

LEWEK ALTAIR SHIPPING PVT. LTD. VERSUS CC, VIJAYAWADA (VICE-VERSA)

Classification of imported goods - import of vessels "Lewek Altair" and "Lewek Atlas" - whether classified under CTH 8905 90 90? - the Commissioner has imposed a meagre amounts of redemption fine under section 112 (a) which is less than 1% of the value of the vessels and this needs to be enhanced - benefit of exemption N/N. 12/2012-Cus, dated 17.03.2012 as amended.

Held that:- The vessels in question are meant to support the ONGC's oil drilling platform and were imported as such - As is evident from all available documents that the vessels carry out this function by carrying personnel and equipment from shore to the platform and back. Such a function is essential for the off shore oil drilling platforms which are located far away from the shore. In such a factual matrix, it cannot be held that the navigation of the vessels is not the primary function. The navigation indeed, is the primary function of the vessels and dynamic positioning system helps to perform this function efficiently. Similarly, loading or unloading goods or embarking or disembarking personnel are incidental to the transportation. Therefore, the vessels in question are rightly classifiable under Customs Tariff Heading 8901 9000 as claimed by the appellants.

The vessels cannot, by any stretch of imagination, fall under CTH 8905. Consequently the benefit of exemption notification No. 12/2012-Cus is also admissible to the appellants - The demand of duty under CTH 8905 9090 denying the benefit of exemption notification No. 12/2012-Cus, dt. 17.03.2012 by Ld. Commissioner needs to be set aside - confiscation and redemption fine set aside - penalty set aside - appeal allowed - decided in favor of appellants.

No.- Appeals No. C/30608/2017, C/30609/2017, C/30230/2016, C/30234/2016

Order No.- A/30053 – 30056/2019

Dated.- January 9, 2019

Citations:

1. [Hal Offshore Ltd. and Great Offshore Ltd. Versus Commissioner of Customs \(Import\) Mumbai - 2013 \(10\) TMI 409 - CESTAT MUMBAI](#)
2. [CGU LOGISTIC LTD. Versus COMMISSIONER OF CUSTOMS \(I\), MUMBAI - 2011 \(6\) TMI 616 - CESTAT, MUMBAI](#)

Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL) And Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Shri Prakash Shah, Advocate for the Appellant Assessee.

Shri N. Bhanu Kiran, Asst. Commissioner/AR for the Respondent.

ORDER

Per: Mr. P. Venkata Subba Rao

1. All these appeals pertain to the same issue and hence are being disposed of together. Appeal No. C/30608 /2017 and C/30609/2017 have been filed by the assessee against the order of the Commissioner of Customs, classifying the vessels which they imported under the Customs Tariff Heading 8905 90 90 and denying the benefit of exemption notification. They also challenged the confiscation of the vessels imported by them under section 111(m) and imposition of penalties under section 112 (a) and 114AA of the Customs Act, 1962. The Department's appeals No. C/30230/2016 and C/30234/2016 are against the impugned orders on the ground that the Commissioner has imposed a meagre amounts of redemption fine under section 112 (a) which is less than 1% of the value of the vessels and this needs to be enhanced.

2. Heard both sides and perused the records. The facts of the case in brief are that assessee imported vessels "Lewek Altair" and "Lewek Atlas" and filed Bills of Entry, classifying them under chapter heading 8901 9000 of Customs Tariff and claimed the benefit of Exemption Notification No. 12/2012-Cus, dated 17.03.2012 as amended. These vessels are meant to support oil rigs of ONGC in their offshore drilling platforms. The vessels in question are used to transport personnel and equipment from shore to the platform and back. It is the case of the Revenue that such vessels are to be correctly classifiable under Customs Tariff Heading 8905 9000 and are not eligible for exemption under notification No. 12/2012-Cus, dated 17.03.2012. It is the case of the appellants assessee that the

vessels are classifiable under CTH 89019000 and are eligible for exemption under notification No. 12/2012-Cus, dated 17.03.2012 (S.NO. 461). Consequently there is a demand of customs duty along with interest as applicable under Section 28AA. It is also the case of the department that the appellant herein has misclassified the goods in question and therefore the goods in question do not correspond in relation to the classification in the bill of entry. Therefore, there is a violation of Section 111 (m) of the Customs Act and are therefore the imported vessels are liable to be confiscated. It is further the case of the Revenue that appellant is liable to penalty under section 112 (a) of the Customs Act, 1962 as well as under section 114AA of the Customs Act. The appellant contests the confiscation of the vessels as well as imposition of penalties under sections 112(a) and 114AA. Show cause notices were issued to the appellant and after following due process, Ld. Commissioner vide the impugned orders classified the vessels under CTH 8905 9090 and denied the benefit of exemption notification No. 12/2012-Cus. He accordingly ordered finalisation of the provisional assessment as above and demanded duty along with applicable rate of interest. He further confiscated the goods under section 111(m) as the entry of classification in the Bill of Entry filed by the appellant is not reflecting the correct classification. He allowed redemption of the vessels on payment of redemption fine and imposed penalties under Section 112 (a) and 114 AA. Hence these appeals by the assessee.

3. Ld. Counsel for the appellant submits that vessels in question are meant for transporting personnel and equipment from shore to off shore platform of ONGC where the rigs are located and back and this function of the vessels is not in dispute. He draws the attention of the Bench to the two conflicting entries in the Customs Tariff Heading i.e. 8901 and 8905 which are as follows:

Tariff Item	Description of goods	Unit	Rate of duty	
			Standard	Preferential areas
(1)	(2)	(3)	(4)	(5)
8901	CRUISE SHIPS, EXCURSION BOATS, FERRY-BOATS, CARGO SHIPS, BARGES AND SIMILAR VESSELS FOR THE TRANSPORT OF PERSONS OR GOODS			
8901 10	Cruise ships, excursion boats and similar vessels principally designed for the transport of persons; ferry-boats of all kinds :			
8901 10 10	Ships	u	10%	-
8901 10 20	Launches	u	10%	-
8901 10 30	Boats	u	10%	-
8901 10 40	Barges	u	10%	-
8901 10 90	Other	u	10%	-
8901 20 00	Tankers	u	10%	-
8901 30 00	Refrigerated vessels, other than those of Subheading 8901 20	u	10%	-
8901 90 00	Other vessels for transport of the goods and other vessels for the transport of both persons and goods	u	10%	-
8905	LIGHT-VESSELS, FIRE-FLOATS, DREDGERS, FLOATING CRANES, AND OTHER VESSELS THE NAVIGABILITY OF WHICH IS SUBSIDIARY TO THEIR MAIN FUNCTION; FLOATING DOCKS; FLOATING OR SUBMERSIBLE DRILLING OR PRODUCTION PLTFORMS			

8905 10 00	Dredgers	u	10%	-
8905 20 00	Floating or submersible drilling or production platforms	u	10%	-
8905 90	Other :			
8905 90 10	Floating docks	u	10%	-
8905 90 90	Other	u	10%	-

4. He would argue that the primary function of the vessels being to carry persons and equipments, they cannot be classified under 8905 but have to be classified under Chapter Heading 8901 9000. Chapter Heading 8905 basically covers such vessels whose function is not navigation but is some other function and navigability is only a subsidiary function, whereas Chapter Heading 8901 covers such vessels which are primarily meant for transport of persons and goods. It is not necessary for the vessels falling under 8901 to carry passengers and goods to travel very large distances or carry persons or goods from one port to another. What is important is that they carry persons and goods as their primary function whereas the vessels falling under chapter heading 8905 have other functions such as dredging work, float cranes, fire floats etc. and their navigation is only incidental. He draws the attention of the Bench to the findings of Hon'ble Commissioner of Customs in paras 30, 31, 32 & 36 in O-I-O No. VJD-CUSTOM-PRV-CM-030- 15-16, dated 31.12.2015 which are as follows:

30. Capt. Sanjoy Jacob K, Master of the vessel in his statement dated 21.01.2015, given under section 108 of the Customs Act, 1962, inter-alia, deposed that DP is Dynamic positioning used to maintain the vessel in required position even in high seas and thrusters and propellers are integrated with DP system along with reference systems to maintain the position of the vessel in high seas and these systems are not used in cargo / passenger vessels. He has further stated that the main feature of the vessel is to keep the vessel in stationery position for off-loading or loading the goods from the Rigs by using the Dynamic position and their vessel has got provisions for ROV, crane, High Precession and positioning system. To a specific question whether the vessel is for transporting goods or persons, Capt. Sanjoy Jacob K has stated that they transport goods or persons (maximum 12 nos in addition to crew) but such transaction is restricted for special purpose like carrying from shore to rigs to shore only. He has further stated that they cannot transport cargo to other ports as the vessel is specifically designated for sea logistic services from base to rig and back and the net tonnage of the vessel is 1061 MTs and it is not commercially viable to transport the goods to long distances and the vessel is manufactured for plat-form supply operations only.

31. As seen from the statement of the master of the vessel as well as the specifications of the vessel, it is clear that the vessel 'Lewek Altair' is not meant for transport of goods or persons, as it is not commercially viable for such activity. The said vessel is meant of supporting activities in oil drilling operations and was equipped with certain specialized provisions viz., Dynamic Positioning System (DPS) which keeps the vessel in stationary position for off-loading or loading the goods. The same facilities are not available to cargo/passenger vessels. Further the vessel consist of various ship's propulsion electrical, navigational, communication system, safety, survival fire fighting systems, interior hull fittings, furnishing storage systems, Automatic identification system (AIS), Bow thrusters, Life saving equipments, Rescue Boa, Life-rafts etc.

These having in-built fire fighting equipments, Cranes, storage tanks, winches, sophisticated propulsion and other dynamic engineering and navigational systems etc. The main function of the vessel viz., Lewek Altair is supporting the activities at the place of Oil Rigs to support the oil exploration and drilling operations and normally works under stationary position where the navigability is subsidiary to the main function of the vessel. The main feature of the vessel is keeping it in stationary position for specified activities and the navigability is subsidiary to its main function. The regular cargo or passenger vessels cannot perform such activities and the vessel 'Lewek Altair' was specially designed to perform such activities only.

32. M/s LASPL has contended that the classification adopted in 2009 while ship builder exported the vessel to Singapore shall be accepted and has also contended that their request for classification of the vessel under 89019000 was accepted by the then Commissioner at the time of re-import of the vessel in 2013. As seen from the record, the vessel was classified under 89019000 at the time of its Export to Singapore in 2009. As the ship is for Export and as there is no duty liability, it appears that the classification issue has not got much attention at that time. Further M/s LASPL was permitted to classify the same under 89019000 at the time of its re-import in 2013 based on the information provided by M/s LASPL that primary function of the vessel was transportation of goods and personnel. The contention of M/s LASPL is not correct as the past classification or permission accorded by the then Commissioner for classification of the vessel under CTH 89019000 cannot be a binding precedent on the Department as further investigations carried out by the Department revealed that M/s LASPL has not furnished the correct information and misled the Department by stating that the primary function of the vessel was for transportation of goods and personnel. It was revealed in the investigation carried out by the Department that the primary function of the vessel was not transport of goods and personnel and the classification adopted by them is in fact not correct.

36. M/s LASPL contended that Lewek Altair was classified as an "Offshore supply vessel" by the Registrar of Indian Ship, Visakhapatnam and the Registrar of ships, maritime and port authority of Singapore, Singapore and they rely on the decision of the Hon'ble Tribunal in the case of *CGU Logistics Ltd Vs Commissioner of Customs (Import), Mumbai* and *HAL Offshore Ltd Vs Commissioner of Customs (Import), Mumbai* where in it was held that supply vessels merit classification under CTH 8901. I have verified the certificate of class issued by Indian Register of Shipping vide their certificate No.15094, dated 05/03/2015. As seen from the certificate, the class notation given was *SUL, STS, Supply Vessel*. The ship was classified as *IY, TCM, [DP(2)]*. As seen from the Indian Register of Shipping Rules and Regulations for the construction and classification of steel ships, the expanded form of *SUL* is *SARVOUTAM LANGER* which denotes vessels which are classed with Indian Register of Shipping where the hull and its appendages and equipment meet the rule requirement; the expanded form of *STS* is *SAMATARANA STHIRATVA* which denotes that the ship complies with the survival capability (floating in damaged condition) in accordance with Chapter 3 of IMO Resolution MSC 235(82). The notation "Supply Vessel" will be assigned to all ships built in accordance with applicable requirement of Part 5, Chapter 8 of the Rules. Part 5 of the Rules pertains to Special Ship Types. The notation "Passenger Ship" will be used only when the vessels intended for carrying more than 12 passengers and the notation "Container Ship" will be used for vessels built for exclusive carriage of containers in holds and on decks. As seen from the class notations given for the vessel viz., Lewek Altair, "Passenger Ship" or "Container Ship" was not given. Further, the class notation "Supply Vessel" indicates that it is a special type of ship and it is not a cargo or passenger ship. The expanded form of *DP(2)* is Dynamic Positioning (2) which denotes that the ship is fitted with automatic controls of position keeping with automatic standby controls and redundancy in design and equipment as required by part 5, Chapter 24 of rules. As seen from the definitions contained in Part 5 Chapter 24, 'Dynamically positioned vessel' means a vessel which automatically maintains its position and heading (fixed location or predetermined track) by means of thrusters force and 'Dynamic Positioned System' means the complete installation necessary for dynamically positioning a vessel, comprising of the following sub-systems: a)

Power System b)Thuster system c) DP-Control System d)Independent Joystick System. As seen from Part 5 Chapter 24 Para 1.3.1, DP(2) notation will be assigned when a ship is fitted with automatic controls for position keeping with automatic standby controls, an independent joystick system back-up and redundancy in design and equipment as required by the rules. Thus it is clear that the main function of the vessel 'Lewek Altair' is mainly for operations which require keeping the vessel at a stationery position in the sea and it is not a passenger or cargo vessel for carrying persons or goods.

5. He thus submits that Commissioner took a view that the vessels in question are not commercially viable to transport the goods to long distances and are meant for platform supply and operations only. He further held that the dynamic positioning system located in the vessels is the primary function which gets fulfilled at a stationary position and therefore the vessels are not meant for carrying goods and passengers. Ld. Counsel would submit that the dynamic positioning system enables the supply vessel to be in a stable condition when the goods or passengers are being loaded or off loaded at the oil platform in the sea. This loading or unloading is not an end in itself but is a means to enable their transport to the shore and back. He would argue that the navigation is therefore the primary function of the vessels and they are classified under Tariff 8901 9000 and not under 8905 as held by Ld. Commissioner.

6. Ld. DR, on the other hand, would argue that the vessels in question are not ordinary boats meant for transport of goods or persons but for platform support vessels whose primary function is to support the platform of oil rig in the high sea. On a specific query from the Bench as to how the platform is supported by vessels in question, Ld. DR would say that by the dynamic positioning system at the platform and by carrying personnel and goods within the shore and the platform. He further argue that the vessels in question are incapable of carrying personnel and equipment to different

Ports or over long distances as has been admitted by the Master of the Vessels in his statement before the Customs Officer. Therefore, the navigation of the vessels is secondary to the primary function of the vessels namely supporting the oil rig platforms.

7. We have considered the arguments on both sides and perused the records including the statement by the Master of the vessel. The vessels in question are meant to support the ONGC's oil drilling platform and were imported as such. The next question is how the vessels support the platform. As is evident from all available documents that the vessels carry out this function by carrying personnel and equipment from shore to the platform and back. Such a function is essential for the off shore oil drilling platforms which are located far away from the shore. In such a factual matrix, we are unable to hold that the navigation of the vessels is not the primary function. We find that navigation indeed, is the primary function of the vessels and dynamic positioning system helps to perform this function efficiently. Similarly, loading or unloading goods or embarking or disembarking personnel are incidental to the transportation. Therefore, the vessels in question are rightly classifiable under Customs Tariff Heading 8901 9000 as claimed by the appellant. Thus, in our view, the vessels cannot, by any stretch of imagination, fall under CTH 8905. Consequently the benefit of exemption notification No. 12/2012-Cus is also admissible to the appellant. The demand of duty under CTH 8905 9090 denying the benefit of exemption notification No. 12/2012-Cus, dt. 17.03.2012 by Ld. Commissioner needs to be set aside and we do so. Consequently, no interest is also payable on such demand. We find that confiscation of vessels under section 111(m) was only on the ground that the bill of entry claimed under Customs Tariff Heading which, according to the Commissioner, was incorrect. It was therefore held that in the entry made under Customs Act viz; Bill of Entry, the Customs Tariff Heading was not correct and therefore the goods are liable to be confiscated under section 111 (m). As we have held that the goods in question are classifiable as claimed by the appellant, under CTH 8901 9000, this allegation does not survive. Even otherwise, we find it hard to hold that an assessee who filed bill of entry with a Customs Tariff Heading which is not correct, will render his goods liable to confiscation under section 111 (m). The Customs Tariff Heading indicated in the bill of entry is only a self assessment by the appellant as per his understanding which is subject to re-assessment by the officers if necessary. Therefore, an assessee, not being an expert in the customs law can claim a wrong tariff or an ineligible exemption notification and such claim does not make his goods liable to confiscation. It is a different matter if the goods have been described wrongly or the value of the goods has been incorrectly declared. In this case, although there was an allegation in the show cause notice that the invoices were initially submitted for a lower value and thereafter were revised for higher amount, the confiscation in the impugned orders were only on the ground that CTH in the bill of entry was incorrect. In our view, this cannot form the basis for confiscation of goods under section 111(m). Therefore, the confiscations and the redemption fines need to be set aside and we do so. Consequently no penalties are imposable under section 112 (a). As far as the penalties under section 114AA are concerned, these are imposable if a person knowingly or intentionally makes, signs or uses or causes to be made, signed or used, in a declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purpose of the Customs Act. Ld. Commissioner held *"considering the facts of the case, it has to be held that on the ground of wilful misstatement regarding classification and availing of notification, I am constrained to hold that the importer is liable for penalty under section 114AA of the Customs Act, 1962."* Thus holding, he imposed a penalty of ₹ 1.00 Crore on the appellant in each of the impugned orders. In our considered view, claiming an incorrect classification or the benefit of an ineligible exemption notification does not amount to making a false or incorrect statement because it is not an incorrect description of the goods or their value but only a claim made by the assessee. Thus, even if the appellant makes a wrong classification or claims ineligible exemption, he will not be liable to penalty under section 114AA of the Customs Act, 1962. Further, in these cases, we have already upheld the classification claimed by the appellant and therefore find that no penalty is imposable on the appellant.

8. In conclusion, the appeals filed by the assessee are allowed and Revenue's appeals seeking enhancement of the redemption fine are rejected. The impugned orders are set aside with consequential relief to the assessee.

9. The impugned orders are set aside and the appeals of the appellant assessee are allowed with consequential relief. Revenue's appeals are rejected.

(Operative portion of the order pronounced in open court on conclusion of hearing)