
(1989) 03 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No. 255 of 1985

Ranadip Shipping and Transport Co. Pvt. Ltd.

APPELLANT

Vs

Collr. of Customs

RESPONDENT

Date of Decision : 10-03-1989

Acts Referred:

Citation : (1989) 42 ELT 398

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Judgement

1. Whether the consignment imported by the Petitioner falls under Heading 84.22 or Heading No. 87.07 of the Customs Tariff Act, 1975, is the bone of contention between the importer and the Customs Authorities. The further contention is regarding the question whether the petitioner is entitled to refund of the difference of the duty in the event of the first issue being answered in its favour.

2. The Petitioner, who carries on business as Steamer Agent and Cargo Handling Agent and Transport Operator, on the 11th of September, 1981 imported Belotti B-75 Container Handling Crane and its spares on behalf of its principals Sea Land Service Inc. U.S.A. of which the Petitioner is the local Agent. The petitioner believing that it was the pioneer in the field of importing the said consignment and not being certain as to the duty that would be leviable on its import, entered into correspondence with the Customs Department. By its letter dated the 23rd of April, 1980, the Petitioner enquired with the Collector of Customs regarding its classification. By intimation dated the 2nd of July, 1980, the Petitioner was informed that the consignment was stacking Machine and fell within the Heading 87.07 and duty would be leviable accordingly. The Petitioner finding that the duty payable under the above classification was over 100%, it by its letter dated the 3rd of February 1981 addressed to the Director, Central Board of Excise and Customs, New Delhi, requested to refix the duty payable. By letter dated the 28th of April 1981, addressed by the Government of India, Ministry of

Commerce, New Delhi, to the Director, Central Board of Excise and Customs, New Delhi, the Government asked for assistance and advice in respect of the Petitioner's claim for classification. The consignment arrived and was duly cleared on the 11th of September, 1981 and the Bill of Entry in regard thereto shows that the Petitioner paid duty of Rs. 23,62,792.83p. on the two container handling equipment and Rs. 1,00,511.26 p. on its spares. This was as per the classification under the Heading 87.07. By letter dated the 26th of September 1983, the Government of India, Ministry of Commerce informed the petitioner that the Director, Central Board of Excise and Customs, has in pursuance of its query opined that the consignment, viz., Belotti B-75 container Handling Equipment is a special purpose mobile crane designed to handle containers of various types and this machine will be classified under the above category.

3. Emboldened by the aforesaid advice, the Petitioner on the 28th of September 1983 applied to the Government for refund. By reply dated the 17th October 1983 the Petitioner was informed that the assessment of duty was quasi-judicial matter and if it was aggrieved by the decision of the Customs authorities, it may take recourse to appellate remedies provided under the Customs Act. The Petitioner, on the strength of the advice of the Director of Central Board of Excise and Customs, re-applied on the 29th of March 1984 and 21st of May 1984 without a favourable response except a reply dated the 4th of June when the government re-informed the Petitioner of the advice of the Director of Central Board of Excise and Customs earlier intimated by the letter dated 26th of September 1983. The Petitioner, thereafter on the 17th of December 1984 filed the present Petition.

4. This Petition came to be rejected by the learned Single Judge by his order dated the 19th of February 1985. The Petitioner thereafter preferred Appeal No. 346 of 1985 wherein the learned Judges of the Appellate Court by their order dated the 19th of August 1987 set aside the order of the learned Single Judge and issued the Rule and expedited the hearing of the Petition, and the said Petition has been taken up by me for hearing and final disposal.

5. Shri Bharucha, the learned Counsel appearing in support of the Petition, submitted that the Government had referred the matter of classification of the consignment imported by the petitioner to the director General of Technical Development and had obtained its expert advice and opinion. The information indicated that the consignment was a special purpose mobile crane designed to handle containers of various types. Hence the consignment would fall not under Heading 87.07 but would fall under Heading 84.22. The Heading 87.07 related to "Vehicles", whereas Heading 84.22 related to "Cranes, transporter cranes, etc.". Though the consignment in question was crane mounted on a chassis fitted on the wheels to facilitate short movement for the purpose of lifting, handling, loading or unloading the goods, the same could not be termed as "Vehicle" so as to attract the application of Heading of 87.07. He relied upon the technical literature in respect of consignment and pointed out that the consignment was

meant for handling and not for transporting goods. He further submitted that the popular and trade meaning of the consignment should be adopted rather than the technical meaning which was applied by the Department and for this purpose a reference is made to Encyclopaedia Britannica. According to Shri Bharucha, the petitioner did not approach the Department in its Appellate jurisdiction as no relief could have been granted in its favour as claim had already been time-barred and it was not open to the relevant authorities to condone the delay. The remedies of appeals not being adequate an alternate efficacious remedies the petitioner chose to prefer the present petition. On the question of limitation he submitted that as the excess payment was made under a mistake, the Department was bound to refund the same u/s 72 of the Contract Act especially when the Petitioner had claimed it within three years from the discovery of the mistake. [Vide Section 17(c) read with Article 113 of the limitation Act]. He finally submitted that the excess tax which was collected by the Department was without the authority of law and hence the Respondents were bound to refund the same. Shri Bharucha placed reliance on Encyclopaedia Britannica and on certain decisions in support of his propositions which I will have occasion to refer to at a later stage of this judgment.

6. Shri Bulchandani, the learned Counsel appearing on behalf of the Respondents, submitted that the Petition involves disputed questions and facts and the same cannot be decided in the present writ Petition. Classification was mixed question of facts and law. The Petitioner was advised to file a Departmental Appeal which it chose not to do. It was not, therefore, open to the Petitioner to invoke the extraordinary writ jurisdiction of this Court. Referring to the advice of the Director, Central Board of Excise and Customs, he submitted that all that it stated was Belotti B-75 Machine is a special purpose mobile cranes designed to handle containers of various types and will be classified under the said category. It did not thereby opine that the said consignment would fall under Heading 84.22 as contended on behalf of the Petitioner. According to Shri Bulchandani, the Department had properly classified the consignment under Heading 87.07. Placing reliance on the Explanatory Notes found in Brussels Tariff Nomenclature he contended that since the consignment was Container Handling Equipment mounted on a chassis having wheels which are mechanically propelled by power, the same would be mechanically propelled vehicle of the types used in factories, warehouses, dock areas or airports for short distance transport or handling of goods of various types and will thus properly classify under Heading 87.07. He further contended that if the Petitioner had any grievance on account of the consignment being classified under Heading 87.07, it could have paid duty under protest, which it had not done. The Petitioner had chosen not to prefer an appeal though it was advised to do so. The petitioner was not entitled to seek interference in the present writ petition.

7. The consignment, which is the subject-matter of the present dispute, is described in a brochure which is annexed as Exhibit "A" to the Petition. It is a device for stacking and handling containers with the help of a crane of modelled

device. It is no doubt fixed on chassis fixed over wheels which are mechanically propelled. It cannot however, be termed as a "Vehicle". The primary function of the said crane is to handle containers to short distances. It is not the function of this equipment to transport goods.

8. In order to appreciate the controversy between the parties, it may be advisable to reproduce the two Headings, viz., Headings 84.22 and 87.07 ad verbatim. Heading 84.22 falls u/s XVI which deals with machinery and mechanical appliances, etc. It provides -

"Lifting, handling, loading or unloading machinery, telphers and conveyers (for example, lifts, hoists, winches, cranes, transporter cranes, jacks, pulley tackle, belt conveyers and telegerics) not being machinery falling within Heading No. 84.23.

"Heading 87.07 falls u/s XVII which deals with Vehicles, Aircraft, etc. It provides -

"Work trucks, mechanically propelled, of the types used in factories, warehouses, dock areas or airports for short distance transport or handling of goods (for example, platform trucks, fork-lift trucks and straddle carriers); tractors of the types used on railway station platforms; parts of foregoing vehicles".

Chapter 84 u/s XVI under its Note 1 provides for the items which are excluded from the said Chapter. It provides -

"1. This Chapter does not cover :

- (a) millstones, grindstones and other articles falling within Chapter 68;
- (b) appliances and machinery (for example, pumps) and parts thereof, of ceramic materials (Chapter 69);
- (c) laboratory glassware of Heading No. 70.17/18; machinery and appliances and parts thereof, of glass (Heading No. 70.20 or 70.21.)
- (d) heating equipment falling within Heading No. 73.33/40 and similar articles of other base metals (Chapter 74 to 81); or
- (e) tools for working in the hand of Heading No. 85.05 or electro-mechanical domestic appliances of Heading No. 85.06/07."

It would thus appear that the aforesaid exclusion does not include machinery which can be moved by mechanically propelled power. Heading 84.22 specifically includes within its sweep crane and transporter cranes and mobile cranes have not being excluded. Heading 87.07 does not refer to cranes at all but deals with works trucks mechanically propelled. In my view, the consignment in question can fall only under Heading 84.22 and not under Heading 87.07.

9. In the case of Dunlop India Ltd. and Madras Rubber Factory Ltd. Vs. Union of India (UOI) and Others, , the Supreme Court was held -

"The meaning given to articles in a fiscal statute must be as people in the trade and commerce conversant with the subject generally treat and understand them in the usual course. But, once an article is classified and put up in a distinct entry, the basis of classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, there is no difficulty for statutory classification under a particular entry It is well established that in interpreting the meaning of words in a taxing statute, the acceptation of a particular word by the trade and its popular meaning should commend itself to the authority".

To the similar effect are the observations of the Supreme Court in the case of *United Offset Process Pvt. Ltd. Vs. Asst. Collector of Customs, Bombay and Others*, wherein it was observed -

"The question involved in this matter is as to what is a proper tariff entry under which the goods in question fall and are as such classifiable. There is no specific technical definition as such provided in the Customs Tariff Act or in the notification. If there is no meaning attributed to the expression used in the particular enacted statute then the items in the customs entries should be judged and analysed on the basis of how these expressions are used in the trade or industry or in the market or, in other words, how these are dealt with by the people who deal in them, provided that there is a market for these type of goods. This principle is well-known as classification on the basis of trade parlance. This is an accepted form of construction. It is a well-known principle that if the definition of a particular expression is not given, it must be understood in its popular or commonsense, viz., in the sense how the expression is used everyday by those who use or deal with those goods. See, in this connection, the observations of this Court in *Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad*, . In incorporating items in the statutes like Excise, Customs or Sales-tax whose primary object is to raise revenue and for which to classify diverse products, articles and substances, resort should be had not to the scientific and technical meaning of substance but to their popular meaning, viz., the meaning attached to these expressions by those dealing in them. See the observations in *King v. Planter's Company* 1951 CLR (EX) 122 and *Two Hundred Chests of Tea* 1824 6Led. 128 . In the former case, Justice Comeron referred to the reason for adopting the test of commercial understanding in respect of the tariff items of an Excise Act and observed that the legislature did not suppose our merchants to be naturalists, or geologists, or botanists. These principles were adopted by this court in *State of West Bengal and Others Vs. Washi Ahmed and Others*, See also *Union of India v. Delhi Cloth and Gen. Mills* 1963 Su. 1 SCR 586 = 1977 ELT (199) and *Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola*, . See also *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, . This principle was reiterated by this Court of Bhagwati, J., the learned Chief Justice as then was, in *Porritts and Spencer (Asia) Ltd. Vs. State of Haryana*, ".

10. Shri Bharucha in support of his submissions that the popular meaning should be attached to the consignment, made a reference to certain passages from Encyclopaedia Britannica and it may be advisable to reproduce the same. They are as follows :

"Materials - Handling Equipment Materials handling equipment may be classified in terms of the type of product handled, thus including machinery for bulk products in large continuous volumes; continuous processing based on industrial parts movement; discontinuous processing of a wide variety of goods; and order filling of large varieties of goods.

A second classification relates to the mobility characteristic of the materials handling equipment and includes both stationery and movable facilities.

A third classification which identifies the type of equipment itself, includes wheeled carts, power and lift trucks, trailer trains, racks and pallets, bins and boxes, mono-fails and conveyers, containers, unit loads, and cranes and hoists.

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Power trucks - This equipment improves the productivity of labour by increasing both the speed and the size of load. Forklifts are among the most common power trucks now used. Trucks for general packaged merchandise usually are designed to convey from 2,000 to 4,000 pounds (900 to 1,000 kilograms). Power trucks of larger capacity are designed for special product handling Lumber yards, for example, have large capacity trucks usually of a straddle type that can lift 10,000 to 20,000 pounds (4,500 to 9,000 kilograms) of lumber.

.....
Craines and hoists. - Generally employed for very heavy lifting and moving of machinery and materials, cranes and hoists may be fixed or movable.

Jib cranes, which consists of single arms attached to walls or other structures, have the capability of swinging through an angle of 180 degree to 360 degree and therefore are useful for positioning material. Jib cranes are frequently observed in high rise building construction, where they are set on the topmost floor to move construction materials vertically to the floor that is being worked horizontally to the place where needed.

Mobile cranes are wheeled devices with their own motive power, which enables them to move over wide areas. They are generally of the Jib type with a single boom attached to the mobile body."

11. If regard is had to the aforesaid observation and as I view the consignment which is reflected in the brochure as Exhibit "A" to the Petition, it would be evident that it is a machine which squarely falls under Heading 84.22. That Heading specifically includes lifting, handling, loading or unloading machinery, telphers and conveyors, for example, crane and transporter cranes have been specifically mentioned. The said heading does not rest by merely mentioning

cranes but also mentions transporter cranes. In my view it was intended to include the present consignment though the same is mounted on chassis fitted on wheels which is propelled by mechanically propelled boom. The cranes which are mobile have not been excluded though what is excluded has been specifically provided for in Note 1 of Chapter 84. Hence I see no reason why the said consignment cannot squarely fall under Heading 84.22. As regards Heading 87.07, the same does not deal with cranes but concerns itself with work trucks, etc. The example contained in the said heading no doubt makes a reference to forklift trucks and straddle carriers. That would not however, retract to the present consignment from falling in Heading 84.22 as the present consignment is more aptly described as "crane" than fork-lift trucks. The present consignment cannot answer the description of trucks as the primary object of this machinery is the handling of goods and not its transportation.

12. In regard to the Brussels Nomenclature upon which reliance was placed by Shri Bulchandani in support of his submission that the consignment was properly classified under Heading 87.07, it is true that the wordings of Headings 84.22 and 87.07 therein is *pari materia* with the said Headings found in the Customs Tariff Act, 1975. However, the Explanatory Notes to the Brussels Nomenclature can at best be resorted to in the event of there being any doubt. The Customs Tariff Act, 1975 has been broadly based on Brussels Nomenclature. Whenever there is any diversion between the two, it would be reasonable to infer that the diversion has been intended and to that extent Brussels Nomenclature will have no application. However, since the two Headings viz., Headings 84.22 and 87.07, are *pari material* in both these statutes, the Exclamatory Notes found in the Brussels Nomenclature can be best persuasive in nature and cannot have a winding effect. To this effect are the observations contained in a judgment, though of Customs, excise and Gold (Control) Appellate Tribunal, in the case of 1983 ECR 1504D . It has been observed in the said case as follows -

"In this connection, we would also like to observe that the Explanatory Notes to the CCCN can only be taken as guidelines but not conclusively determinative of a matter which has to be decided on a comparative study of the Tariff Entries given in the Schedule to Customs Tariff Act."

To the same effect are the observations contained in the case of 1985 (20) ELT 382 , again a case of Customs, Excise and Gold (Control) Appellate Tribunal.

13. Having considered the aforesaid two decisions of the Tribunal, the aforesaid ratio whereof I concur, in my judgment, wherever there is a divergence between the Customs Tariff Act, 1975, and the Brussels Nomenclature, no reference to the latter can or need be made. However, in case of provisions which are identical or *pari materia*, it may be open to look into the Explanatory Notes contained in the latter. Those Explanatory Notes can at best have a persuasive value and cannot be of a binding nature. It is only in cases where on a plain construction of the provisions contained in the former, a definite interpretation is not possible to be arrived at, a look at the Explanatory Notes in the latter may be permissible and

that is only to assist in arriving at a proper construction and interpretation. However, if the provisions contained in the former are clear and unambiguous, reference to the latter would be redundant. In this view of the matter, in my judgment, it would not be open to resort to the Explanatory Notes to Heading 87.07 of the Brussels Nomenclature and come to the conclusion that the consignment in question is covered by that Heading on account of the crane being mechanically propelled vehicle.

14. Mr. Bulchandani, however, placed reliance on a decision in a case of *I.T. Cycles of India v. The Union of India*, reported in 1983 ECR 202 (Mad), wherein it was held that the Brussels Trade Nomenclature can be pressed into service as an aid for interpreting and understanding the entries in the Indian Tariff Act. In that case all that was held was that as the Central Excises and Salt Act, 1944 and the Tariff Act are cognate legislations which are in *pari materia*, it follows that Brussels Trade Nomenclature can be used as an aid for interpreting and understanding the terms and entries in the Schedule to the Central Excise Act. In my view, the said ratio decides precisely what I have held hereinabove and cannot further the submissions of Shri Bulchandani.

15. In regard to the grievance of Shri Bulchandani that the Petitioner not having availed of the departmental remedies of Appeals and hence it was not open to it to approach this Court in a writ petition, it will have to be observed that the Petitioner had even prior to the import of the present consignment entered into correspondence with the Customs Authorities and had prayed for re-fixing the customs duty. It carried on the correspondence even after it had got the consignment released on payment of duty under Heading 87.07. It was only by letter dated the 26th September 1983 that the Petitioner was informed of the expert opinion of the Director of Central Board of Excise and Customs, New Delhi. By this time the period of limitation to prefer an appeal had already expired. The Collector of Customs in appeal as also the Tribunal, being the creatures of statute, would be vested with no jurisdiction to condone the delay provided under the Act. Vide 1983 ECR 242D , and *Miles India Ltd. v. The Assistant Collector of Customs* 1985 ECR 289 (S.C.) . In my view, the petitioner's appeals to these authorities would have been naturally futile. The limitation that exists in the powers of the Appellate Authorities would, however, not come in the way of granting relief in a Writ Petition. In the case of *Union of India and others Vs. Advani Oerlikon Limited and another*, , this Court held that where the duty is paid on incorrect value, it was a payment under mistake of law. Receipt thereof by the Department is without the authority of law. The time limit laid down for refund under the Act in such a case was not applicable and a refund claim filed beyond the time limit laid down under the relevant provisions was not barred by the Law of Limitation. In such a case the Department had no authority to recover the duty. Since the payment was received without the authority of law, the limitation provided by the relevant provision did not apply. Similarly, in the case of *Kay Foam Limited Vs. Union of India (UOI)*, , this Court held that it is now well settled that the duty recovered without the authority of

law cannot be retained by the authority and provision for filing application within period of six months from payment of duty has no application to such a case. It is open for the tax payer to demand back duty which was recovered without authority of law at any stage. In view of the aforesaid, it will have to be held that the bar of limitation cannot be a hurdle in the way of the Petitioner to claim refund.

16. Looked at from another angle, the Respondents had been paid the excess duty under a mistake and, therefore, they are liable to refund the same under the provisions of Section 72 of the Indian Contract Act. Section 17(c) of the Limitation Act provides that where, in the case of any suit or application for which a period of limitation is prescribed by this Act, the suit or application is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the applicant has discovered the mistake or could, with reasonable diligence, have discovered it. In the present case, the mistake was discovered when the letter in respect of the expert opinion of the Director, Central Board of Excise and Customs, New Delhi, dated the 26th of September 1983, was received by the Petitioner. Article 113 of the Limitation Act prescribes a period of three years for filing a claim of the present nature. This Petition having been filed well within that period, there would be no justification not to grant the relief prayed for in the Petition. Furthermore this would be a tax collected by the Respondents without the authority of law. The Respondents would be bound to refund the same.

17. In the result, the Petition succeeds. The Respondents are directed to pay to the Petitioner the difference between the duty levied under Heading 87.07 and the one payable under Heading 84.22 within eight weeks from today. In the facts and circumstances of the case, there shall be no order as to costs.

18. On the application of Shri Bulchandani, my order to stand stayed for a period of six weeks from today.