
(1980) 10 BOM CK 0007
In the Bombay High Court
Case No : Order-in-Appeal No. S/49-782/80R
In Re: M/s Kirloskar Oil Engines Ltd.

Date of Decision : 27-10-1980

Acts Referred:

Customs Act, 1962 — Section 12, 14, 2(23), 2(27), 45(1)

Citation : (1981) 1 ECR 374 : (1981) 8 ELT 309

Hon'ble Judges : M.G. Vaidya, J

Bench : Single Bench

Judgement

Shri M.G. Vaidya, Appellate Collector

1. This is an appeal presented by M/s. Kirloskar Oil Engines Ltd. They claim that the addition of landing charges to the invoice value is incorrect and the c.i.f. invoice value converted at the appropriate rate of exchange itself should be accepted as assessable value. They make it quite clear that this appeal is a test case though they have not yet followed up with similar appeal on their other importations.

2. In their original application before the Assistant Collector, the appellants relied upon Section 2(23) of the Customs Act for their contention that landing charges ought not be included in the assessable value arrived at u/s 14. The said section 2(23) actually defines import and not "Place of importation" as indicated by the appellants. Of course what the appellants intend to convey is that since India includes territorial waters of India vide Section 2(27) and since import is complete as soon as the goods are brought into India from a place outside India the landing charges which are incurred after importation are post-importation charges and therefore ought not to be included in the assessable value. I would not say that appellants grounds are irrelevant or incorrect. However they are too simplistic. Import as defined in Section 2(23) as well as "India" as defined in Section 2(27) are relevant only for determining the chargeability of imported goods to duty in terms of Section 12. However, the value on which such duty should be charged is entirely a matter of Section 14. For that purpose it would not be correct to go by such literal and simplistic interpretation of Section 2(23)

and 2(27).

3. The inclusion of landing charges to arrive at the assessable value is being done by Indian Customs from almost times immemorial. It is being done to my knowledge from some time earlier than 1935 at least, which is the date of earliest manual instructions that I can remember. The landing charges are paid to such agency as may be approved by the Collector of Customs in terms of Section 45(1). In effect it always means the Port Trust, a corporate local authority established by law made by Parliament. The Port Trust issues a dock scale of rates, for all different services rendered by them to importers, exporters and ships. Being a statutory authority it, in turn, has no authority to levy any dues without due force of law. In fact Port Trust will be included in the definition of "State" within the meaning of Article 12 of Constitution. We are always in a position to know positively what exactly is the scheme of different rates charged by the Port Trust for different dues levied on importers, exporters or ships. The Port Trust does not levy landing charges on a single flat rate per unit of weight or measurements. It is quite a complicated tariff schedule by itself though not perhaps as complicated as the Customs Tariff, Excise Tariff or Sales Tax Tariff. It would be comparable to either a Shipping Company's tariff for freight charges or a railway tariff. The fact remains that the actual landing charges as levied on different charges, if expressed as percentage of their value, vary within a very wide margin of anywhere between 0.001% to say 1%. Clearance of goods from Customs is always a matter of break-neck speed. The working of the Port Trust Organisation will be thrown in chaos if goods are not cleared with sufficient promptness. It will therefore be an impracticable thing for the Customs to levy the landing charges on the basis of either the actual charges paid or even on the basis of estimate of charges payable on each individual consignment. As it is, the Customs Appraiser has to be an expert on his own Customs Tariff and also has to be an expert on the Central Excise Tariff. He is also required to be an expert on the Import Trade Control Schedule. If on top of it we throw on him an onerous responsibility to be an expert of the Docks scale of rates it would be almost an impossible task as well as a very onerous task. At the same time fact remains that assuming the landing charges properly form part of the assessable value, the legal authority for such addition extends only to the actual landing charges and nothing else.

4. Because of the difficulties of estimating the actual or statutory charges on heterogeneous consignments, the Customs however almost never do that. Instead they periodically publish trade notices by which the percentage addition to be made on account of landing charges is published. Such percentage additions on account of landing charges are worked out by Customs Department with sufficient data and meticulous care. I should dispel impression if any prevailing in the trade, as if it is done purely arbitrarily. The value of the goods imported is always available to the Customs from their own records. The total amount of landing charges collected is available with the Port Trust and again is a data that are readily available to the Customs. By putting such figures

together for a relevant block of time the Customs work out the average landing charges and they adopt such average landing charges as the notional addition to be made on account of landing charges. Thus what is being actually added by the Customs on account of landing charges is not the actual landing charges for each individual consignment but a sort of weighted average of landing charges for all the cargo coming at a port. Since the Port Trusts are all autonomous bodies the rates differ from port to port and each Customs House has its own rate of this weighted average of the landing charges.

5. As I already observed, if the levy of duty on landing charges is legal it follows automatically that legally it is only the actual landing charges that will be liable to assessment for each consignment. In law there is no authority for this weighted average. At least not in the law as it stands to-day. In effect this means two things. These importers who pay a higher amount of landing charges (then the notional weighted average adopted by the Customs) are paying something less than due by way of Customs duty. Correspondingly those who pay a lesser amount by way of actual landing charges, are paying an excess customs duty. In effect the notional addition which Customs make is almost never in excess of 1%. Therefore nobody has so far seriously contested this matter. On pragmatic considerations of business convenience and expediency, nobody has taken the legalistic view. However a few importers whose actual landing charges were far less than notional weighted average addition made by Customs did claim refunds and the Customs paid such refunds, on the difference between actual landing charges v/s. notional weighted average additions. When the contrary happened the auditors of the Customs Department did naturally object. In their opinion the refunds may be right, but then as a corollary step must be taken to recover extra duty in all those cases where the actual landing charges were more than the notional weighted average addition made by Customs. It is obvious that such a tussle would have thrown the working out of gear and the very reason for adopting a notional weighted average would go over-board. Unlike those importers claiming difference of duty on the basis of actual landing charges and unlike the auditors, the present appellants M/s KOEL claim landing charges are not at all liable to be included in the assessable value.

6. The question whether such landing charges are at all properly liable to be included in the assessable value has been discussed from time to time. Even the present appellant made available to me certain extracts from the minutes of a Central Customs & Central Excise Advisory Council (Minutes of meeting held on 10-7-75). However, the Government reply as contained in its minutes, is rather sketchy. It does not answer the debatable point as to why the landing charges are properly part of expenses for delivery at the place of importation. It reads in so many words, "landing charges form part of expenditure incurred in respect of the cargo up to the point of landing and transit to port shed and cannot therefore be construed as post-importation charges, and therefore have to be included in the assessable value."

7. In India import cargo does arrive at many smaller Ports where the Customs Authorities and even the importers are not equipped with up to-date machines or office gadgets to aid calculation. Apart from the legality of the issue even on pragmatic grounds, it would be in the interests of all concerned if no such levy is imposed on landing charges. Calculating the landing charges is a time consuming task. Of course such practical considerations can be no guide to the statutory tribunal like the undersigned. That would have to be a Policy decision by the Government. However, even outside these pragmatic considerations, I have often felt to myself that there is no legal basis for levying duty on landing charges. In various Departmental meetings or forum, I have tried to broach this subject so as to elicit a discussion. However, my efforts always ended without a discussion on merits or legality of the levy and with a presumptive approach that the well entrenched practice must obviously be correct. I think this appeal by M/s. KOEL is the first appeal where the very legality of landing charges being clubbed in the assessable value is being challenged. Therefore, instead of the implicit assumption that the landing charges form rightly a part and parcel of the assessable value, we have now to turn to Section 14 and its text and see whether landing charges on a proper interpretation are at all liable to be included in the assessable value.

8. As per the said Section the assessable value is the price at which the goods are ordinarily sold for delivery at the place of importation. We have therefore to interpret and determine what is "place of importation".

9. The different terms used in overseas supplier's invoices are familiar to us. Some suppliers quote an ex-factory price and they show separately all different charges such as inland freight, loading charges etc. Ex-factory price is easy enough to understand. Ex-factory price plus inland freight up to loading port will convert it into as FAS price. The abbreviation FAS stands for "free along side ship". It is necessary to understand that FAS is different from f.o.b. In an FAS quotation it is implicit that the expenses incurred for placing the goods on board the ship are not included, whereas in an f.o.b. quotation such expenses are included. The abbreviation f.o.b. stands for "free on board".

10. An f.o.b. price becomes c.i.f. price if insurance and freight expenses up to port of destination are included therein. It is necessary and worthwhile to look into the different kinds of services which a steamer offers when it carries goods for freight paid or payable. If the ship offers these services without any extra charge beyond the freight, quite clearly those services stand included in c.i.f. price quotation.

11. A steamer when it arrives at the destination port where the cargo is to be unloaded, employs stevedoring labour. As everybody knows this labour is quite distinct from shore labour. The stevedoring labour works in the ship's batches. They prepare the slings of the cargo to be unloaded and hook these slings to the landing gear etc. All the expenses on account of such stevedoring labour are borne by the steamer on its own account. It does not levy any extra dues either

to the Bill of Lading holder or his nominee. In other words, the cost of stevedoring labour is a service which is included within freight charges collected and which are always part of our assessable value. Likewise the steamer has to employ some landing gear. Usually it would employ either its own winches or it would hire wharf cranes from the Port Authority. At one time employing shore cranes was the custom. However the service not only in India but all over the world from port authority - which are mostly governmental bodies - was so very unreliable that almost all Shipping Companies have now built modern ships with their own landing gear. Employment of port authority's cranes is almost the exception now rather than the rule. Fact remains that even today the port authority's cranes are sometimes employed by the ships. It is well-known that the expenses for wages of the winch operator or the actual expenses for running of the winch or the expenses paid to the port authority for cranes hired are all borne by the steamer. Just like the charges for stevedoring labour these are also expenses which the steamer company meets out of freight collection and no extra charge is levied by it on account of the carnage. In other words, with collection of the freight steamer company customarily renders a service inclusive of landing the cargo ex-hook on the port authority's wharf.

12. The price f.o.b. loading port does not include freight. The price f.o.b. destination port is a terminology rather unfamiliar to us. However, if a ship charges something extra over and above the freight on account of the carnage on which operator or the stevedoring labour it is quite obvious that the service rendered by the Shipping Company is not quite on par with a c.i.f. quotation which does not include such extra charges. Such an invoice where extra charges over and above freight have to be paid for carnage and stevedoring services will have to be described as "f.o.b. destination port". It stands distinguished from normal quotation of c.i.f. destination by the fact that the former does not and the latter does include expenses up to landing the sling on port authority's wharf. It is not as if I am making this imaginary distinction between "c.i.f. destination" and "f.o.b. destination". We have large volume of trade with U.S.S.R. That Communist country follows so many practices in international trade which are not at all customary with the free world. They always show in their invoices freight but include an additional and extra charge over and above freight on account of stevedoring charges and carnage. Since most of the imports from U.S.S.R. are on account of Governmental Undertakings, private trade may not be sufficiently aware of this system. We in Customs are familiar with the fact that for Russian invoices on actual enquiry is invariably undertaken whether stevedoring charges are payable over and above the freight expenses included in the invoice. If the answer is in the affirmative a further addition on account of stevedoring charge payable is always made to the invoice of U.S.S.R. origin goods. I am trying to establish that there is a distinction between f.o.b. destination and c.i.f. destination. The c.i.f. destination includes cost of delivery at port authority wharf. It is in effect, delivery F.A.S. destination port.

13. Would not such delivery ex-wharf of the destination port authority meet the

requirements of Section 14 viz. delivery at the place of importation ? If it meets the requirements obviously a further levy on account of landing charges which the importer paid to the port authorities is uncalled for. Such additional landing charges would be proper only if the ex-wharf or ex-hook delivery of the Shipping Company could be deemed to be falling short of delivery at the place of importation, the terminology of Section 14.

14. In my opinion, the ex-wharf or ex-hook delivery with is implicit in "c.i.f. destination" meets fully the requirements of Section 14. The further charges which the importer pays to the port authorities are on account of removal of the cargo ex-hook to a safe protected place and its proper stacking. It is a charge for a service over and above "delivery at the place of importation". Naturally nobody renders any service free. If the port authorities render any such service they are entitled to charge for that. The fact remains that it is a charge for a post-importation service and therefore not liable to be included in the assessable value of the goods.

15. In fact there are certain types of cargoes for which business considerations as well as safety warrant that delivery be obtained promptly ex-hook or on overside barges. If the barges are employed by the importer at his own cost he will indeed be accepting no further services from the port authority. The landing charges incurred by him would be nil, (though with their statutory powers the port authorities might very well be authorised to collect and might be compelling him to pay the same). In fact though the port authority does have statutory protection to levy such charges even where they do not actually incur expenses, or are not called upon to render such customary services, they do often encourage the importer to take direct ex-hook delivery in their trucks or on over side barges and as an inducement they reduce or drop the landing charges.

16. At this point the importers/appellants insistence that the place of importation of India becomes relevant. I have no doubt earlier said that arrival of the importing vessel within India Customs Waters would be too simplistic to hold that the delivery at the place of importation has been completed. Nevertheless, I not think that if the c.i.f. price has implicit in it a delivery ex-hook on the port authority's wharf any further stretching of "place of importation" is uncalled for and will lack precision. It will always be an arbitrary exercise to try to determine the place of importation at any point beyond ex-hook delivery on the port authority's wharf. That the importer does actually incur such expenses is not sufficient to charge duty on it. If the expenses are positively on account of a post-importation service there is clearly no authority of law to charge duty on it. Even the fact that port authority has statutory right to levy the charge even if it renders no such services should not in my opinion make difference.

17. The term "landing charges" is of course confusing. It gives the impression as if it is in fact the expenses of landing the cargo from ship's holds on to the wharfs. If that were the case, certainly landing charges could be included in the assessable value. It would not be correct to say that free on board the vessel at

destination port is the contemplated delivery at the place of importation of Section 14. But I hope my above analysis makes it clear that notwithstanding the wrong impression conveyed by the apparent sense of the expression "landing charges", such landing charges are not at all the expenses for unloading cargo from ships hatches to Port Authorities wharf. Those expenses are already included in the freight which is an element of the c.i.f. destination price. The erroneous expression landing charges actually applies to expenses incurred for a service beyond that point. It is the expenses for keeping the Port Authority's wharf - which after all is a transit area - clean. It is the expenses for protection of the cargo and the proper stacking. It is quite clearly a charge for post-importation services. Port Authority's wharf where the cargo is landed by the Shipping Company, with stevedore labour and carnage expenses borne by itself without extra charges beyond freight, is certainly the place of importation. In other words, with collection of freight the Steamer Agents deliver the cargo not free on board the ship but free along side ship at the Port of destination. Expenses of landing cargo from ship's hatches on to wharf are borne by them and are met out of freight collection without any extra fee. What is known by the name of landing charges are not properly landing charges at all but a specific fee for certain post-landing and post-importation services.

18. In the circumstances, I allow this appeal. In my opinion, there is no authority of law to levy duty on this notional addition of landing charges. Whatever expenses are incurred for effecting the delivery at the place of importation are always included in the element of freight in c.i.f. quotation. The assessable value of appellant's goods shall be reduced by the amount of addition made on account of landing charges and consequential refund shall be paid.