(2004) 03 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition No''s. 1977 and 2029 of 1992

Godrej Industries Limited APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 22-03-2004

Acts Referred:
Customs Act, 1962 — Section 14

Citation : (2005) 98 ECC 25 : (2004) 171 ELT 5

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : R.A. Dada and Milind Vasudeo, instructed by R. Ravindran, for the Appellant; Pradeep Jetley and A.S. Rao, instructed by T.C. Kaushik, for the Respondent

Judgement

J.P. Devadhar, J.—Validity of the public notices dated 30th March, 1992 and 17th September, 1997 issued by the Collector of Customs, Mumbai as well as the validity of the Circular dated 27th December, 2002 issued by the Central Board of Excise and Customs are challenged in these petitions. Under the said public notices/circular, the assessing authorities under the Customs Act are required to assess the imported bulk liquid cargo discharged from the vessel into the tank lorries as per the quantity determined under the ullage survey report irrespective of the quantity actually received by the importer.

2. Since the issues raised in these two petitions are common, both these petitions are heard together and disposed of by this common judgment.

3. Although, detailed facts are not necessary for deciding the issues raised in these petitioners, to appreciate the contentions of the parties, few facts enumerated in Writ Petition No. 1977 of 1992 (Godrej Industries Ltd.) are set out hereinbelow.

4. Godrej Industries Limited manufactures soaps, toiletries detergents, chemicals, etc. In the normal course of business they import different kinds of

oils, fats, etc. in bulk (bulk liquid cargo) as raw materials. For decades the petitioners have been obtaining delivery of liquid cargo directly from the vessel into the tank lorries and the respondents have been granting remission of duty if the quantity received as per the B.P.T. Weigh-bridge report is less than the quantity set out in the Bill of Lading. According to the petitioners, the quantity determined on the basis of the B.P.T. Weigh-bridge certificate represents the correct quantity delivered. Some time in August/September, 1992, when the petitioners were about to file the bills of entry in respect of the bulk liquid cargo imported by them from Indonesia/Malaysia, the petitioners were informed that in view of the Public Notice No. 49, dated 30th March, 1992 issued by the Collector of Customs, Mumbai, the customs duty will not be levied on the basis of the B.P.T. Weigh-bridge report but on the basis of the quantity determined as per the ullage survey report at the port of discharge i.e. at Bombay. On a representation made by the petitioners, the Assistant Collector of Customs by his letter dated 19-8-1992 informed the petitioners that their request for actual weighment cannot be acceded to in view of the Public Notice No. 49, dated 30th March, 1992. This petition was filed by the petitioners challenging the above public notice dated 30th March, 1992 and the intimation dated 30th March, 1992. During the pendency of the petition, another public notice dated 17th September, 1997 has been issued by the Commissioner of Customs (Imports), Mumbai and subsequently, a Circular Bearing No. 96/02, dated 27th December, 2002 has been issued by the Central Board of Excise and Customs (C.B.E.C.), New Delhi to the same effect. The petition has been amended to challenge the said notice dated 17th September, 1997 and the Circular dated 27th December, 2002.

5. Mr. R.A. Dada, learned Senior Advocate appearing on behalf of the petitioners submitted that it is now well established by various judicial pronouncements that the quantity determined by "Ullaging" is only approximation and not accurate determination and, therefore, the importers of bulk liquid cargo cannot be subjected to customs duty on the basis of ullage reports. Mr. Dada referred to a consignment of bulk liquid cargo imported by Godrej Industries Limited, the particulars of which are as follows :-

Quantity (i) as per the Bill of Lading - 649.651 MT (ii) as per the ullage report - 652.787 MT (excess at the Port of Loading 3.136 MT) (iii) as per the ullage report - 649.612 MT (indica- at the Port of ing shortage of (i.e. at Bombay) 0.039 MT) (iv) actually received as - 642.600 MT per B.P.T. Weigh-bridge report

Mr. Dada submitted that from the aforesaid facts, it is clear that the ullage report gives only the estimated quantity and not the exact quantity. From the aforesaid facts, it is seen that the quantity determined as per ullage report at the Port of loading is more than the quantity set out in the Bill of Lading. It was submitted that no supplier would dispatch goods more than what he has agreed to sell. Thus, it is clear that the quantity determined by ullage report is on estimate basis. However, in view of public notice dated 30-3-1992, the petitioners are required to pay the customs duty on 649.612 MT being the quantity determined under ullage report even though quantity actually received is only 642.600 M.T. Accordingly, it was submitted that the quantity determined under the ullage report cannot be made the basis for levy of customs duty.

6. Mr. Dada further submitted that all these years, the bulk liquid cargo discharged directly from the ship into the tanker lorries were weighed on the B.P.T. Weigh-bridge and the certificate issued by the B.P.T. Weigh-bridge was taken into account for remission of duty in case any quantity is lost or destroyed. Mr. Dada submitted that in view of the impugned public notices/circular the petitioners would be deprived of remission of duty and the duty assessed as per the ullage report would be final.

7. Mr. Dada further submitted that the CBEC Circular No. 96/02, dated 27th December, 2002 has been issued by misreading the orders of the CEGAT. In the case of Commissioner of Customs, Mumbai v. Hindustan Petroleum Corporation Ltd. reported in 2000 (121) E.L.T. 109 CEGAT noted that ullage report is made in the absence of any precise measurements. The Tribunal in that case, referring to several decisions of the Apex Court held that the taxable event in the case of bulk liquid cargo would commence from the date on which the ship crosses the customs barrier and will continue till the cargo is pumped into the shore tanks and the Bills of Entry for home consumption is filed. It was held that in cases where the cargo is discharged from the ship through the pipeline, the quantity determined in the shore tank through dip measurement should be the basis for assessment of customs duty. Similar view was taken by the CEGAT in the case of 1999 (66) ECC 502 . Civil Appeal filed by the Commissioner of Customs against the decision of the Tribunal in the case NOCIL (supra) was dismissed by the Apex Court on 20th February, 2002 - 2002 (142) E.L.T. 280 (S.C.). Thus, the dispute regarding the quantity discharged directly from the ship to the shore tank through regular pipeline is now settled. Mr. Dada submitted that when it is held by the Tribunal and approved by the Apex Court that the ullage measurement does not represent the correct quantity, it is not open to the C.B.E.C. to issue a circular directing that in cases where the bulk liquid cargo is not discharged through regular pipeline and is cleared directly on payment of duty under the white Bill of Lading i.e without the cargo being warehoused in a shore tank, the assessment has to be done as per the ship''s ullage survey report. He submitted that the customs duty should be levied on the quantity actually delivered and not on hypothetical basis. Accordingly, Mr. Dada submitted that the directions contained in the public notices/circular regarding assessment on the basis of ullage method be quashed and set aside.

8. Mr. P.S. Jetley, learned Advocate appearing on behalf of respondents, on the other hand submitted that the decisions of the Tribunal relied upon by the petitioners are not applicable to the case of the petitioners. He submitted that unlike in the case of delivery through pipeline into the shore tank, in the present case, the cargo discharged from the vessel into the tank lorries are transported

to the petitioner''s factories by road. He submitted that after the delivery of the cargo from the vessel into the tank lorries the Customs do not have control over the tank lorry and the physical weighment is done by the importers at the B.P.T. Weigh-bridge for their own safety against theft or pilferage. Therefore, B.P.T. Weigh-bridge report is not relevant for the purpose of assessment of duty of bulk liquid cargo cleared from the vessel directly into tank lorries.

9. Mr. Jetley further submitted that the impugned Circular No. 96/02, dated 27-12-2002 has been issued by the C.B.E.C. after examining the matter in the light of the decision of the Apex Court in the case of NOCIL (supra).

10. Mr. Jetley further submitted that in the case of palm acid oil on arrival of the ship immediately after the ullage survey the oil is discharged into the tank lorries and once all the tank lorries are loaded, another Ullage Survey termed as "after discharge" is carried out. The difference between the ''before discharge ullage survey report'' and after the discharge ullage survey report is taken to ascertain the oil actually discharged into the tanker lorries. These tanker lorries are taken to B.P.T. Weigh-bridge after obtaining out of charge from the proper officer. Since there is no time gap left between the pre-discharge ullage survey and after discharge ullage survey, if any loss in the quantity occurs during physical weighment of lorries, it is due to adhesive properties of fatty oil, pilferage of the oil from the pipes during discharge, leakage from the tank lorries, mechanical error in the Weigh-bridge, error in reading the weight, etc. Accordingly, it was submitted that where there is no facility for discharge of cargo through regular pipeline, quantity as per the ullage survey report has to be the basis for the purpose of assessing the discharged cargo.

11. Mr. Jetley further submitted that the cargo discharged through the regular pipeline e.g. petroleum products are volatile in nature; whereas cargo such as palm acid oil are not volatile. In view of the volatile nature of the cargo and there being no chance of diverting the goods transported through the pipeline, the Tribunal held that in the case of cargo discharged through regular pipeline into the shore tank, the measurement taken therein should be adopted for assessment. Mr. Jetley submitted that the cargo imported by the petitioners is not volatile in nature and after the cargo is loaded into lorries, the same is out of the charge of the Customs authorities and merely because the goods are weighed on the Weigh-bridge for the safety of importers, it cannot be said that the quantity for the levy of customs duty should be as per the Weigh-bridge report. He submitted that the ullage measurement is carried out in the presence of the consignee. Accordingly, it was submitted that there is no merit in the contention of the petitioners and the above petitions be dismissed.

12. We have heard the Counsel on both sides. The basic issue raised in these petitions is regarding the validity of the public notices/circular wherein it is declared that the bulk liquid cargo cleared directly on payment of duty under a white Bill of Entry should be assessed at a quantity determined as per ship''s ullage survey report, As per the said public notice/circular, for assessment, only

the quantity as per the ullage report is relevant and not the quantity determined by any other method.

13. Before dealing with the validity of the circular, we may refer to the decisions which led to the issuance of the impugned circular. In the case of Shaw Wallace and Co. Ltd. v. Assistant Collector of Customs and Ors. reported in 1986 (25) E.L.T. 948 (Bombay), the issue before this Court was whether the Customs authorities could levy penalty on the person in charge of the conveyance and their agents u/s 116 of the Customs Act, 1962 solely based on the outturn report given by the Bombay Port Trust. It was held that the ship owner had no control after the goods left its permanent hose connection and, therefore, the ship owner cannot be made liable for the short landing of goods based on the outturn report prepared by the Port Trust authorities. While disposing of the said petition, in the public interest and by consent of the appearing Counsel for the parties, guidelines were laid down by this Court for determining the quantity discharged from ship/vessel. The guidelines laid down by this Court in respect of bulk liquid cargo are as follows :-

"(A) Liquid Cargo in bulk :-

(1) The quantity shown in the Bill of lading reflected in the Import General Manifest should be prima facie accepted as the cargo on board the vessel brought for unloading at the Port of Bombay.

(2) In case, the person-in-charge of the ship or his Agent produces the ullage survey report prepared at the Port of loading and certified by an independent Surveyor, then the quantity mentioned in the ullage survey report should be accepted as the correct quantity brought by the vessel for unloading.

(3) The vessel should be permitted to discharge liquid cargo after a ut lage survey is carried out under the supervision of the Customs Officer and such survey report is signed by the Customs Officer, by the ship owner and the consignee.

(4) After the discharge of the liquid cargo from the vessel a fresh survey should be carried out in the presence of the Customs Officer and this discharge completion survey report should be signed by the Customs Officer, the Ship-owner, and the consignee.

(5) In case of any difference between the Bill of Lading, quantity or the ullage survey report of the Port of loading quantity and the discharge port ullage survey report quantity, then such difference shall be considered as short landed quantity and for which the ship owner should be held responsible."

It is pertinent to note that the aforesaid guidelines were laid down in the context of determining the short landing of goods and penalty leviable on the ship owners u/s 116 of the Customs Act, 1962.

14. In the case of NOCIL (supra) the issue before the CEGAT was, where the

cargo is discharged into the shore tank through the regular pipeline, what should be the quantity for levy of customs duty. Taking into account the losses that occur during the storage and transit on account of natural causes, evaporation, etc., it was held that the quantity determined at the shore tank by dip measurement should be the basis for levy of customs duty in respect of the cargo discharged into the shore tank through the regular pipeline. The said decision of the Tribunal has been upheld by the Apex Court. Thus, it is now settled that in respect of cargo discharged into the shore tank through the regular pipeline, the customs duty has to be levied on the quantity determined as per the shore tank dip measurement and not on the basis of the quantity determined as per the ullage report.

15. It is in the light of the aforesaid judicial decisions, the impugned public notices/circulars have been issued, Paras 6 and 7 of Circular No. 96/02, dated 27-12-2002 are relevant for the purpose of herein and the same are reproduced herein below :-

"6. Another issue of relevance pertains to assessment of bulk liquid cargo which is not discharged through regular pipelines and cleared directly on payment of duty under a white Bill of Entry, i.e. without the cargo being warehoused in a shore tank. The point raised is how to determine the quantity in such cases. It needs to be mentioned here that though the CEGAT order in case of HPCL relates to a situation of bonded tanks in a warehousing scenario, it would nevertheless be applicable in a situation of home consumption shore tank discharge which is under custodial/customs control. In such situations, the port/custodian would be issuing reports for quantity actually received. In the light of the guidelines of CEGAT orders referred to above, it has been felt that it is this quantity which should be taken into account for the purposes of levy of duty. However, in a situation where there is no facility of measurement at the port, i.e., bulk liquid cargo, which is not discharged through regular pipelines and cleared directly on payment of duty under a white Bill of Entry, i.e. without the cargo being warehoused in a shore tank, assessment may continue to be done as per ship''s ullage survey report.

7. In the light of above, I am directed to convey that in case of all bulk liquid cargo imports, whether for home consumption or for warehousing, the shore tank receipt quantity should be taken as the basis for levy of customs duty. Pending provisional assessments may be finalized accordingly. In the case of bulk liquid cargo imports which are not discharged through regular pipelines and cleared directly on payment of duty under a while Bill of Entry i.e., without the cargo being warehoused in a shore tank, assessment may continue to be done as per ship''s ullage survey report. As for liability of the Master/Agent for penal action for shortages u/s. 116 of the Customs Act, 1962, the same may continue to be fixed in terms of the guidelines laid down by the Bombay High Court in the case of M/s, Shaw Wallace. The liability should be evaluated by comparing ship''s ullage quantity at the port of discharge with the ship''s load port ullage quantity

or Bill of Lading quantity if the former is not made available by the Master/Agent."

16. In our opinion, the inference drawn by the C.B.E.C. from the decisions set out in the circular is not correct. In the case of NOCIL (supra), it was held that where the cargo is discharged directly into the shore tank through the regular pipeline, in view of the losses that occur during the storage and transit on account of natural causes, evaporation, etc. the quantity determined at the shore tank by dip measurement basis must be taken into account for levy of customs duty. From the said decisions, it cannot be inferred that in cases where the cargo is discharged from the vessel directly into the tanker lorries, the assessment of customs duty has to be done as per the quantity determined on the basis of ullage report. If by any method the actual quantity received by the importer can be determined; then it is not necessary to assess the cargo on the basis of the ullage reports. In other words, it cannot be said that the ullage report is the only basis for assessing the bulk liquid cargo discharged directly into the tank lorries.

17. It is true that the quantity determined on the basis of ullage report may not be totally accurate. However, if there is no other established method available then the recourse to ullage report will have to be taken. Wherever, it is possible to ascertain the quantity actually delivered, then such method can be adopted for the purpose of assessment. Therefore, the Customs authorities are not justified in issuing public notice/circular directing the assessing authority to adopt the ullage report for assessing the bulk liquid cargo discharged directly into tank lorries.

18. In the case of Varun Shipping Co. Ltd. Vs. Govindas S. Tampi, this Court has held that the measurement by ullages is a recognised method. The said decision has been consistently followed by this Court in large number of cases. It is true that in all those cases the issue pertained to the levy of penalty u/s 116 of the Customs Act, 1962. Even the CEGAT in the case of NOCIL (supra) or in the case of Hindustan Petroleum Corporation Ltd. has not held that the quantity determined on the ullage method should be totally discarded. It may be that the ullage report is made in the absence of any precise measurement. But nonetheless it is a recognised method and in the absence of any other recognised method which gives more accurate results, the quantity determined as per the ullage can be taken into account for the purpose of assessment.

19. In these circumstances, we hold that the public notices and the circular dated 27-12-2002 have to be read to the effect that wherever it is possible to determine the quantity actually delivered from the vessel into the, tank lorry, then such method is to be adopted for the purpose of assessment of customs duty of bulk liquid cargo and it is not proper to direct the assessing authorities to assess only on the basis of ullage report. If there is any other recognised method that gives more accurate results, such method may be taken into account for the purpose of assessment. In the absence of any such method, the quantity determined as per the ullage can be taken into account for the purpose of assessment by ensuring that such ullage survey prior to discharge of liquid cargo

is carried out under the supervision of the customs officer and signed by the consignee and the customs officer and after discharge of liquid cargo also survey is carried out in the presence of customs officer and the consignee and report is signed by both of them.

The petitions are allowed in the part as indicated above. However, there will be no order as per costs.