

(2012) 07 GUJ CK 0050
In the Gujarat High Court

Case No : CE-Customs Gold Control Reference No. 14 of 2004

Priya Holding (P) Ltd.

APPELLANT

Vs

Commissioner of Customs, Preventive

RESPONDENT

Date of Decision : 05-07-2012

Acts Referred:

Customs Act, 1962 — Section 130A, 28, 46

Citation : (2013) 288 ELT 347

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

Bench : Division Bench

Advocate : Jitendra Malkan, for the Appellant; Amee Yajnik and Shri A.Y. Kogje, for the Respondent

Judgement

Harsha Devani, J.—Pursuant to a reference application made by the applicant u/s 130A of the Customs Act, 1962 (hereinafter referred to as "the Act") this court had admitted the reference by framing the following substantial question of law for determination and had called for a statement of case from the Tribunal:

Whether the bunkers containing oil were to be treated as part of the vessel's machinery so as to attract Entry No. 89.08 of the Schedule to the Customs Tariff Act, 1985?

The facts stated briefly are that the M/s. Priya Holding (P) Ltd. (the respondent herein) imported an old ship M.V. BORROVICH I at the ship breaking yard, Sosiya for the purpose of breaking up and filed Bill of Entry No. 67 dated 12-11-1990 for home consumption/clearance before the Superintendent of Customs and Central Excise, Alang in terms of Section 46 of the Act. The Bill of Entry was assessed to duty amounting to Rs. 50,52,210/- which was paid by the respondent. Subsequently, the Superintendent issued Demand Notice to the respondent for levy of duty amounting to Rs. 1,34,913/- being duty on moveable gears, fuel oil, stores, etc. u/s 28 of the Act as the duty was not recovered along with the vessel. The Central Board of Excise and Customs issued a Circular No. 37/96-Cus., dated 3-7-1996 containing guidelines for classification of (1) Moveable

gears such as lifting and handling equipment, (2) Bunkers such as fuel and oil, engine oil, (3) Ship stores such as spare parts, food stuffs, etc. Based on the said circular, the Assistant Collector, Central Excise, Bhavnagar adjudicated the case by an order-in-original dated 30-3-1999 and confirmed duty amounting to Rs. 66,582/- The respondent carried the matter in appeal before the Commissioner (Appeals) contending that in the light of the Boards Circular, the Bunkers, that is, fuel and lubricating oil contained in the tanks in the engine room should also be classified with the ship imported for breaking and not individually on merit. The Commissioner (Appeals) did not accept the said contention on the ground that the respondent was treating lubricating oil and fuel contained in vessel's machinery and engine as the same as the fuel and oil contained in the engine room. According to the Commissioner (Appeals) the definition of LDT as furnished by the respondent and in terms of the Board's Circular means is that fuel and oil contained in vessel's machinery and engine could be regarded as forming the integral part of the vessel and hence was classifiable under Chapter Heading No. 89.08 of the Customs Tariff Act, and not the fuel kept in the engine room, which cannot be treated as a part of the engine and machinery. He, accordingly, held that the bunkers, that is, fuel and oil in a tank kept in the engine room cannot be treated as "remaining fuel or oil" or fuel or oil in engine and machinery, and accordingly, cannot be called as forming part of vessel, and therefore, is not classifiable under Chapter Heading No. 89.08 of the Tariff Act as clarified by the Board under para (d) of its Circular. The respondent carried the matter in second appeal before the Tribunal.

2. The Tribunal, in the impugned order 2003 (153) ELT 104 , held that the Board's Circular No. 37/96-Cus., dated 3-7-1996 had been issued after consulting World Customs Organization, Brussels. The circular also mentions that fuel and oil contained in the vessels machinery and engines can only be regarded as forming integral part of the vessel and to be classifiable along with the vessel under Heading No. 89.09; that the circular, further provides that the remaining fuel and oil has to be classified separately in their own appropriate heading. The Tribunal, found force in the submissions of the learned counsel for the respondent that the engine room tank is to be considered as containing fuel and oil in the vessel's machinery and engine. The Tribunal, however, held that the fuel and oil contained in the other tank will fall within the category of "remaining fuel and oil" which is covered by Para 2(d) of the Circular and held that the fuel and oil in engine room tanks will be classified with the ships under Heading 89.08 and fuel and oil in other tanks will be classifiable in their own headings and duty will be charged accordingly. Being aggrieved, the revenue filed a reference application before this court which came to be admitted on the above referred substantial question of law.

3. Ms. Amee Yajnik, learned senior standing counsel for the appellant, assailed the impugned order passed by the Tribunal submitting that the Tribunal was not justified in holding that the fuel contained in the engine room tanks should be classified with the ship under Heading 89.08. It was submitted that engine room

tank can in no manner be stated to be forming part of the vessel's machinery and engine, and hence, the Tribunal has erred in holding that the same should be classified under Heading 89.09 with the ship. According to the learned counsel the Tribunal has erred in equating engine with engine room and that the interpretation put forth by the Tribunal is contrary to the provisions of the circular. On a simple reading of the circular, it is clear that the fuel and oil contained in the vessel's machineries and engines only can be regarded as integral part of the vessel, and hence, be classified under Heading No. 89.08 and that, by no stretch of imagination, can the engine room tanks to be considered as part of engine. It was further submitted that the circular envisages fuel and oil contained in "engines" and not in "engine room tanks" or "tanks in engine room". It was, accordingly, urged that the question is required to be answered in favour of the Revenue by holding that the fuel contained in the engine rooms is required to be classified separately under its own heading.

4. Though served, there is no appearance on behalf of the respondent.

5. As is apparent from the substantial question of law framed by the court while admitting the reference, the core question that arises for consideration is as to whether bunkers containing oil were to be treated as part of the vessel's machinery so as to attract Entry No. 89.09 of the Schedule to the Customs Tariff Act, 1975. In other words whether the fuel and oil in the engine room tank of the vessel should be classified with the ships under Heading 89.08 or under their own headings.

6. In this regard, it may be germane to refer to the Circular 37/96-Cus., dated 3-7-1996 on which reliance has been placed by the applicant as well as by the Tribunal and both the authorities below which reads as under :

Ships and other floating structures imported for breaking up-Doubts have been raised in the context of an audit para regarding classification of (i) moveable gears such as lifting and handling machinery, anchors, navigational equipments/ machine tools, fire fighting equipment (ii) bunkers, such as fuel and oil, engine oil and (iii) ship stores, such as spare parts, food stuffs, alcoholic and other beverages imported on Board a ship for breaking-up [Para No. 1.01 of the report of the Comptroller & Auditor General of India for the year ended 31st March, 1991 (4 of 1992)]. While Department was of the view that the articles are classifiable under Heading 89.08 of the Customs tariff covering vessel and other floating structures for breaking up. Audit was of the view that these items are not covered by this heading and needs to be classified separately in their respective headings.

2. The issue was referred to World Customs Organization, Brussels, who has opined that:

(a) Moveable gears such as lifting and handling machinery, anchors, navigational equipment, machine tools, fire fighting equipment form part of vessel's normal equipment and hence classified under Heading No. 89.08.

(b) Fuel and Oil contained in the vessel's machinery and engines can also be regarded as forming integral part of the vessels and hence be classified under Heading No. 89.08.

(c) Spare parts (such as propellers), whether or not in a new condition and moveable articles (furniture, kitchen equipment, table-ware etc.) showing clear evidence of use and which have formed part of normal equipment of vessels are classifiable under Heading No. 89.08.

(d) Remaining fuel and oil (other than that mentioned in sub-para (b) above and other ship stores including drinks and foodstuff) are classifiable separately in their own appropriate headings.

7. A perusal of the impugned order of the Tribunal shows that before the Tribunal, it had been contended on behalf of the respondent that as per the definition of LDT of ship, oil stored in double bottom tanks, deep tanks, storage or reserve supply tanks, barrels, drums or tins is not included in LDT and duty is leviable thereon. However, oil in engine room tanks connected and associated with the machinery and engines of the ship is included in the LDT and duty is not leviable thereon. Reliance had been placed on a Book titled "Ship Design and Construction" published by the Society of Naval Architects and Marine Engineers, New York, wherein it is mentioned that while sending ships for breaking, the seller provides sufficient fuel oil and water so that ship can be beached properly at their own power that such oil is always in engine department tanks only which are associated and connected with the machinery and engine and ship; that such oil is called "fuel and oil contained in vessel's machinery and engines" regarded as forming integral part of the vessel and no separate duty is leviable thereon.

8. Thus, the case of the respondent was that other tanks containing fuel and oil did not form part of the LDT of the vessel and had to be classified under their own heading and duty had to be charged accordingly. But the fuel and oil contained in the Bunkers, that is, the engine room tanks formed an integral part of the vessel and, therefore, had to be classified along with the vessel under Heading No. 89.08.

9. Thus, the issue of classification had been referred to the World Customs Organization, Brussels, which has given its opinion as reflected in the above referred Circular No. 37/96-Cus. Insofar as the issue involved in the present case is concerned, the relevant paragraph are sub-paras (b) and (d) of paragraph 2 of the Circular, As per sub-para (b) the fuel and oil contained in the vessel's machinery and engines can also be regarded as forming integral part of the vessel and classified under Heading No. 89.09; whereas as per sub-para (d) the remaining fuel and oil [other than that mentioned in sub-para (b)] and other ship stores, including drinks and food stuff are classifiable separately in their own appropriate headings.

10. The crucial question, therefore, is whether the fuel and oil contained in the engine tanks would fall within sub-para (b) or sub-para (d) of paragraph 2 of the

circular.

11. As can be seen from the impugned order, the Tribunal, after appreciating the evidence on record, has come to the conclusion that the fuel contained in the engine tanks would form an integral part of the vessel's machinery and engine, and therefore, would fall under sub-para (b) whereas the remaining fuel and oil contained in other tanks would fall within the ambit of sub-para (d) and would be classifiable under their own separate headings.

12. As noted earlier, before the Tribunal, the learned counsel had placed reliance upon the Book titled "Ship Design and Construction" for demonstrating that fuel and oil contained in the engine department tanks is always associated and connected with the machinery and engine of the ship which forms an integral part of the vessel. The learned counsel had also submitted that as per the definition of LDT of ship, oil stored in other tanks on the ship are not included in the LDT, however, oil in engine room tanks is included in the LDT and it, therefore, forms part of the vessel and is classifiable along with the ship under Heading No. 89.08. Based upon the aforesaid evidence led before it, the Tribunal has, accordingly, come to the conclusion that the fuel and oil contained in the bunkers, that is, engine room tanks of the vessel form an integral part of the vessel, and therefore, would be classifiable under Heading 89.09; whereas the fuel contained in the other tanks would be classifiable under their own headings. It may also be recalled that as per the commentary in the Book titled "Ship Design and Construction" the fuel contained in the engine tanks are associated and connected with the machinery and engine of the ship, and such oil is called fuel and oil contained in the vessel's machinery and engines and is regarded as forming integral part of the engine. If the fuel and oil contained in the engine tanks is considered to be fuel and oil contained in the vessel's machinery and engines, the same would directly fall within the ambit of sub-para (b) of paragraph 2 of the above referred Circular No. 37/96-Cus. Once the fuel and oil contained in the bunkers, that is, engine room tanks, fall within the ambit of sub-para (b), as a natural corollary the same would be classifiable along with the vessel under Heading No. 89.08. In the light of the aforesaid discussion, it is not possible to state that there is any legal infirmity in the impugned order passed by the Tribunal. The question is, accordingly, answered in the affirmative, that is in favour of the assessee and against the Revenue. The bunkers containing oil were to be treated as part of the vessel's machinery and were classifiable under Heading No. 89.09 of the Schedule to the Customs Tariff Act, 1975. The reference stands disposed of accordingly.