



## **Bangladesh customs practice for assessing shortage of liquid bulk cargo now aligned with India**

The Appellate Division of Bangladesh Supreme Court upholds the decision of the High Court declaring penalties imposed by Customs Authorities on the basis of short landing in shore tanks unlawful and allowing 1% transit loss.

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The judicial challenge took more than 40 years but succeeded in bringing the Bangladesh customs law and practice in determining liquid bulk cargo quantity outturn in line with the Indian law and practice thus recognizing a 1% transit loss allowance and joint ullage surveys rather than shore tank measurements as the basis for shortage penalties for liquid bulk cargo shipments.

The Appellate Division of the Supreme Court of Bangladesh has dismissed the civil petition filed by the Bangladesh Customs Authority in the matter of *Government of Bangladesh & others versus M Mashukul Haq* challenging the judgment and order passed by the High Court Division setting aside adjudication orders passed by the Customs Authorities imposing penalties for short landing of liquid bulk cargo. The High Court in its judgment had declared that to impose a penalty under section 156.24 of the Customs Act the joint ullage survey conducted on board the vessel after arrival and before discharge should have been relied rather than shore figures and recognized a 1% transit loss allowance for determination of shortage of liquid bulk cargo and imposition of penalties. The decision removed the uncertainties which have long prevailed in relation the basis of imposition of short landing penalties for liquid bulk cargo and puts the Bangladesh law with relation to the imposition of penalty in line with the law and practice in India which has a similar Customs Act as Bangladesh evolving from the colonial era Customs Act of 1868.

### **A 40-year battle - the twists and turns in the protracted legal challenge**

The basis for imposing a penalty for short landing was laid down in section 156.24 of the Bangladesh Customs Act 1969 which provides that if any goods entered in the import manifest of a conveyance are not found in that conveyance, or as per clause 24(ii) if the quantity found in the conveyance is short and the shortage is not accounted for to the satisfaction of the officer in charge of the customs house, then the person in charge of the conveyance shall be liable for a penalty not exceeding twice the amount of duty chargeable on the goods not found on the conveyance or, if such goods are not dutiable or the duty thereon cannot be ascertained, to a penalty not exceeding twenty five taka for each missing or deficient package or separate article and in the case of bulk goods to a penalty not exceeding the value of the goods or fifty thousand taka whichever is higher.

The word *Conveyance* is defined in section 2 (g) of the Customs Act as any means of transport used for carrying goods or passengers such as a vessel, aircraft, vehicle or animal and a plain reading of the provision would suggest that penalty could only be imposed if the quantity was found short on board the vessel by ullage survey carried out on board prior to breaking bulk as the customary scientific method to determine on board quantity of liquid bulk cargo is by ullage survey. The customs authority however interpreted the statutory provision and issued adjudication orders imposing a penalty on the basis of a survey carried out at shore tanks located kilometers away from the vessel and refused to consider the findings of joint ullage surveys. Furthermore, although the Customs Preventive Manual allowed 1% of transit loss the Customs Authorities arbitrarily refused to allow such transit loss for liquid bulk cargo other than petroleum.

There was a provision to appeal against the customs adjudication orders before the Customs Appellate Tribunal but such an administrative appeal could only be filed by depositing the entire amount of penalty imposed in cash with the Customs Authority and in almost all cases of appeal the Appellate Tribunal upheld the decision of the Customs Commissioner. The decision of the Appellate Tribunals could be reviewed on request but the revisional authority also never set aside the penalty. The general advice the shipowners received from the local lawyers was that no appeal could be filed before the High Court without exhausting the appeal process outlined in the Customs Act. In the case of *Haque and Sons v National Board of Revenue* the owners/ agents of the vessel completed the entire appellate process laid down in Customs Act and being dissatisfied as the penalty had not been set aside filed a writ petition before the High Court Division of the Supreme Court of Bangladesh. The Hon'ble judge set aside the adjudication order and held that ullage survey report shall prevail over the shore tank survey report in case of a difference between the two reports and in case the shortage on board the vessel is less than 1% of admissible ocean allowance then no penalty can be imposed against the carrier or her agent.

The time taken to get the judgment was very long, the vessel completed her discharge of cargo in April 1978, proceedings were commenced by Customs Authority in April 1980 by issuing the letter of call, the adjudication order was passed by Commissioner of Customs in September 1983, an appeal was filed by owners and their agents before the Customs Appellate Tribunal and an order in appeal was passed in May 1985 without setting aside the penalty and an application for review of the order was filed and the review order was passed by the Customs Authority without setting aside the penalty in January 1994. The writ petition challenging the order imposing the penalty was filed in 1994 and judgment was passed in June 1999. It took long twenty-one (21) years to get the unlawful penalty set aside with the full amount of security lying with the Customs Authority in the form of cash and bank guarantee.

The Customs Authority did not appeal against the decision and thus as per the constitution of Bangladesh, the determination of was the law to be followed. However, in violation of the law pronounced by the High Court, the Customs Authority continued to impose penalties on the basis of shore tank surveys. Due to the requirement that security be posted in the form of cash or bank guarantee to challenge a penalty and given the time it would take to overturn the penalty, the economical course for shipowners and Clubs has been to pay the unlawfully imposed penalty as the cost of a challenge was significantly more than the penalty itself. The main challenge for a party who did not wish to pay the penalty was to be able to challenge the order without having to put up security in the form of cash and bank guarantee.

The Bangladesh Government passed the Tax Ombudsman Act 2005 and under the provisions of the act, appeal could be filed against decision of the Commissioner of Customs without depositing security and going through the appeal process laid down in Customs Act 1969. Capt. MAK (Mohiuddin Abdul Kadir, Advocate, Supreme Court of Bangladesh) advised Clubs and members to file appeals under the Tax Ombudsman Act and pray for stay of the adjudication order until disposal of the appeal. The first appeal with the Tax Ombudsman was filed in December, 2008 and the first order by the Ombudsman was issued on June, 2009. The order set aside the impugned adjudication order and directed the Commissioner of Customs to issue a new adjudication order with a reduced penalty. Although achieving a reduction, the Ombudsman's order did not invalidate the Adjudication Orders which imposed a penalty on basis of shore tank surveys and did not require adherence to 1% transit loss allowance. The Ombudsman's order was clearly unlawful on the face as it did not state the reasons for not taking into account the law set down by the High Court Division in the Haque & Sons case. Our member shipowner's agent filed an appeal before the Minister of Finance against the order of the Ombudsman, but no order has been passed by the minister who reportedly forwarded the matter to Customs Policy Division for advice. However, between 2008 to 2010 no further adjudication orders had been issued by the Customs Authority who did not know how to deal with our appeals to Tax Ombudsman which automatically stayed the adjudication orders passed by them until final disposal of the matters. The shipowner members and their agents who appealed against Customs adjudication orders, however, did not need to pay the heavy fine imposed at that time.

In 2011 the Tax Ombudsman Act was repealed, and the Customs Authority again started issuing unlawful adjudication orders on the basis of short landing found in shore tank surveys. Capt. MAK now decided to challenge the Adjudication Orders before the High court without going through the administrative appeal process. Under Article 102 of the Constitution of the Government of the Peoples Republic of Bangladesh the High Court Division could accept petitions from aggrieved parties and decide on the legality of the adjudication orders issued by the Customs Authorities if there was no alternative equally efficacious remedy under law. The Hon'ble High Court admitted the writ petitions and issued a ruling staying the adjudication orders and accepting the argument on behalf of the members, represented by their local agent that the Customs Administrative Appellate process was not an equally efficacious remedy and our members and their local agents had the right to appear before the High Court Division directly. The Customs Authority filed an affidavit in opposition against the writ petitions and the hon'ble High Court upon hearing both the parties passed a judgment in February 2016 declaring the adjudication orders to have been passed without any legal effect. The Customs Authorities did not file any appeal within the statutory limitation period but the agents refused to return the LOUs provided by the P&I Clubs on behalf of their members as they were concerned that the Customs Authorities could appeal against the decision even after the limitation period on the basis of section 5 of limitation act which allowed for condonation of delay in certain cases.

In 2017 the Customs Authority filed civil petitions challenging the judgment of the High Court Division. The Correspondents and the members were not aware of the filing of the appeal as no copy had been served on the respondents. The correspondents prior to receiving the notice of appeal in 2021 through their lawyers issued several notices on the Customs Authorities to direct the agents to return the LOUs but no response was received. Interport Maritime Ltd filed a pro bono writ petition for direction on the authorities to instruct the agents licensed by them to return the Club LOUs kept as security before the High Court Division. The High Court Division issued a rule on the Customs Authorities and also directed them to dispose of our application. The Customs Authorities refused to act and thereafter MCLaw Services the law firm representing the members and their local agents issued a notice on the Customs Authority that if no response was received, they would file a petition for contempt of court. It was then that the Customs Authorities served notices of the appeal against the judgment and order of the High Court Division setting aside the adjudication orders issued by the Customs Authorities.

The hearing of the civil petition was delayed due to Covid 19 but finally it came up for hearing and after the hearing the full bench of the Appellate Division of the Supreme Court of Bangladesh dismissed the Civil Petitions filed by the Customs Authorities challenging the High Court Judgment which declared the adjudication orders which imposed customs penalty upon the local agents on the basis of findings of shore tank survey report and not ullage survey report without allowing 1% transit loss to be null and void and having been passed without lawful authority.

## **Conclusion**

The decision of the Appellate Division of the Supreme Court of Bangladesh is not appealable and according to section 111 of the Constitution of Bangladesh the law declared by the Appellate Division of the Supreme Court is binding on the High Court and the law declared by either division of the Supreme court is binding on all courts subordinate to it. The Customs adjudication orders having been declared null and void there can be no further ground for the agents to refuse to return Club LOUs. No Customs Penalty can now be imposed for any liquid cargo carried in bulk if there is no shortage shown by an ullage survey report or, if there is a shortage shown, it is less than 1%.

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