of Section 111 of the Customs Act, 1962 and also penalty u/s 112 of the Customs Act be not imposed.

3. The assessee filed a reply to the notice on 22-3-2004. It was pointed out that the assessee carried out only repair works on such barges and there was no breaking activity. It was contended that the department's stand that such activity amounted to breaking was not valid. It was pointed out from the various statements of the representatives of the assessee and the repairer contractor that during the repairing work several parts had to be replaced. The worn out and damaged parts such as MS plates, winches and such spares of barges required replacement, to keep the barges in good condition. It was contended that the quantity of plates replaced was higher than that of plates taken out. In the natural course when such barges would be brought for breaking, at that time as per the condition of the exemption notification, necessary duties will be paid on such barges. It was contended that such duty is charged on the value of the vessel at the time of breaking and the barges will therefore, be valued at the time of being brought for breaking. Its value would not be reduced. On this and several other grounds, the assessee opposed levy of duty and penalty.

4. The Adjudicating Officer however, was not convinced. He ordered confiscation of seized goods valued at Rs. 3,60,000/-. He gave an option to redeem the goods on payment of fine of Rs. 90,000/-. He imposed penalty of Rs. 50,000/- on the company and also imposed separate penalty of Rs. 25,000/- on the Director of the company.

5. In such order, the Adjudicating Officer noted that such barges were brought into India as containers for imported goods by one M/s. DOSA but later on sold to the assessee on 9-2-1996 and were brought to Jamnagar or Mul Dwarka by the assessee for plying in Indian waters. He noticed that the original owner M/s. DOSA had not filed any bill of entry for such barges. Upon inquiry with the assessee, it was found that for certain irregularities in import of such vessels, the assessee was facing litigation. The Commissioner of Customs, Mumbai had passed order confiscating the vessel but also offered redemption fine in lieu of confiscation. It is not in dispute that against such order, assessee has filed appeal before Tribunal and thereafter, before Mumbai High Court and such appeal was pending.

6. The Adjudicating Officer however, was not influenced by such background history. He was of the opinion that such scrap was generated during repair work

which amounted to breaking of ship. He observed that just because the barges after repairs were again put to use would not mean that such repairs can be allowed without following procedures laid down in the Customs Act, 1962. He held that iron waste and scrap valued at Rs. 3,60,000/- during the course of repair of imported barges was dutiable under the Tariff Heading No. 7204 of the Customs Tariff Act, 1975. Relevant portion of his order reads as under :

14. I also find that in the present case it is not disputed that who was the original importer of all the barges whether M/s. DOSA or M/s. Bedi Shipping Ltd. In the instant case as deposed by Shri Arvind K. Shah, Director of M/s. Bedi Shipping Ltd. as well as repairer of the said barges Shri Manibhai K. Padhiar and Shri Keshubhai K. Padhiar of M/s. Padhiar Hi-Tech Pvt. Ltd. in their statements dated 22-8-2003, 22-8-2003 (sic) and 24-8-2003 respectively that all the four barges were of foreign origin i.e. Russian repaired at Rozi Dry Dock Area and Scrap Generated during the repairing were removed from the Customs Area. As per the provision of Notification 21/2002-Cus., dated 1-3-2002 if the vessels are intended to be broken up after their importation, the importer shall present a fresh bill of entry to the Commissioner of Customs and thereupon such goods shall be chargeable to Customs duty as if they were entered for home consumption u/s 46 of the Customs Act, 1962. Accordingly, M/s. Bedi Shipping Ltd. have to file fresh Bills of Entry when barges are cleared for breaking as if barges were entered for home consumption u/s 46 *ibid* but I find that they have not done so. All the four barges were repaired and 50 MTS approximate scrap were generated and out of that, 40 MTs were removed from the Customs Area without following any of the procedure of the Customs Act, 1962 viz. Section 42, Section 45 and Section 47 of the Customs Act, 1962, therefore, their claim does not find any favour that all the barges were not broken up. It is also fact that after breaking the damaged/spoiled portion of the barges, new plates were placed/ utilised and the barges became sea worthy but the said notification neither allow such partial breaking nor plying of barges without payment of duty. If the intention of M/s. Bedi Shipping Ltd. were clear then they would have approached to the Customs Officer and followed prescribed procedures for repairing and also paid duty on the import of waste and scrap generated during the course of repairing of the said barges at the time of clearance from the Customs Area. The said notification also does not give any free import of any floating structure for repairing and one cannot presume the activity of breaking is going on for the purpose of repairing and not for totally broken up. Just because of the fact that barges after repairing were again put into use by plying into the Indian Water, import of waste and scrap generated during the course of repairing of barges cannot be allowed without following the procedure laid down under the Customs Act, 1962. For the very reason that out of four barges, three barges which were put into use i.e. plying were not seized and proposed for confiscation but only scrap generated during the course of repairing & removed from the Customs Area without following the procedure prescribed under the Customs Act, 1962 for importation were placed under seizure for illegal import. I also find that only 40

Mts of waste and scrap were placed under seizure, which was removed from the Customs Area, and lying in the Godown of M/s. Padhiar Hi-Tech Pvt. Ltd. Sikka and 10 Mts lying on jetty area of Rozy Pier Port were not placed under the seizure. Therefore, argument put forth by M/s. Bedi Shipping Ltd. that in any case iron scarp are also lying in the Sikka Dry dock area, which is within the Customs Area is also far from the truth. Panchnama dated 24-8-2003 is very much specific in this regard and seizure of iron scrap were from the private premises and not from the Customs Area...

28. I also find that seized iron waste & scrap valued at Rs. 3,60,000/- generated during the course of repairing of imported barges are dutiable under tariff heading No. 7204 of the Customs Tariff Act, 1975 being an imported goods M/s. Bedi Shipping Ltd. had unloaded the same at a place other than declared for the purpose and removed without supervision of the proper officer as laid down u/s 33 and Section 34 of the Customs Act, 1962 hence I find that the seized goods are liable for confiscation u/s 111(h) of the Customs Act, 1962. As regard to argument put forth by the party that otherwise duty could have been demanded in the notice itself, I find that no goods can be cleared without filing bills of entry and without payment of duty of Customs as assessed by the proper officer but in the instant case goods were cleared for home consumption without filing bills of entry, without opting for assessment and without payment of customs duty, hence goods are liable for confiscation u/s 111 of the Customs Act, 1962 and when goods are liable for confiscation no duty can be demanded u/s 28 of the Customs Act, 1962 while proposing confiscating of the goods but duty of Customs is required to be paid as provided u/s 125(2) of the Customs Act, 1962 at the time of payment of fine in lieu of confiscation. On this subject reference is made to Commissioner of Customs (Import), Mumbai Vs. M/s. Jagdish Cancer and Research center, . Hence, the order for payment of duty would be an integral part of proceedings relating to confiscation.

30. I find that floating structure falling under tariff sub-heading No. 8901 10 40 of Customs Tariff Act, 1975 are exempted from payment of Customs duty by virtue of that "if the vessels are intended to be broken up after their importation, the importer shall present a fresh bill of entry to the Commissioner of Customs and thereupon such goods shall be chargeable to Customs Duty as if they were entered for home consumption u/s 46 of the Customs Act, 1962". In the instant case M/s. Bedi Shipping Ltd. had contravened the provisions of the said notification and cleared the four barges for breaking therefore the same are liable for confiscation u/s 111(o) of the Customs Act, 1962 but since the barges are not placed under the seizure, it cannot be confiscated under the said provisions.

On the basis of above observations, he passed the following operative order :

(1) I order confiscation of seized goods viz. 40 Mts. Iron Scarp valued at Rs. 3,60,000/- u/s 111(a), (h) & (f) of the Customs Act, 1962. However, I give an option to redeem the goods on payment of fine for Rs. 90,000/- (Rs. Ninety Thousand Only) in lieu of confiscation plus duty as provided u/s 125 of the

Customs Act, 1962. This option may be exercised within 30 days from the date of receipt of this order.

(2) I impose penalty of Rs. 50,000/- (Rs. Fifty Thousand only) upon M/s. Bedi Shipping Ltd. u/s 112(a)(ii) of the Customs Act, 1962.

(3) I impose penalty of Rs. 25,000/- (Rs. Twenty Five Thousand) upon Shri Arvind K. Shah, Director of M/s. Bedi Shipping Ltd. u/s 112(b)(ii) of the Customs Act, 1962. The dues adjudged should be paid forthwith.

7. The Appellate Authority confirmed the order of the Adjudicating Authority, however, on somewhat different grounds. He was of the opinion that pursuant to order passed by the Commissioner (Customs), Mumbai confiscating the barges and offering redemption fine, the assessee had not produced any proof that he had in fact redeemed the barges. He noticed that the appeal against such order was filed, but observed that in such appeal only pre-deposit of penalty was waived and in any case appeal was still pending. He was therefore, of the opinion that the goods continue to have the status of imported goods and further unless the barges are redeemed by paying fine and duty, it remains property of the Government of India. On such grounds, he dismissed the appeals of the assessee.

8. Against such orders of the Revenue Authorities, assessee carried the matter in further appeal before the Tribunal. The Tribunal dismissed the appeal observing that the barges are availing benefit of Notification No. 21/2002 and therefore, if any scrap is generated during repair of such barges, would fall in category of imported goods as defined under sub-section (25) of Section 2 of the Customs Act, 1962. Since duty has not been discharged for such waste and scrap, the same were liable for confiscation. It is this order of the Tribunal which the assessee has challenged before us in the present appeal.

9. Counsel for the appellant submitted that the barges were imported. For the purpose of Customs Act, 1962 such import was complete at the time of its actual import into Indian waters. Under exemption Notification No. 21/2002, all goods under entry no. 89.01 were exempted from payment of customs duty except vessels and other floating structures as are imported for breaking up. He submitted that in terms of such notification, therefore, even after importation of barges they would continue to enjoy exemption from payment of customs duty till they are meant for breaking. He submitted that the Customs Authorities gravely erred in holding that the repairing activity amounted to breaking of the barges. Counsel submitted that the barges remain in sea water continuously and also carry substantial load from the port to the larger ships. By very nature of things therefore, such barges are subjected to heavy wear and tear, requiring periodical repairs. When such repair work is done, number of parts need to be replaced generating scrap. These parts are replaced by indigenously manufactured parts such as plates, nuts, bolts and other items. In the present case, the assessee had pointed out that the value of parts replaced exceeded the value of scrap. When the barges are eventually condemned and then broken, the

value of the barges including the replaced parts would be taken into account for reckoning the value for determining the customs duty. He clarified that the dispute about the procedure for import of the barge has arisen in case of only one vessel and there is no dispute about the rest of them.

10. On the other hand, Shri Kogje for the department opposed the appeal contending that the Tribunal has given a correct verdict. The status of import of barges by the assessee itself is in doubt. Appeal before Mumbai High Court is still pending. He however, submitted that during the repair, whatsoever scrap is generated, would be exigible to customs duty.

11. Having thus heard learned counsel for the parties and having perused the documents on record, we find that one of the barges purchased by the appellant did run into some legal complications since it was found that the original owner importer had not completed the necessary formalities. For such purpose, the assessee had to face proceedings initiated by the Commissioner of Customs, Mumbai. He ordered confiscation of barges, but offered fine in lieu of such confiscation. Against such order, appeal of the assessee is pending before the Mumbai High Court. Outcome of such litigation before the Bombay High Court would decide whether order of confiscation was valid or not, whether the assessee has to pay fine to avoid such confiscation and such related questions. However, such pending litigation need not cast any shadow on the present appeal since the questions involved are vastly different. We are informed that such legal complications arose only in one out of four barges owned by the appellant. We have therefore, proceeded on the basis that such barges were imported barges and at the time of import were exempt from payment of customs duty under exemption Notification No. 21/2002 under serial no. 352 till the same were imported for breaking.

12. In that view of the matter, short question that needs to be decided is whether the repairing work carried out by the assessee on such barges can be stated to be breaking activity. We are of the opinion that the Adjudicating Officer committed an error in coming to the conclusion that repairing of barges amounted to breaking. In the common parlance as well as in the dictionary meaning both the terms have vastly different connotations. Term "repair" in the Webster's Third Unabridged New International Dictionary is explained as the act or process of repairing or restoration to state of soundness, efficiency or health. Term "breaking" is explained as to split into pieces or smash into parts or fragments typically by a blow or stress with suddenness or violence, to pull, rend, tear, thrust or sheer a part typically, forcefully or roughly.

13. Both the terms thus carry vastly different meaning. In the context of shipping business, ship breaking has a particular connotation where a ship or vessel which is no longer useful for voyage worthy is condemned and is broken thereby completely dismantling the vessel and selling parts generated from such ship breaking activity. In the present case, admittedly the barges were all in working condition. To maintain such barges and to repair the wear and tear, they

were brought for repair work and entrusted to a contractor. The assessee's contention that during such repair works, the value of parts replaced, exceeded the value of scrap generated is not disputed by the department. Under the circumstances, we are of the opinion that the Adjudicating Officer as well as the Appellate Commissioner committed an error in holding that during the repair work of the barges what activity was carried out amounted to breaking and that therefore, exemption which was granted for such barges on payment of customs duty, stood withdrawn.

14. Under the circumstances, we are of the opinion that scrap generated during the repair work was not exigible to customs duty when brought in India. We are confining our observations on the basis of the facts of the case where it is stated that approximate weight of each barge was 100 metric tones and it was during repair work of four such barges that total scrap of 40 metric tones was generated. We are also influenced by the fact that during such repair work substantial amount of indigenously manufactured parts were fitted in the barges and the value of such replaced parts would also be part of the value of the barges as and when they are brought for breaking and on which value the customs duty would be assessed. In the result, we allow the appeal, reverse the orders under challenge. We answer the question in the negative i.e. in favour of the assessee and against the Revenue. Tax Appeal is disposed of accordingly.