CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 14189 of 2013-DB

[Arising out of Order-in-Original/Appeal No 651-656-2013-CUS-COMMR-A--KDL dated 21.10.2013 passed by Commissioner of CUSTOMS-KANDLA]

Indian Oil Corporation Limited .... **Appellant**
(Marketing Division) Western Region, 254-C, Dr. Annie Besant Road, Worli, MUMBAI, MAHARASHTRA-400030

VERSUS

Commissioner of Customs, Kandla .... **Respondent**
Custom House, Near Balaji Temple,
Kandla, Gujarat

WITH

CUSTOMS Appeal No. 14148 of 2013-DB

[Arising out of Order-in-Original/Appeal No 651-656-2013-CUS-COMMR-A--KDL dated 21.10.2013 passed by Commissioner of CUSTOMS-KANDLA]

Bharat Petroleum Corporation Limited .... **Appellant**
Taxation Department, Bharat Bhavan-ii, 3rd Floor,
4 & 6, Currimbhoy Road, Ballard Estate, MUMBAI
MAHARASHTRA-400001

VERSUS

Commissioner of Customs, Kandla .... **Respondent**
Custom House, Near Balaji Temple,
Kandla, Gujarat

AND

CUSTOMS Appeal No. 10154 of 2014-DB

[Arising out of Order-in-Original/Appeal No 651-656-2013-CUS-COMMR-A--KDL dated 21.10.2013 passed by Commissioner of CUSTOMS-KANDLA]

Hindustan Petroleum Corporation Limited .... **Appellant**
Kandla Installation, P.B. No. 43, Gandhidham,
KUTCHH, GUJARAT

VERSUS

Commissioner of Customs, Kandla .... **Respondent**
Custom House, Near Balaji Temple,
Kandla, Gujarat

APPEARANCE :

Shri Sachin Chitnis & Shri Viraj Reshamwala, Advocates for the Appellant
Shri Prabhat K. Rameshwaram, Addl. Commissioner (AR) for the Respondent

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

DATE OF HEARING : 22.06.2023
DATE OF DECISION: 12.09.2023

FINAL ORDER NO. 11933-11935/2023

C.L. MAHAR :

The brief facts of the matter are that M/s. Indian Oil Corporation Limited (IOCL for short), Kandla had imported 98 consignments of HSD and SKO during the period from May 1994 to December 1998 as a canalizing agency on behalf of himself as well as for M/s. Bharat Petroleum Corporation Limited, Kandla (BPCL for short) and M/s. Hindustan Petroleum Corporation Limited, Kandla (HPCL for short). The respective oil Companies filed Ex-bond Bills of Entry which were provisionally assessed. The quantity which was meant for IOCL was warehoused in the warehouse of the IOCL and quantity meant for BPCL and HPCL was warehoused in their respective warehouse / shore tanks for which each one of them were holding proper Customs Warehouse License. M/s. IOCL, BPCL and HPCL paid duty provisionally at the time of clearance from the warehouse by filing ex-bond bills of entry proportionately depending upon the quantity of HSD, SKO cleared by them. On scrutiny of documents, following six show cause notices came to be issued:-

Sr. No.	SCN No. and date	No. of B/Es involved	Period	Amount of Duty (Rs.)	Amount of Interest (Rs.)
1	S/20-4/99 APPG.1 DATED 03.02.99	32	May 94 To Oct. 95	25,10,65,022	24,89,21,413
2	S/2-51/99 APPG.1 DATED 26.02.99	1	June 95	37,99,272	47,35,150
3	S/2-60/99 APPG.1 DATED 22.02.99	23	Jan 98 To Dec 98	2,65,07,748	21,39,011
4	S/2-41/99 APPG.1 DATED 22.02.99	12	Jan 96 To Oct 98	1,09,60,811	41,35,547
5	S/2-50/99 APPG.I DATED 26.02.99	14	Apr 97 To Dec 98	67,33,656	9,45,713
6	S/2-78/99 APPG.1 DATED 08.07.99	16	Apr 97 To Dec 97	1,27,30,865	43,18,192

2. The main issues on which the above show cause notices were issued were:

(i) whether the shore tank receipt quantity of M/s. IOCL, BPCL and HPCL as shown in ex-bond bills of entry to be taken for calculation of the duty or the quantity which have been indicated on the invoices and the bills of lading, is to be considered for charging Customs duty.

(ii) whether the actual freight and insurance amount to be included in the value of goods i.e. Crude Oil.

(iii) whether interest as per Section 18(3) of the Customs Act, 1962 is leviable on the amount of the duty finalized after finalization of bills of entry.

2.1 M/s. IOCL, BPCL and HPCL have deposited an amount of Rs. 8,61,66,605/- after the issuance of above mentioned six show cause notices. After a lot of litigation upto the level of this Tribunal, the matter was finally adjudicated vide impugned order dated 11.03.2013 wherein the learned Adjudicating Authority has passed the following order:-

> "1. All the provisional assessment of all the ex-bond bills of entry presented / filed by IOCL, BPCL and HPCL against 98 warehousing/into bond bills of entry filed / presented by IOCL as a canalizing agent, as indicated in the annexure enclosed to this order (the warehousing bills of entry are indicated vessel-wise as covered in respective 6 show cause notices earlier issued on this issue as indicated in Para 1 and 2 of this order), stand finalized in terms of Section 18 of the Customs Act, 1962, on the basis of actual shore tank receipt quantity and actual cost, freight and actual insurance incurred. The annexure also gives the break-up of the shore tank quantity and actual duty liability of IOCL, BPCL and HPCL and this differential duty should be paid by the respective companies within 10 days of receipt of this order.
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> 2. The differential duty amounts already paid by IOCL, BPCL and HPCL over a period of time till date, as indicated in the annexure stand to be adjusted against the above duty liability. These 3 companies, IOCL, BPCL and HPCL only have to pay the balance differential duty as indicated in the summary sheet of the annexure, which is indicated below:
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> (a) BPCL : Rs. 1,83,50,035.00
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> (b) HPCL : Rs. 84,94,296.00
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> (c) IOCL : (-) Rs. 5,15,512.00
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> 3. The interest on the above amounts shall be charged under section 18(3) read with Section 28aa of the Customs Act, 1962, from the date of provisional assessment till the actual date of payment of duty so determined as at above."

2.2 The department has challenged the above mentioned order-in-original dated 11.03.2013, on the ground that Adjudicating Authority has erred in taking the transaction value as envisaged in CBEC Circular No. 6/2006 dated

12.02.2006 i.e. quantity of Crude oil taken on the basis of shore tank quantity was not correct and actual. The invoices/ bills of lading quantity should have been taken by the Adjudicating Authority for deciding the final assessment of bills of entry.

2.3 The said order-in-original was also challenged by M/s. IOCL, BPCL and HPCL before the Commissioner (Appeals) contesting the levy of interest in terms of Section 18(3) of the Customs Act, 1962. As, it was the contention of the appellant that Section 18(3) was inserted into Customs Act, 1962 only with effect from 13.07.2006 and therefore, the Adjudicating Authority has wrongly invoked this provision as in their case the period of import pertains to 05/1994 to 12/1998. M/s. BPCL and HPCL has also contested that no show cause notice issued to them before passing the impugned order and despite specific directions from the Tribunal and therefore, order-in-original has been issued in violation of principles of natural justice. The levy of interest has also been contested as mentioned above. The matter was decided by learned Commissioner (Appeals) vide his order dated 21.10.2013 wherein it has been decided that Adjudicating Authority was wrong in applying Circular No. 96/2002-Cus dated 27.12.2002 for the purpose of final assessment of ex-bond bills of entry filed during the period 05/1994 to 12/1998 and the Deputy Commissioner should have decided taking into consideration the invoice value charged as per bills of lading in respect of quantity received by the importer namely M/s. IOCL, BPCL and HPCL in warehouse and shore tank. The Commissioner (Appeals) has also decided that interest under Section 18(3) of Customs Act, 1962, after finalization of the provisional assessment is also not applicable as the Section 18(3) inserted on 13.07.2006, the Commissioner (Appeals) has also supported the point of view with case law of *Sterlite Industries India Limited reported in 2008 (223) ELT 633 (Tri. Chennai)* as well as Hon'ble Gujarat High Court order in Tax Appeal No. 1992/2010 filed by M/s. Goyal Traders etc. The appellants are before us against the above mentioned order-in-appeal dated 21.10.2013.

3. We have heard both the sides and perused the record of the appeal in detail.

4. It can be seen from the preceding paras that the only issue which needs to be addressed by us is whether the duty at the time of finalization of final assessment is to be paid on the basis of invoice value and the quantity indicated on the bills of lading or the quantity received by the importer/ appellants in their warehouse/ shore tanks.

We find that the matter has been decided by the Hon'ble Apex Court in the case of *Mangalore Refinery & Petrochem vs. CC, Mangalore – 2015 (323) ELT 433 (SC)* wherein the Hon'ble Supreme Court had held as follows:-

> **"14.** The Tribunal's judgment dated 6th February, 2006 gives several reasons for arriving at the conclusion that the bill of lading quantity alone is to be looked at for the purpose of determining the value of goods imported. The first reason that it gives is that duty has to be on the total payment made by the assessee irrespective of the quantity received. The second reason given is that an *ad valorem* duty would necessarily lead to this result but duty levied at the specific rate would not, the quantity of goods in the latter case being only on the basis of the quantity of crude oil received in the shore tank. The third reason that it gives is that Section 14 kicks in when the duty is on an *ad valorem* basis and Sections 13 and 23 do not stand in the way because it is not the question of demanding duty on goods not received, but it is the demand of duty on the transaction value. In spite of the "ocean loss", the appellant has to make payment on the basis of the Bill of Lading quantity.
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> **15.** We are afraid that each one of the reasons given by the Tribunal is incorrect in law. The Tribunal has lost sight of the following first principles when it arrived at the aforesaid conclusion. First, it has lost sight of the fact that a levy in the context of import duty can only be on imported goods, that is, on goods brought into India from a place outside of India. Till that is done, there is no charge to tax. This Court in *Garden Silk Mills Ltd.* v. *Union of India,* 1999 (8) SCC 744 = 1999 (113) E.L.T. 358 (S.C.), stated that this takes place, as follows :-
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> > *"It was further submitted that in the case of Apar (P) Ltd. [(1999) 6 SCC 117 = JT (1999) 5 SC 161] this Court was concerned with Sections 14 and 15 but here we have to construe the word "imported" occurring in Section 12 and this can only mean that the moment goods have entered the territorial waters the import is complete. We do not agree with the submission. This Court in its opinion in Bill to Amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944, Re [AIR 1963 SC 1760 = (1964) 3 SCR 787 sub nom Sea Customs Act (1878), S. 20(2), Re] SCR at p. 823 observed as follows :*

"Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers, i.e., before they form part of the mass of goods within the country."

It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed." [at paras 17 and 18]

16. Secondly, the taxable event in the case of imported goods, as has been stated earlier, is "import". The taxable event in the case of a purchase tax is the purchase of goods. The quantity of goods stated in a bill of lading would perhaps reflect the quantity of goods in the purchase transaction between the parties, but would not reflect the quantity of goods at the time and place of importation. A bill of lading quantity therefore could only be validly looked at in the case of a purchase tax but not in the case of an import duty. Thirdly, Sections 13 and 23 of the Customs Act have been wholly lost sight of. Where goods which are imported are lost, pilfered or destroyed, no import duty is leviable thereon until they are out of customs and come into the hands of the importer. It is clear therefore, that it is only at this stage that the quantity of the goods imported is to be looked at for the purposes of valuation. Fourthly, the basis of the judgment of the Tribunal is on a complete misreading of Section 14 of the Customs Act. First and foremost, the said Section is a section which affords the measure for the levy of customs duty which is to be found in Section 12 of the said Act. Even when the measure talks of value of imported goods, it does so at the time and place of importation, which again is lost sight of by the Tribunal. And last but not the least, "transaction value" which occurs in the Customs Valuation Rules has to be read under Rules 4 and 9 as reflecting the aforesaid statutory position, namely, that valuation of imported goods is only at the time and place of importation.

17. The Tribunal's reasoning that somehow when customs duty is *ad valorem* the basis for arriving at the quantity of goods imported changes, is wholly unsustainable. Whether customs duty is at a specific rate or is *ad valorem* makes not the least difference to the above statutory scheme. Customs duty whether at a specific rate or *ad valorem* is not leviable on goods that are pilfered, lost or destroyed until a bill of entry for home consumption is made or an order to warehouse the goods is made. This, as has been stated above, is for the reason that the import is not complete until what has been stated above has happened. The circular dated 12th January, 2006 on which strong reliance is placed by the revenue is contrary to law. When the Tribunal has held that a demand or duty on transaction value would be leviable in spite of "ocean loss", it flies in the face of Section 23 of the Customs Act in particular, the general statutory scheme and Rules 4 and 9 of the Customs Valuation Rules.

18. We therefore, set aside the Tribunal's judgment and declare that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty. Consequential action, in accordance with this declaration of law, be carried out by the customs authorities in accordance with law. All the aforesaid appeals are disposed of in accordance with this judgment.**"**

5. In view of the above decision of the Hon'ble Apex Court, we hold that actual oil quantity physically received into the shore tank should be taken as the basis for payment of duty at the time of ex-bond bills of entry.

6. Accordingly, in view of the above decision of the Hon'ble Apex Court, we set-aside the impugned order-in-appeal and allow the appeals.

(Pronounced in the open court on 12.09.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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