

CASE NO.:
Appeal (civil) 2018-2019 of 2002

PETITIONER:
Commissioner of Customs, Calcutta & Another

RESPONDENT:
Biecco Lawrie Ltd.

DATE OF JUDGMENT: 01/02/2008

BENCH:
ASHOK BHAN, DALVEER BHANDARI & P. SATHASIVAM

JUDGMENT:
JUDGMENT

BHAN, J.

1. The present appeal has been filed under Section 130-E of the Customs Act, 1962 (for short, 'the Act') against the judgment and final order dated 9th of August, 2001 passed by the Customs Excise and Gold (Control) Appellate Tribunal, ERB, Cal. in Appeal Nos. C/R-84 & 116/1999.

2. Respondent-assessee (hereinafter referred to as 'respondent') imported 5273.156 M.T. of Superior Kerosene Oil (hereinafter referred to as 'SKO') on 15th of May, 1998. At that time, the duty payable on importation of SKO was only the countervailing duty of 10% ad valorem. The imported quantity of SKO was stored in a private warehouse of M/s. IBP Ltd. at Budge Budge at the port under the Bill of Entry No. 302(OIL).

3. On 20th May, 1998, respondent filed Ex bond bill of Entry (to get them de-bonded) for home consumption for a quantity of 5140 M.T. The full amount of duty was paid thereon amounting to Rs.35,75,836/-. The proper officer endorsed on the reverse of the Bills of Entry to the effect that the goods may be released by the Officer-in-charge of the warehouse. The Officer-in-charge, in turn, released the goods and made an endorsement to this effect on the reverse of the Bill of Entry.

4. Ex Bond bill of Entry for home consumption for quantity of 133.156 M.T. was filed on 28th May, 1998. The full amount of duty was paid thereon amounting to Rs.92,635/-. The proper officer endorsed on the reverse of the Bill of Entry to the effect that the goods may be released by the officer-in-charge of the warehouse. The officer-in-charge, in turn, released the goods and made an endorsement to this effect on the reverse of the Bill of Entry.

5. In view of the fact that SKO is a highly combustible material and cannot be taken out of storage tank to store elsewhere, the respondent made an application to the Assistant Commissioner of Customs, under Section 49 of the Act, requesting him to permit storage of goods, which had been cleared for home consumption, in the same warehouse/tank.

6. It may be mentioned here that the respondent had obtained a registration certificate from the concerned Central Excise Authorities under Rule 174 of the Central Excise Rules (for short, 'the Rules') in order to sell SKO to dealers/customers who required an invoice for Modvat purposes. In the said registration certificate, it was clearly mentioned that SKO would be stored by the respondent in IBP's storage tank at Budge Budge. The respondent had also subsisting contract with IBP Company Ltd., the owners of the storage tank for storage of SKO belonging to the respondent in the said tanks. The respondent had paid hire charges for the said tank to IBP under the agreement dated 22nd of October, 1997 which was further extended by an agreement dated 7th of July, 1998.

7. According to the respondent, with effect from 28th of May, 1998, upon clearance of the material for home consumption, the appellant stopped levying, Preventive Officer Charge (P.O. Charge), which is collected for supervision of the goods in warehouse, so long as they remain under the control of Preventive Officer of Customs. That, after the duty was paid, the control over the goods was lifted and no such charge was thereafter collected. Respondent, thereafter, started lifting goods from the storage tank from time to time in accordance with the requirements of its customers. During the period 28th of May, 1998 to 1st of June, 1998, the respondent lifted a quantity of 463.31 M.T. of SKO from the storage tank.

8. In the Budget for the year 1998-99, Basic Customs Duty and Special Customs Duty was levied on SKO @ 30% and 2% ad valorem respectively. Thereafter, the Customs Authority (the 'appellant' hereinafter) withheld the clearance of SKO from the said tank on the contention that the respondent was required to pay Basic and Special Customs Duty @ 30% and 2% ad valorem and accordingly, wrote a letter to the respondent on 18th of June, 1998 contending that the differential duty would be payable on SKO not physically lifted before 2nd of June, 1998. Keeping in view the fact that lifting of goods was stopped by the Customs Authorities, the respondent deposited under protest an amount of Rs.24,48,822/- towards Basic and Special Customs Duty on 1000 M.T. of SKO under the Customs Receipt No. 1-1631 dated 25th of June, 1998. The respondent made a further deposit under protest of Rs.12,78,116/- towards Basic and Special Customs Duty on the quantity of SKO lifted between 2nd of June, 1998 and 6th of June, 1998.

9. A show-cause notice was issued by the appellant to the respondent for charging the enhanced rate of duty. In the said show-cause notice, the claim of the appellant was, inter alia, for appropriation of the sum of Rs.12,78,116/- paid towards differential duty on the material removed between 2nd of June, 1998 and 6th of June, 1998, appropriation of the sum of Rs.24,48,822/- deposited towards differential duty on 1000 M.T. of SKO and for levy of enhanced rate of duty on the further remaining quantity of SKO. The respondent deposited a further sum of Rs. 62,63,000/- on 3rd of August, 1998 under protest Basic and Special Customs Duty towards balance quantity of the said material lying in the storage of IBP. Respondent filed his reply to the aforesaid show-cause notice dated 23rd of July, 1998.

10. The Commissioner of Customs, Calcutta vide his order

dated 5th of November, 1998 confirmed the assessment as detailed in the show-cause notice and also imposed a penalty of Rs.5,000/- upon the respondent. The respondent being aggrieved, filed statutory appeal before the Tribunal. The Tribunal accepted the appeal and set aside the order of the Commissioner of Customs. It was held that once full duty has been paid by the importer and the clearance for home consumption has been permitted by the Customs Officers, any subsequent enhancement of the rate of duty would not be leviable on the goods which remain stored in the warehouse under the provisions of Section 49 of the Act.

11. After the passing of the order by the Tribunal, respondent filed a miscellaneous application before the Tribunal praying for a direction upon Customs Authorities to refund the amount deposited. Tribunal by its order dated 1st of November, 2002 directed the Revenue Authorities to refund the amount of duty inter alia in order to avoid uncalled for interest liability on the public exchequer. In terms of the orders passed by the Tribunal, a sum of Rs.99,89,938/- which was deposited under protest by the respondent, was refunded to it. Respondent, thereafter, filed an application before the Customs Authorities seeking payment of interest in terms of Section 27A of the Act on the aforesaid amount for the period during which the said sums were lying deposited with the appellant. The claim of the respondent on this account was for the sum of Rs.61,97,886/-. As the appellant had, in the meanwhile, filed an appeal in this Court, the appellant vide communication dated 15th of January, 2004 informed the respondent that the claim cannot be considered due to pendency of the matter in this Court.

12. Counsel appearing for the Revenue contends that the Tribunal fell in error of law as it failed to correctly appreciate the import of Section 15(1)(b) of the Act. According to him, the duty payable for the warehoused goods is at the rate prevalent on the date of removal of the goods from the warehouse under Section 68. According to him, in terms of Section 15(1)(b), the \023cause\024 is \023the physical removal of goods from warehouse\024 and the \023effect\024 is the payment of duty for such removal of goods and not otherwise. The Learned Senior Counsel appearing for the respondent controverts the submissions made by the Learned Counsel appearing for the Revenue. He submits that the Tribunal did not fall in any error while appreciating the provisions of Section 15(1)(b). According to him, the present case would fall under Section 15(1)(a). By referring to Section 2(25) of the Act, it was contended that the expression \023imported goods\024 means any goods brought in India but does not include goods which had been cleared for home consumption. Since, in the present case, goods had been cleared by the Customs Officers for home consumption and out of charge order was passed, provisions of Section 15(1)(a) would be more appropriately applicable in the present case.

13. Section 15(1) at the relevant time read as under: -
15. Date for determination of rate of duty and tariff valuation of imported goods.-(1)
The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force, -
(a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is

presented under that section;
(b) in the case of goods cleared from a warehouse under section 68, on the date on which the goods are actually removed from the warehouse;
(c) in the case of any other goods, on the date of payment of duty;
[Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.] \024

14. Section 15(1) provides for the date for determination of rate of duty and tariff valuation of imported goods. In the case of goods cleared from warehouse under Section 68, Section 15(1)(b) provides that the rate of duty and tariff valuation applicable to any imported goods shall be the rate and valuation in force on the date on which the goods are actually removed from the warehouse. The relevant date for determination of rate of duty and tariff valuation is the date on which a Bill of Entry in respect of such goods is presented for home consumption. In the present case, the goods were cleared for home consumption upon payment of full duty thereon as applicable on 28th May, 1998. The subsequent storage of the goods in warehouse was under the provisions of Section 49. Clearance of warehouse goods for home consumption under Section 68 was, therefore, complete prior to 2nd of June, 1998. The Bill of Entry for home consumption had been presented in the prescribed form much prior to the coming into force of the amended provisions providing for enhanced rate of duty. The import duty leviable had been paid and the order of clearance of the goods for home consumption had been made by the proper officer. On the fulfilling of the requirements of Section 68, Section 15(1)(b) would cease to operate. Section 49, provides that in the case of imported goods, whether dutiable or not, which have been cleared for home consumption on an application filed by the importer, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, on being satisfied that the goods cannot be cleared within a reasonable time, may permit the storage of such goods in a public warehouse, or in a private warehouse if facilities for deposit in a public warehouse is not available and such goods shall not be deemed to be warehoused goods for the purposes of the Act and, accordingly, the provisions of Chapter IX shall not apply to such goods. Section 68 falls in Chapter IX. Section 15(1)(b) expressly refers to the clearance from the warehouse under Section 68 and the same would not be applicable to the present case.

15. Section 15(1) provides for the rate of duty and tariff valuation applicable to any \023imported goods\024. The term \023imported goods\024 is defined in Section 2(25) of the Act to mean any goods brought into India from a place outside India, but does not include goods, which have been cleared for home consumption. In view of the fact that the imported goods in the present case had been cleared for home

consumption on 28th of May, 1998, they ceased to be imported goods within the meaning of the Act and the provisions of Section 15(1)(b) could not be applicable.

16. The Constitution Bench of this Court, in *Bharat Surfactants (Private) Ltd. and Anr. vs. Union of India* (UOI) and Anr. [(1989) 4 SCC 21], observed as under: -

\023...The provisions of Section 15 are clear in themselves. The date on which a Bill of Entry is presented under Section 46 is, in the case of goods entered for home consumption, the date relevant for determining the rate of duty and tariff valuation...\024(Para 14).

17. Following the Judgment of the Constitution Bench referred to above, this Court in *Shah Devchand & Co. and another vs. Union of India* and another [AIR 1991 SC (1931)] held as under: -

\023In *Bharat Surfactant's* case it has been held that the rate of duty and tariff valuation has to be determined in accordance with Section 15(1) of the Customs Act. Under Section 15(1)(a), the rate and valuation is the rate and valuation in force on the date on which the Bill of Entry is presented under Section 46. Thus all the contentions raised in the cases in hand before us are fully covered by the above-mentioned cases decided by the Constitution Bench of this Court. In the result we find no force in any of the grounds raised in these cases and the same are dismissed with no order as to costs.\024

18. Subsequent to this, a two-Judge Bench of this Court, in *D.C.M. & Anr. vs. Union of India & Anr.* [(1995) Supp (3) SCC 223], held as under: -

\023The first aspect to be noticed is that Section 12 opens with the words \023except as otherwise provided in this Act or any other law for the time being in force\024. Thus, Section 12 is subject to Section 15 among others. Secondly, Section 12 does not purport to prescribe the date with reference to which rate of duty shall be determined. It only says that duties of customs shall be levied at such rate as may be specified under the Customs Tariff Act on goods imported. It is Section 15 that prescribes the date with reference to which the rate of duty and tariff valuation of imported goods shall be determined. A reading of Section 15, 46 and 68 makes it clear that they provide an option to the importer either to file a bill of entry for home consumption straight away (in which case he has to pay the duty determined with reference to that date) or to file a bill of entry for warehousing. In the latter case, the goods are merely warehoused. The import duty

will be levied at the rate and on the basis of the valuation determined in accordance with the provisions prevailing on the date of clearance from the warehouse for which purpose the importer has to file a fresh bill of entry for home consumption. In other words, it is the date of filing the bill of entry for home consumption which determines the rate of duty in clauses (a) and (b) of Section 15. Inasmuch as the matter is left to the option of the importer and also because a uniform principle is adopted by the Act, as explained above, we see no room for any legitimate grievance of discrimination. There is also no presumption that rate of duty always goes up. It may also go down, in which case, the importer stands to gain.\024

19. The same principle was laid down by this Court in *Dhiraj Lal H. Vohra & Ors. vs. Union of India & Ors.* [1993 Suppl.(3) SCC 453] and in *Union of India & Ors. vs. Apar Private Ltd. & Ors.* [(1999) 6 SCC 117].

20. There is no dispute that where the imported goods are allowed to be warehoused under Section 68 of the Act and are subsequently cleared from the warehouse, the rate as applicable on the date of actual removal of the goods from the warehouse, is applicable. But where the goods are cleared for home consumption under Section 46, the duty payable would be as on the date the goods were cleared for home consumption. In the present case, not only the full duty stood paid by the respondent, but the Customs Officer had also permitted clearance of the same, as is evident from the endorsement made on the back of the bill of entries. As such, the goods cannot be held to be the warehoused goods and the same were allowed to be kept in the warehouse only on account of an application made by the appellants in terms of the provisions of Section 49 of the Act. The respondents have been clearing the goods from the storage tank as and when required. They were permitted to store the goods in a private warehouse as if it was their own godown. The goods were stored in the IBP storage tank under an agreement entered into by the respondent with IBP and the storage charges were paid by the respondent. Thereafter, the Preventive Officer Charges were discontinued to be levied. Where duty on the warehoused goods is paid and out of charge order for home consumption is made by the proper officer in compliance of the provisions of Section 68, the goods removed in smaller lots have to be treated as cleared for home consumption.

21. For the reasons stated above, we are of the view that since the entire duty required to be paid by the importer has been paid and an out of charge order had been passed by the Customs Authorities, nothing more remained to be paid by the importer. In this view of the matter, the question of applicability of provisions of Section 15(1)(b) becomes irrelevant. The goods would be more appropriately governed under Section 15(1)(a) which provides that in the case of goods entered for home consumption under Section 46, the duty leviable would be as on the date on which the bill of entry in respect of such goods is presented. In this case, the bill of entry was presented by the respondent on 20th of

May, 1998 and 28th of May, 1998 and full duty was paid. The goods were got cleared on the payment of the entire duty as applicable on that date. Once, goods are cleared for home consumption, the duty payable would be on the date on which the Bill of Entry in respect of such goods is presented, under Section 46.

22. For the reasons stated above, we do not find any merit in these appeals and dismiss the same leaving the parties to bear their own costs.

23. The Customs Authorities now may proceed to decide the application filed by the respondent for interest on the delayed payment in accordance with law.