

(2017) 02 GUJ CK 0134
In the Gujarat High Court
Case No : 1490 of 2005

COMMISSIONER OF CUSTOMS (PREVENTIVE)

APPELLANT

Vs

KHANBHAI ESOOFBHAI

RESPONDENT

Date of Decision : 08-02-2017

Acts Referred:

Customs Act, 1962, Section 2(26), Section 15, Section 46 - Definitions. - Date for determination of rate of duty and tariff valuation of imported goods - Entry of goods on importation.

Citation : (2017) 02 GUJ CK 0134

Hon'ble Judges : M R Shah, B N Karia

Bench : Division Bench

Advocate : Dhaval D Vyas, Paresh M Dave

Judgement

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 23.02.2005 passed by the learned Customs, Excise and Service Tax Appellate Tribunal, Mumbai (hereinafter referred to as "CESTAT"), by which the learned CESTAT has dismissed the said appeal preferred by the Revenue relying upon its earlier decision in the case of Shree Dev Krupa Ship Breaking A/778/WZB/2004 dated 03.09.2004 which subsequently came to be confirmed by the Division Bench of this Court vide order in Tax Appeal No.537/2004, the learned CESTAT has dismissed the said appeal, the Revenue has preferred the present Appeal initially to consider the following questions of law. "Whether in the facts and circumstances of the case M/s. Khanbhai Esoofbhai in whose hands the vessel was actually broken up is liable to pay customs duty that became leviable in accordance with proviso to Notification No.163/65Cus dated 16.10.1965, or otherwise" 1.1 It is required to be noted that relying upon the decision of this Court in the case of Commissioner of Customs vs. Shree Dev Krupa Ship Breaking rendered in Tax Appeal No.537/2004, the Division Bench of this Court vide order dated 28.07.2006 dismissed the present Tax Appeal. However, subsequently, against the order passed by the Division Bench of this Court in

Shree Dev Krup Ship Breaking (Supra) and the decision of this Court in present Tax Appeal No.1490/2005, the matters were carried before the Hon''ble Supreme Court and the Hon''ble Supreme Court allowed the said appeals being Civil Appeal Nos.1577/2007 and 1578/2007 and quashed and set aside the orders passed by this Court in Tax Appeal No.537/2004 in the case of Shree Dev Krupa Ship Braking (Supra) and also quashed and set aside the order passed in present Tax Appeal No.1490/2005 and remanded the matter to this Court. While remanding the matters to this Court, the Hon''ble Supreme Court framed the following questions:

"1 M/s Shree Dev Krupa Ship Breaking, Sosio Ship Breaking Yard, Bhavnagar, are not importer within the meaning of section 2(26) of the Customs Act, 1962 (Para ix) of Page 8 of CESTAT order?

2 In the absence of specific condition (like condition No.65 of Notification No.16/2000Cus dated 2.03.2000) stipulating the filing of fresh Bill of Entry for breaking up and creating a legal fiction in the Notification No.163/65Cus dated 16.10.1965 as amended vide Notification No.129/86Cus dated 17.02.1986 cannot be retrospectively extended and posted to be read in Notification No.163/65Cus dated 16.10.1965 as amended (para (x) of page 9 of CESTAT Order)?

3 The relevant 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 on that date the importer would be Shipping Corporation of India (Para (xii) of page 10 of CESTAT Order? On remand, over and above, the above question, the Division Bench also framed one additional question of law. Thus, in the present case, the following substantial questions of law arise for consideration of this Court.

"1 M/s Shree Dev Krupa Ship Breaking, Sosio Ship Breaking Yard, Bhavnagar, are not importer within the meaning of section 2(26) of the Customs Act, 1962 (Para ix) of Page 8 of CESTAT order?

2 In the absence of specific condition (like condition No.65 of Notification No.16/2000Cus dated 2.03.2000) stipulating the filing of fresh Bill of Entry for breaking up and creating a legal fiction in the Notification No.163/65Cus dated 16.10.1965 as amended vide Notification No.129/86Cus dated 17.02.1986 cannot be retrospectively extended and posted to be read in Notification No.163/65Cus dated 16.10.1965 as amended (para (x) of page 9 of CESTAT Order)?

3 The relevant 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 on that date the importer would be Shipping Corporation of India (Para (xii) of page 10 of CESTAT Order?

4 Whether, on the facts and in the circumstances of the case, as provided under section 15 *ibid*, rate of duty 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 shall be the rate in force and accordingly, in the instant case, effective rate would tariff read with Sr. No.298 of Notification No.16/2000Cus dated 1.03.2000 subject to condition No.65?"

2. At the outset it is required to be noted and it is not in dispute that thereafter on remand the appeal in the case of Shri Dev Krupa Ship Breaking (*Supra*) came to be heard by the Division Bench of this Court and *vide* judgment and order dated 26.07.2012, the Division Bench of this Court has allowed the said Tax Appeal No.537/2004 and has quashed and set aside the order passed by the learned CESTAT and has answered all the questions which are common in the present Tax Appeal also, in favour of the Revenue and against the assessee. Therefore, as such substantial questions of law raised in the present Tax Appeal are already answered in favour of the Revenue and against the assessee, by the Division Bench of this Court in Tax Appeal No.537/2004. The aforesaid is not disputed by Shri Paresh Dave, learned Counsel appearing on behalf of the respondent. However, Shri Dave, learned Counsel appearing on behalf of the assessee has submitted that before the learned CESTAT some other submissions were also made, however without deciding other questions / submissions, the learned CESTAT dismissed the appeal preferred by the Revenue considering the decision of this Court in the case of Shree Dev Krup Ship Breaking (*Supra*) in Tax Appeal No.537/2004. It is submitted that therefore irrespective of the decision in Tax Appeal No.537/2004 dated 26.07.2012, it is requested to remand the matter to the learned CESTAT to consider other issues. 2.1 It is submitted that following are such issues which arise in this case on which there is no decision of the Appellate Tribunal.

"1) The case of M/s. Mustan Taherbhai on which the Commissioner of Customs (Appeals) relied upon has been ultimately remanded by the Hon''ble Supreme Court as is reported in 2011 (265) ELT 161 (SC). The present case may also therefore be remanded to the Tribunal to examine the entire legal issue after ascertaining the foundational facts as directed by the Hon''ble Supreme Court in case of Mustan Taherbhai (*Supra*).

2) A vessel built in India cannot be said to be imported when it comes back after completing a foreign voyage as held by the Hon''ble Supreme Court in case of UOI vs. Baijnath Mealram 1998 (97) ELT 27 (SC). This submission made before the Commissioner of Customs (Appeals) is not considered nor decided by the Appellate Tribunal.

3) *Vide* Notification No.167/86CE, the Central Government has allowed exemption from Central Excise duty to vessels for breaking up and the Hon''ble Karnataka High Court has held in case of Engee Industrial Services Pvt. Ltd. 2004 (164) ELT 242 (KAR) that additional duty of customs being directly linked to rate of central excise duty of customs being directly linked to rate of central

excise duty, which is nil for ship imported for breaking up, the additional duty in respect of Tariff item 89.08 for vessels for breaking up must also be nil. This exemption is applicable for the vessel involved in the present case also, and accordingly a substantial portion of the duty demand would disappear if additional customs duty is exempt.

4) This Hon''ble Court has held in case of Shivam Engineering Co. & Others 2014 (310) ELT 641 (Guj.) that additional customs duty on ships and vessels under Heading No.89.08 of the Customs Tariff Act, which covers vessels and other floating structures for breaking up, is not leviable because this heading is ultra vires Section 3(1) of the Customs Tariff Act. In view of this principle laid down by this Hon''ble Court also, demand of additional custom duty, which forms a substantial portion of the total demand, would be invalid.

5) Even otherwise, the Central Government has exempted recovery of Customs duty on the value of imported parts and materials used in relation to a ship or a vessel constructed in India. Such exemption qua value of imported parts and materials used by Hindustan Shipyard Ltd. would also be admissible."

3. When a pointed question was asked to Shri Dave, learned Counsel appearing on behalf of the assessee that whether any Cross Objection or Cross Appeal has been filed by the assessee, he has fairly conceded that the assessee has neither filed any Cross Objection nor Cross Appeal, against the decision of the learned CESTAT. He has also fairly conceded that even no such grievance was raised earlier and the aforesaid issue is raised for the first time now, when the decision in Tax Appeal No.537/2004 in the case of Shree Dev Krupa Ship Breaking (Supra) is against the assessee and in favour of the Revenue. He has also fairly conceded that question with respect to levy of additional customs duty on ships and vessels under Head No.89.08 of the Customs Tariff Act was neither raised before the learned CESTAT nor the said question arise in the present Tax Appeal. Therefore, the submission on levy of additional customs duty is raised now for the first time. Therefore, it is required to be noted that no question of law is framed with respect to levy of additional customs duty on ships and vessels and rightly not raised as no such question was raised before the learned CESTAT. Therefore, now it is not open for the assessee to raise the question with respect to levy of additional customs duty on ships and vessels which was never raised earlier. It is required to be noted that earlier before the learned CESTAT the respondent assessee heavily relied upon the decision in the case of Shree Dev Krupa Ship Breaking (Supra). Even the Division Bench of this Court also earlier dismissed the present Tax Appeal considering the decision of this Court in the case of Shree Dev Krupa Ship Breaking (Supra) in Tax Appeal No.537/2004. The Hon''ble Supreme Court reversed the decision of this Court in the case of Shree Dev Krupa Ship Breaking (Supra) in Tax Appeal No.537/2004 and also set aside the order passed by this Court in the present Tax Appeal, which was dismissed relying upon the decision in Tax Appeal No.537/2004. While remanding the matters / appeals to this Court, the Hon''ble Supreme Court also framed the

aforesaid questions of law and remanded the matter to this Court to consider the aforesaid questions of law only.

4. Now, by a detailed judgment and order dated 26.07.2012 in Tax Appeal No.537/2004, the Division Bench of this Court has answered all the questions of law raised in the present Tax Appeal in favour of the Revenue and against the assessee and has quashed and set aside the order passed by the learned CESTAT in the case of Shree Dev Krupa Ship Breaking (Supra).

5. In view of the above binding decision dated 26.07.2012 of the Division Bench of this Court in Tax Appeal No.537/2004, present Tax Appeal deserves to be allowed and is, accordingly, allowed. All the questions raised in the present Tax Appeal are answered in favour of the Revenue and against the assessee.