

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 2

Customs Appeal No. 10407 of 2013-SM

(Arising out of OIO-10/COMMISSIONER/2012 Dated- 23/01/2013 passed by Commissioner of
CUSTOMS-JAMNAGAR(PREV))

J M Baxi & Co

Jal-Pari, Opp.Dattattreyas Temple,
Pratap Palace Road, JAMNAGAR
GUJARAT

.....Appellant

VERSUS

C.C.-Jamnagar(prev)

Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar Gujarat

.....Respondent

APPEARANCE:

Shri. Chandrashekhar R. Gupta, Senior Manager for the Appellant
Shri. P Ganesan, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

Final Order No. A/ 12390 /2023

DATE OF HEARING:27.10.2023
DATE OF DECISION:31.10.2023

C. L. MAHAR

The brief facts of the matter are that the appellants were appointed as Customs House Agent (CHA) by the Importers/ Owners of the Vessel "Pride of Goa" by importing company M/s. Goa Coastal Resorts & Recreation Pvt. Ltd. The appellant on the basis of the documents supplied by the importer has filed Bill of Entry for clearance of the imported vessel. The department suspecting misclassification and misdeclaration of import the value of -Vessel 'Pride of Goa' issued a show cause notice dated 16.04.2012 where under additional customs duty amounting to Rs. 7,61,91,014/- was demanded under Section 28 (4) of the Customs Act, 1962. The demand of duty was charges that the value has been misdeclared and therefore the same is to be

re-determined as per the provisions of Section 14 of the Customs Act, 1962. Other penal provision and other charges were also invoked. The appellant was also show cause as to why a penalty under Section 112 (a) of the Customs Act, 1962 on them. On adjudication of the matter by the learned adjudicating authority vide its order dated 23.01.2013. A penalty of Rs. 5,00,000/- has been imposed on the appellant under Section 112(a) of the Customs Act, 1962. The appellants are before this Tribunal against the impugned Order-In-Original imposing personal penalty on the appellants. Learned Advocate has submitted that the charges of under invoicing misclassification against the importing firm M/s. Goa Coastal Resorts & Recreation Pvt. Ltd. its director of Shri. Ashok Khetrapal has already been decided by this Tribunal vide its Final Order No. A/10367-10368/2014/WZB/AHD dated 12.03.2014 and Appeal Nos. C/10948 and 10965/2013-DB reported under 2014 (304) ELT 408 (Tri-. Ahmd.). Wherein, the charge of misclassification has been dropped against importing firm. It has been contention of the learned Advocate since the matter already been decided in favour of the importing firm and its director and therefore the cause of imposing penalty against Custom House Clearing Agent gets extinguishable and no justification of services for imposing penalty on the appellant anymore.

2. I have also heard the learned departmental representative who has reiterated the finding given in the Order-In-Original and has agreed that the matter has already been decided by this Tribunal vide its final order dated 12.03.2014.

3. Having heard both the sides. I find that the main charges against the importer and its director has already been dropped by this Tribunal vide its order in case of Ashok Khetrapal vs CC Jamnagar reported under 2014 (304) ELT 408 (Tri.-Ahmd.) wherein , it has been held as follows:-

"5.1 *On the issue of classification of the vessel POG, the adjudicating authority has mainly relied upon the fact that the vessel is a Casino vessel and is intended to be made stationary for use as a casino even if it is capable of making voyages in the open sea. On the other hand, importer has come out with the argument that the end use of the vessel should not be made as the basis for classifying a vessel under the Customs Tariff Act. This issue, whether end use of imported goods should be made the basis of classification was decided by Hon'ble Apex Court in the case of UOI v. V.M. Salegaoncar a Brs (P) Ltd. (supra). In that case, appellants imported transhippers which were vessels used for carrying cargo loaded from the harbour and carry the same for unloading cargo into the large vessels. The issue before the Apex Court was whether such transhippers should be considered as ocean going vessels when they were not actually meant to be going to high seas/oceans. While holding the transhippers to be ocean going vessels and eligible to exemption under Customs Notification dated 11-10-1958, the following observations were made by the Apex Court in Para 20 :-*

"20. We do not think that, in the present case, the question whether a transshipping vessel is an ocean going vessel, can solely rest on the test of its dominant use to which their owners put them at times. Use may vary from season to season, port to port and also managers to managers. So, in this area of understanding use of article stands down staged, and the Court must look at to know what actually the commodity is."

5.2 *In the light of above law laid down by Apex Court and the conflicting judgment of CESTAT Mumbai in the case of CCE v. Waterways Shipyard Pvt. Ltd. (supra), CGU Logistics Ltd. v. CC (I), Mumbai (supra) and Hal Offshore Ltd v. CC, Mumbai (supra), it has to be seen as to what is the nature of vessel POG. Whether it is a 'Passenger Ship' or a 'Pleasure vessel'. The words 'Passenger', 'Passenger Ship' and 'Pleasure Vessel' have neither been defined under the Customs Tariff Act nor in the HSN explanatory notes. The words 'Passenger' and 'Passenger Ship' 'Special Trade Passenger' and 'Special Trade Passenger Ship' have been defined under Section 3(24) and 3(25), 3(47B) and 3(47C) of the Merchant Shipping Act, 1958 as follows :-*

"3. Definitions. - *In this Act, unless the context otherwise requires, -*

(24) *"Passenger" means any person carried on board a ship except -*

(a) *a person employed or engaged in any capacity on board the ship on the business of the ship;*

(b) *a person on board the ship either in pursuance of the obligations laid upon the master to carry shipwrecked, distressed or other persons or by reason of any circumstances which neither the master nor the character, if any, could have prevented or forestalled;*

(c) *a child under one year of age;*

(25) *"Passenger ship" means a ship carrying more than twelve passengers;"*

(47B) *"Special trade passenger" means a passenger carried in special trade passenger ship in spaces on the weather deck or upper deck or between decks which accommodate more than eight passengers and includes a pilgrim or a person accompanying a pilgrim;*

(47C) *"Special trade passenger ship" means a mechanically propelled ship carrying more than thirty special trade passengers."*

From the above definitions, it is not necessary, as contended by the Revenue that a passenger has to be carried from one place to another in a ship in order to hold that a vessel is a "passenger ship". A person taken on board a vessel will also be considered as a passenger as per the above definitions. Various certificates issued by the competent authorities in favour of POG, as per Section 3(38) of the Merchant Shipping Act, 1958, also convey that POG is a passenger ship. It is observed from Para 3 of the order passed by CESTAT Mumbai in the case of CGU Logistics Ltd v. CC (I), Mumbai [[2011 \(274\) E.L.T. 75](#) (Tri-Mum)] that similar certificates were considered for classifying a vessel as cargo ship of CTH 8901 when special equipments were fitting on it for doing special tasks and Revenue was claiming the classification under CTH 8905.

5.3 It is further observed from the HSN explanatory notes under Heading 89.03 that the notes talk of all vessels for pleasure or sport. However, while specifying the inclusions mainly the notes talk of small boats like rowing boats, canoes, sail boats, motor boats, dinghies, sports fishing vessels, inflatable craft and boats, lifeboats propelled by oars, Yachts, etc. At the same time, neither the Customs Tariff Act nor the HSN Explanatory Notes say that all Casino vessels are vessels for pleasure or sport.

5.4 A definition of 'Pleasure vessel' appears in The Merchant Shipping (Vessels in Commercial Use for Sports or Pleasure) Regulations, 1988, issued as per the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17-5-1993. As per these Regulations,

"Pleasure Vessel" means -

(a) any vessel which at the time it is being used is :

(i) (aa) in the case of a vessel wholly owned by an individual or individuals; used only for the sport or pleasure of the owner or the immediate family or friends of the owner; or

(bb) in the case of a vessel owned by a body corporate, used only for sport or pleasure and on which the persons on board are employees or officers of the body corporate, or their immediate family or friends; and

(ii) on a voyage or excursion which is one for which the 'owner does not receive money for or in connection with operating the vessel or carrying any person, other than as a contribution to the direct expenses of the operation of the vessel incurred during the voyage or excursion; or

(b) any vessel wholly owned by or on behalf of a members' club formed for the purpose of sport or pleasure which, at the time it is being used, it used only for the sport or pleasure of members of that club or their immediate family, and for the use of which any charges levied are paid into club funds and applied for the general use of the club; and

(c) in the case of any vessel referred to in paragraphs (a) or (b) above no other payments are made by or on behalf of users of the vessel, other than by the owner."

5.5 Above definition of a pleasure vessel gives support to the argument made by the Advocate of the importer that a vessel for pleasure or sport should be meant for personal consumption/use of the

person/owner of a vessel. It is evident from the facts on record that the vessel POG imported by the importer is not used for personal use of the owner for pleasure or sport but is used for commercial purposes as a 'Casino vessel'. There is thus force in the argument of the importer that when the appropriate authorities under Section 3(38) of the Merchant Shipping Act, 1958, by issuing required certificates, have opined POG to be a passenger ship or Special Trade Passenger Ship then there is no ground for the adjudicating authority to hold that POG is not a passenger ship designed to carry passengers when no contrary opinion of another competent authority is brought on record saying that POG is a vessel for pleasure or sport.

5.6 Temporary use of POG in a stationary position will not change the classification of POG when the same is capable of moving across the seas/oceans but has to be mostly made stationary due to the restrictions imposed by the local laws. It will be a strange situation to classify a vessel under CTH 8901 if used for making trips to open sea, with a night halt arrangement in the sea, but classify the same vessel under CTH 8903 if used in a predominantly stationary position. In view of the above observations, we are of the opinion that Casino vessel POG imported by the importer is principally designed to carry passengers and has been correctly assessed under CTH 8901.

5.7 Another argument taken by the importer appellant is that once original assessment is made on a bill of entry is not challenged then no further demand can be raised afterwards on the same issue. Importer has relied upon several case laws in support of this argument as indicated in Para 3(ii) above. Hon'ble Apex Court in the following cases held that an assessee cannot seek a relief by way of refund without the assessment order being reviewed in appeal as follows :-

(i) *Priya Blue Industries Ltd v. CC (Preventive)* - [2004 \(172\) E.L.T. 145](#) (S.C.)

"6. We are unable to accept this submission. Just such a contention has been negated by this Court in *Flock (India)'s* case (*supra*). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent officers. The officer considering the refund claim cannot also review an assessment order.

8. The words "in pursuance of an Order of Assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained."

(ii) *Collr. of Central Excise, Kanpur v. Flock (India) P. Ltd.* - [2000 \(120\) E.L.T. 285](#) (S.C.)

"10. Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose

their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

5.8 *In the absence of any new facts unearthed by the investigation to indicate fraud/wilful misstatement in the declared description given on the bill of entry with intention to evade duty, the classification of POG already made by the Revenue becomes final and can also not be opened by the Revenue by way of demand under Section 28 of the Customs Act, 1962 invoking extended period.*

6. *Another argument taken by the appellant importer is that the demand is time-barred as full and correct description was shown in the bill of entry. It is observed from the facts available on record that the following description of the imported vessel was given in the bill of entry filed by the importer :-*

"One unit old and used Casino vessel, "Pride of Goa" (Formerly known as (Southern Star-II), Built in Dec. 1994 in Louisiana (USA), 66.1 mtrs length, 23.8 mtr Breadth, 4.5 mtrs Dosta, CRT : 3546, MRT:1089, including apparel, appurtenances and all other parts, machineries equipment and accessories inside (838-Casino Machines and Casino-Game Tables & Accessories, Surveillance Systems- including 15 Monitors & 5 Recording Devices, Casino safe Deposit Systems, Weather Dock Chairs & Tables)."

The above bill of entry was assessed by the assessing officer, cleared by concurrent audit and countersigned by the proper officer. Even the classification declared by the importer was underlined and specifically a handwritten mention of exemption of Sr. No. 352 of exemption Notification No. 21/2002-Customs, dated 1-3-2002 was made on the bill of entry. The details like vessel being a 'Casino vessel' has completely been declared by the importer while giving the description of the goods. Under the circumstances, it cannot be held that there was any suppression, much less suppression with intention to evade Customs duty, on the part of the importer to wilfully claim a wrong classification. The onus of making a correct classification including availment of a correct exemption notification, lies upon the assessing officers. The duty of the importer was to give the correct and detailed description which has been discharged. Imported goods are also subjected to exemption before allowing out of charge. Under the circumstances, issue of a demand by invoking the extended period is also required to be set aside as time-barred.

7. *On the issue of undervaluation, we are not expressing our opinion as on the issue of classification of POG and its assessments have been correctly made and it is held that any value addition will not have effect on duty when the vessel of CTH 8901 imported by the appellant stood exempted under an exemption notification.*

8. *Once on merits the issue has been decided in favour of the importer appellant, there is no point in imposing penalties upon the appellants under various provisions of the Customs Act, 1962 which are accordingly set aside."*

4. Since the issue has already been decided in favour of the importer and his director as mentioned above since the cause of imposing penalty against the present appellant does not exist anymore and therefore I set aside the Order-In-Original in this regard.

5. Accordingly, appeal is allowed.

(Pronounced in the open court on 31.10.2023)

(C. L. MAHAR)
MEMBER (TECHNICAL)