
(2010) 08 BOM CK 0026
In the Bombay High Court
Case No : Customs Appeal No. 3 of 2009

Narayan Bandekar and Sons Pvt. Ltd.	APPELLANT
Vs	
Commr. of Cus. and C. Ex	RESPONDENT

Date of Decision : 18-08-2010

Acts Referred:

Customs Act, 1962 — Section 16(1)(a), 17, 39, 50, 51

Citation : (2011) 183 ECR 55 : (2010) 259 ELT 362

Hon'ble Judges : F.M. Reis, J;A.S. Oka, J

Bench : Division Bench

Advocate : A.F. Diniz, for the Appellant; C.A. Ferreira, ASG, for the Respondent

Final Decision : Allowed

Judgement

A.S. Oka, J.—The appeal has been admitted on the following substantial question of law:

Whether the Tribunal was correct in holding that the relevant date for assessment of duty, was the date on which the loading of goods started i.e. on 1-3-2007?

2. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to briefly refer to the facts of the case. On 28th February, 2007, a vessel "M.V. Iran Ashrafi" was due to arrive at Panaji port. It is stated that the said port does not have an area for stacking iron ore to be exported and, therefore, the ore has to be loaded by using barges. The Appellant presented two shipping bills to the proper officer on 28th February, 2007. On the same day, the Officer assessed the goods for cess payable at Re. 1/- per kg. and the assessed amount was paid by the Appellant on the same day. Thereafter, the Superintendent of Central Excise who had assessed the shipping bills also completed the examination and made a remark "Inspected the lot. Checked the description. Quantity actually loaded will be determined on the basis of draught survey report". The Superintendent also passed an order "Passed for

shipment" on the same day. According to the Appellant, clearance and loading of the iron ore for export was permitted by the Superintendent. However, the vessel arrived at the port on 1st March, 2007 at about 00.42 a.m. Notice of readiness was accepted by the parties at 2.10 p.m. on 1st March, 2007. In the meanwhile, the export duty of Rs. 300/- per Metric Tone on the iron ore was imposed with effect from 1st March, 2007. On insistence of the Department of Customs, the exporter paid the duty at the rate of Rs. 300/- per MT on 9th March, 2007. Thereafter, refund claim was filed on the ground that the date of determination of the rate of duty and tariff valuation of export goods is the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation u/s 51 of the Customs Act, 1962 (hereinafter, referred to as "the said Act"). The contention of the Appellant was that the order for shipment was passed on 28th February, 2007, is an order u/s 51 of the said Act. The refund claims made in respect of both the bills were rejected by the Assistant Commissioner. Therefore, two separate appeals were preferred by the Appellant before the Commissioner of Customs (Appeals). By judgment and Order dated 12th November, 2007, the said appeals were allowed. The said judgment and Order was challenged in appeal by the Respondent. By the judgment and Order dated 30th September, 2009, the Customs, Excise & Service Tax Appellate Tribunal (hereinafter, referred to as "the CESTAT") allowed the appeal preferred by the Respondent against the order in appeal. Order of remand was passed by the CESTAT, directing the appropriate authority to re-assess the goods u/s 17 of the said Act by treating the relevant date for determination of export duty as 1st March, 2007. The CESTAT directed that the refund application shall be decided thereafter.

3. The learned Counsel appearing for the Appellant submitted that the relevant date for determination of the duty payable on the export goods is the date on which the permission for loading and clearance is given by the proper officer. He submitted that in the present case, the order dated 28th February, 2007 passed by the Superintendent of Central Excise will have to be treated as an order u/s 51 of the said Act and, therefore, as on that day, there was no duty payable by the Appellant on the goods inasmuch as only on 1st March, 2007 the duty became payable on the goods. The learned Counsel appearing for the Appellant relied upon a decision of the CESTAT in the case of Kineta Minerals & Metals Ltd. v. Commissioner of Customs, Guntur [2009 (241) ELT 416].

4. The learned Asst. Solicitor General supported the impugned judgment and Order by contending that Section 39 of the said Act will have to be read along with Section 51 and the relevant date is the date on which an order is made for loading of the goods u/s 39 of the said Act. He submitted that as on 28th February, 2007, there was no vessel available in the port for loading the cargo for export. He submitted that the CESTAT has rightly held that the duty was attracted. He submitted that no interference is called for.

5. Section 16 of the said reads thus:

SECTION 16. Date for determination of rate of duty and tariff valuation of export goods. - (1) The rate of duty and tariff valuation, if any, applicable to any export goods, shall be the rate and valuation in force, -

(a) in the case of goods entered for export u/s 50, on the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation u/s 51.

(b) in the case of any other goods, on the date of payment of duty.

(2) The provisions of this section shall not apply to baggage and goods exported by post.

6. We are concerned with Clause (a) of Sub-section (1) of Section 16 which provides that in case of goods entered for export u/s 50, the date of determination of rate of duty and tariff valuation of export goods will be the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation u/s 51 of the said Act. Sections 50 and 51 of the said Act read thus:

50. Entry of goods for exportation.- (1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

51. Clearance of goods for exportation.- Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation.

7. Sub-section (1) of Section 50 contemplates that the exporter of the goods should make entry thereof to the proper officer by presenting a shipping bill. After satisfying that the exporter has paid the duty assessed on the goods, the proper officer can exercise power u/s 51 and make an order permitting clearance and loading of the goods for exportation. In the case of Prime Mineral Exports Private Ltd. Vs. Union of India (UOI), , in paragraph 7, this Court has observed thus:

As per paragraph 40 of the CBEC's Customs Manual of Instructions, on passing of a shipping bill by the Export Department, the exporter has to present the goods to the shed appraiser (export) in docks for examination. The shed appraiser may mark the document to a Custom Officer for examining the goods. If the description and other particulars of the goods are found to be as declared, the shed appraiser gives a "let export order" after which the exporter may

contact the preventive superintendent for supervising the loading of the goods on the vessel. The order passed in the nature of "let export order" is an order permitting the clearance and loading of the goods for exportation in accordance with Section 51 of the said Act.

8. Coming back to the facts of the case, on the shipping bills, the proper officer - Commissioner of Central Excise has recorded the examination report which reads thus:

Examination Report

Inspected the lot, checked the description. Quantity actually loaded will be determined on the basis of draught survey Report.

The Shipping Bills show that Let Export Order was signed on 28th February, 2007 by the Superintendent Central Excise and on the same day an order "allowed for shipment in full" was passed by the said officer. Admittedly, as of 28th February, 2007, only cess was payable on export of iron ore. There is no dispute that cess of Rs. 25,000/- and Rs. 17,000/- respectively was paid against the shipping bills on 28th February, 2007. Admittedly, on 28th February, 2007 no export duty was payable and what was payable was the export cess which was admittedly paid on the same day. The remarks made by the Superintendent of Central Excise show that he was satisfied that the goods were not prohibited goods and, therefore, he passed an order "allowed for shipment" on 28th February, 2007 and signed "Let Export Order" on the same day. Thus, the order permitting clearance and loading of goods for exportation u/s 51 of the said Act was made on 28th February, 2007. Thus, 28th February, 2007 is the date for determination of the rate of duty. Admittedly, on that day, the export duty was not payable. It became payable with effect from 1st March, 2007. The Commissioner of Customs (Appeals) held that the Let Export Order was issued on 28th February, 2007 and, therefore, both the requirements of filing of the shipping bill and issue of the Let Export Order were completed on 28th February, 2007 and, therefore, the relevant date u/s 16(1)(a) is 28th February, 2007. This aspect has been completely overlooked by the CESTAT. The CESTAT committed an error by holding that the relevant date as per Section 16(1)(a) of the said Act will have to be treated as 1st March, 2007 when loading was actually started. On a plain reading of Section 51 read with Clause (a) of Sub-section (1) of Section 16 of the said Act, the date of determination of the duty is the date on which an order was passed u/s 51 by the proper officer which in this case is 28th February, 2007. The date on which actual loading of iron ore was started is totally irrelevant.

9. In the circumstances, order of the CESTAT will have to be quashed and set aside and the appeal preferred by the Respondent will have to be dismissed.

10. Hence we pass the following order:

(i) The impugned judgment and Order dated 30th September, 2009 passed by the CESTAT is quashed and set aside and the judgment and Order dated 12th

November, 2007 passed by the Commissioner of Customs (Appeals) in F. No. A-56/CUS/GOA/2007 & F. No. A-57/CUS/GOA/2007 is restored.

(ii) The appeal is allowed in the above terms, with no order as to costs.

After the judgment was pronounced, the learned Counsel appearing for the Appellant prays that the Appellant be permitted to withdraw the amount transferred to this Court by the CESTAT, along with interest accrued thereon. We direct that after expiry of the period of 8 weeks from today, subject to order which may be passed by the higher Court, the Appellant shall be entitled to withdraw the amount transferred to this Court by the CESTAT along with interest, if any, accrued thereon.