SUPREME COURT OF INDIA

Udayani Ship Breakers Limited

Vs

Commissioner of Customs and Central Excise, Rajkot

Civil Appeal No. 2338 of 2001

(Ashok Bhan and P. K. Balasubramanyan, JJ)

08.02.2006

JUDGMENT

ASHOK BHAN, J.

The assessee-appellant has filed this appeal under Section 130(E) of the Customs Act, 1962 (for short "the Act") against the final Order No.C-I/II/WZB/ 2000 dated 2.1.2001 in Appeal No.C/533-V/99/Bom passed by the Customs Excise and gold (control) Appellate Tribunal, West Zonal Branchat Mumbai (hereinafter referred to as 'the Tribunal ') whereby the tribunal reversed the order in appeal passed by the commissioner of central excise on 8.3.1999 and held that the appellant could not be granted abatement of the duty.

2. Briefly stated the facts of the case are:-

M/s- Priya Blue Industries Pvt. Ltd., Plot No V-1, Sosiya(here in after referred to as "the importer") hold import export code number and also central excise registration. it import vessel MVVLOO ARUN under OGL for the purpose of breaking. The vessel weighing 40, 017 LDT had been purchased for US$ 68, 49, 839.00 i.e. No.V-1, Sosiya (hereinafter referred to as@ US$ 167 per Long Ton. Importer got a letter of Credit bearing No.58 IDC 21.97 dated "the importer") hold import export code12.8.1997 opened in favour of Ruby Enterprise Inc., 2018, Antwerp, Belgium,

the number and also Central Excise foreign sellers for US$ 68, 49, 839.00 which amount was remitted by the Vysya Bank Registration. It imported vessel MV VLOO Ltd., Mumbai to the beneficiaries on 12.8.1997 itself. The importer had thereafter ARUN under OGL for the purpose of sought and been granted permission for beaching the vessel at the designated plot by the proper officer of Customs. On account of heavy current and storm the vessel got dragged towards Plot No. V-5 Sosiya and got grounded there. The importer vide its application dated 24.6.1997 requested the Assistant Commissioner of Central Excise Division, Bhavnagar for extension of time for filing the Bill of Entry for home consumption in respect of the aforesaid vessel. The requisite permission was granted by the jurisdictional Assistant Commissioner. The importer, however did not file the Bill of Entry and sought further extension of time which was declined by the Assistant Commissioner, Bhavnagar. The importer thereafter entered into a memorandum of understanding on 10lh September, 1997 with Udyani Ship Breakers Ltd. ("the appellant" herein) who are the owners of Plot No.V-5, Sosiya in front of which the vessel was grounded for sale of the ship for Rs. 12, 01, 00, 000/-. An agreement to sell was executed on 11th September, 1997 and the sale was affected by Bill of sale on 26lh December, 1999.

3. The appellant also holds import export code number as well as Central Excise Registration for ship breaking. The appellant presented a Bill of Entry bearing No.SBY-III/59/97-98 dated 12.9.1997 before the Superintendent of Customs, SBY-Alang. The price declared by the appellant was Rs.12, 01, 00, 000/-. As the price declared by the appellant was abnormally low a reference was made to the appellant for making a correct declaration with regard to the price.

4. Importer and the respondent produced copies of the following documents:-

(a) The original Memorandum of Agreement dated 2.6.1997 entered into between the foreign seller and the importer,

(b) A copy of the commercial invoice issued by the foreign seller in favour of the importer,

(c) Letter of Credit opened in favour of the foreign seller for the amount of US$ 68, 49, 839.00 by Vysya Bank Ltd., Mumbai on behalf of the importer.

(d) A copy of the Memorandum of Agreement between the importer and the respondents, and

(e) A copy of the Letter of Credit bearing no.KHG/ILC/103/97 dated 12.12.1997 for Rs.12, 01, 00, 000/- issued by Dena Bank, Bhavnagar by the respondents on Dena Bank, Mumbai in favour of the importer.

(f) A copy of the commercial invoice in their favour issued by the importer to the respondent.

5. Thus, the facts which emerge from the above are: Importer entered into an agreement of memorandum with the foreign seller on 2.6.1997. On 4.6.1997 the importer took physical delivery of the ship. On 24.6.1997 the importer requested time for filing the Bill of Entry. On 12.8.1997 LC was opened and on the same day the amount was remitted to the foreign seller. Thereafter importer sought and was given permission for beaching the vessel. The agreement of sale between the importer and the appellant was executed on 11.9.1997. The appellant presented the Bill of Entry on 12.9.1997 and the price was stated to be Rs. 12, 01, 00, 000/-. On 9.6.1997 itself the vessel had started drifting. The importer transferred the title to the buyer in pursuance to the memorandum of understanding and the agreement of sale entered into between them on 26.12.1997 by executing the bill of sale in favour of the appellant on "as is where is" basis for a consideration of Rs. 12, 01, 00, 000/- i.e. after the passing of the assessment order dated 23.12.1997.

6. The Assessing Authority in his assessment order dated 23.12.1997 held that the value declared by the appellant was not the price in the course of international trade and accordingly did not accept the price declared by the appellant in the Bill of Entry and appraised the value of the vessel at the price at which it had been purchased by the importer in the course of international trade.

7. Aggrieved by the aforesaid assessment order the appellant filed an appeal before the Commissioner of Customs (Appeals) who vide its order dated 26.2.1999 allowed the appeal. It was held that the appellant was entitled to the benefit u/s 22 of the Act as the warehoused goods had been damaged after unloading but before their examination u/s 17 on account of accident not due to any wilful act, negligence or default of the importer. It was also held that appellant had purchased the vessel on high seas basis during the course of international trade. Order in original was set aside with consequential relief. Reliance was placed upon the decision of the Tribunal in the case of J.M. Industries v. Commissioner of Central Excise, Rajkot 1988 Indlaw CEGAT 518 (Tribunal]

8. The Revenue being aggrieved, filed an appeal before the Tribunal which allowed the appeal and inter alia held that the abatement of duty under Section 22 could not be granted as no request to that effect had been made to the Assistant Commissioner of Customs and that the Assistant Commissioner was required to record its satisfaction that a case had been made out under Section 22 for abatement of duty on the damaged and deteriorated goods. The judgment in the case of J.M. Industries1 was distinguished. It was further held that transfer by execution of bill of sale between the appellant and the importer was dated 26.12.1997 after the arrival of the vessel in India in June 1997 and therefore the appellant could not claim that it was a sale on high seas basis as indicated in the agreement of sale dated 11.9.1997. The entire action seems to be to evade the duty payable at proper value and accordingly held the order passed by the Commissioner of Customs (Appeals) to be wrong in law and restored the order in original.

9. Counsel for the parties has been heard.

Section 22 of the Act reads:

"22. Abatement of duty on damaged or deteriorated goods.- (1) Where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs-

(a) The value of such goods may be or ascertained by the proper officer.

(a)that any imported goods had been damaged or had deteriorated at any time before or during the unloading of the goods in India ; or

(b)that any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under Section 17, on account of any accident not due to any willful act, negligence or default of the importer, his employee or agent; or

(c)that any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due to any willful act, negligence or default of the owner, his employee or agent, such goods shall be chargeable to duty in accordance with the provisions of sub-section (2).

(2)The duty to be charged on the goods referred to in sub-section (1) shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated goods bears to the value of the goods before the damage or deterioration.

(3)For the purposes of this section, the value of damaged or deteriorated goods may be ascertained by either of the following methods at the option of the owner:-

(b) Such goods may be sold by the proper officer by public auction or by tender, or with the consent of the owner in any other manner, and the gross sale proceeds shall be deemed to be the value of such goods."

10. A reading of Section 22 shows that it is for the party claiming the abatement to show to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods had been damaged or deteriorated at any time before or during the unloading of the goods in India ; or that any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under Section 17, on account of any accident not due to any willful act, negligence or default of the importer, his employee or agent ; or that any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due to any willful act, negligence or default of the owner, his employee or his agent. Thus to claim the benefit of the abatement under Section 22, the party claiming the abatement has to satisfy the Assessing Authority that a case had been made out under Section 22 for abatement of duty on damaged or deteriorated goods. In the absence of any claim made under Section 22 in writing to the Assessing Authority the appellant could not

claim the abatement under Section 22 and the Assessing Authority did not record rightly its satisfaction that the appellant was entitled to the abatement of the duty. The Tribunal is right in holding that the Commissioner (Appeals) had erred in giving benefit to the appellant for abatement of duty under Section 22 of the Act.

11.The act of "Import" in this case was over as soon as the letter of credit was opened by the importer in favour of the foreign seller and remitted the sum of Rs. 24, 78, 27, 175/- to the foreign seller on 12.8.1997 in terms of the letter of credit opened with the Vysya Bank Ltd., Mumbai through ABN Amro Bank, N.V. Brussels. The term "import", "India", "Indian customs water" have been defined under Clauses 23, 27 & 28 of Section 2 of the Act as under :-

(23) "Import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

(27)"India" includes the territorial waters of India;

(28)"Indian customs waters" means the waters extending into the sea up to the limit of contiguous zone of India under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976) and includes any bay, gulf, harbour, creek or tidal river;

12. Section 14, which is the relevant provision for valuing the vessel sold by the importer, reads:-

"Sec. 14 - Valuation of goods for purpose of assessment.-

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force where under a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale." [Emphasis supplied]

13. The price of the vessel in the course of international trade was the price [US$ 68, 49, 839.00] paid by the importer to the Ruby Enterprises Inc., Belgium in terms of the Memorandum of Agreement dated 2.6.1997 in terms of sub-section (1) of Section 14 of the Act. The transaction between the importer and the respondent (sic. appellant) in terms of the Memorandum of understanding dated 10.9.1997 cannot be described as the transaction of purchase and sale during the course of international trade. Any sale of goods after the act of "import" within the meaning of

the Act is over, can only be described as a sale in the course of domestic trade and not a sale in the course of international trade.

14. Under sub-section (1) of Section 14 of the Act the imported goods are required to be assessed at the price ordinarily charged for them in the course of international trade. As pointed out hereinabove the sale price of the aforesaid vessel during the course of international trade which has actually been paid was USS 68, 49, 839.00 equivalent to Rs. 24, 78, 27, 175/-. The reduction in the price to Rs. 12, 01, 00, 000/- was not during the course of international trade but domestic trade. The reduced price, therefore, cannot be accepted for determining the value under sub-section (1) of Section 14 of the Act.

15. Introduction of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 with effect from 16.8.1988 does not alter the above position as under Rule 3 of the aforesaid Rules it is provided that the value of the "imported goods" shall be transaction value thereof. The transaction value in terms of sub-rule (1) of Rule 4 of the aforesaid Rule is the price actually paid or payable for the goods when sold for export to India. Such transaction value in this case is USS 68, 49, 839.00 and has actually been paid by the importer to the exporter abroad. No other price can be taken into consideration for determining the assessable value in this case either in terms of the main definition of the term "value" given under sub-section (1) of Section 14 of the Act or in terms of sub-rule (1) of Rule 4 of the aforesaid Rules.

16. This apart, no application was made by the buyers i.e. importer in this case to the Assistant Commissioner of Customs, Bhavnagar for any abatement of duty on the damaged goods as the importer has not come forward for the clearance of the aforesaid vessel. The appellant i.e. buyer who had purchased the vessel in the course of domestic trade was not entitled to seek any abatement of duty on the ground on which it claimed before the Appellate Authority. No such case had been made out before the Assessing Authority before the goods were actually cleared. Adoption of two different values for the same goods for the purpose of charging duty of customs under Section 12 of the Act and Section 3 of the Customs Tariff Act, 1975 is not only unprecedented but also patently illegal.

17. The Memorandum of Understanding was executed between the importer and the appellant on 10.9.1997 which provided:

"The sellers shall deliver vessel to buyers within 1 (one) day i.e. upon receipt of full purchase price and buyer shall accept the vessel "as is where is" at Sosiya".

18. The bill of sale executed by the importer in pursuance to the MOU entered between the parties on 10.9.1997 and the agreement of sale dated 11.9.1997 on 26.12, 1997 whereby the importer transferred the title of the vessel to the appellant purely on "as is where is" basis for a consideration of Rs. 12, 01, 00, 000/-. The said bill of sale stated as follows:-

"TO HAVE AND TO HOLD the said vessel and appurtenances there into belonging up to the buyer, its successors and assign for ever. Seller hereby transfers title to vessel to buyer outright 'as is where is' in standard condition and warrants that the said vessel is free of all debts, loans, taxes encumbrances and litigation and maritime lines and other claims whatsoever".

19. Memorandum of understanding dated 10.9.1997, the agreement to sell dated 11.9.1997 as well as the bill of sale dated 26.12.1997 are after the goods had arrived in India in June, 1997. Under the circumstances, the appellant could not claim the sale in its favour on High Seas basis as indicated in the agreement of sale dated 11.9.1997. The Tribunal was right in observing that from the conduct of the parties it cannot be ruled out that the action seemed to be to evade the duty payable at the proper value.

20. It is interesting to note that the bill of sale was executed by the importer on 26.12.1997. Thus the title to the goods passed to the appellant on 26.12.1997, i.e., after the order in original passed by the assessing authority on 23.12.1997.

21. For the reasons stated above, we do not find any merits in this appeal and dismiss the same with costs.