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

REGIONAL BENCH : COURT NO - 3

Customs Appeal No. 476 of 2011-DB

(Arising out of OIA No. 38-39/COMMR-A-/JMN/2011 dated 28.06.2011 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

C.C. Jamnagar (prev) ...Appellant

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

-Versus-

Shree Electrometals Ltd. ...Respondent

3/4, Kartikey Complex, 2nd Floor,
Kala Nala,
Bhavnagar,
Gujarat
364001

WITH

Customs Appeal No. 477 of 2011-DB

(Arising out of OIA No. 38-39/COMMR-A-/JMN/2011 dated 28.06.2011 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

C.C. Jamnagar (prev) ...Appellant

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

-Versus-

Shree Electrometals Ltd. ...Respondent

3/4, Kartikey Complex, 2nd Floor,
Kala Nala,
Bhavnagar,
Gujarat
364001

Present For the Appellant : Shri Rakesh Bhaskar, Authorised Representative

Present For the Respondent : Shri Manish Jain, Advocate

CORAM:

HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. A/12238-12239/2019

Date of Hearing: 19/11/2019
Date of Decision: 26/11 /2019

RAMESH NAIR

The facts of the case are that the respondent had purchased two consignments of "Coking Coal" (Ash content below 12%) from the original importer on High Sea basis and sought clearance of the said imported goods against two Bills of entry under Customs Tariff heading 271011910 (for coking coal having less than 12% Ash content) claiming benefit of Nil rate of Basic Customs Duty under Notification No. 21/2002-Cus dated 01.03.2002. Notification No. 21/2002 (Sr. No. 68) dated 01.03.2002 as amended vide Notification No.44/2004-Cus dated 28.02.2004-Cus dated 28.02.2004, prescribed Nil rate of duty for "Coking Coal" of ash content below 12% of CTH 2701. The said bills of entry were provisionally assessed on execution of bond for want of original documents, test results and finalization of the issue of Coal Cess. The respondent paid Coal Cess at the rate of 20% of Rs. 10/- PMT along with Education Cess and Secondary & Higher Education Cess on the provisionally assessed value. Samples of the imported goods were sent to Chief Chemical Examiner, Customs Laboratory, Kandla to ascertain the parameters like total moisture ARB, Ash, ADB, Sulphur ADB, Volatile material ADB and Gross Calorific Value. Testing of the samples revealed the results as per col. Nos. 4,5 & 6 of the table hereinabove. Relying on the test results that the samples tested were '*other than coking coal',* the bills of entry were finally assessed vide Final Assessment Orders denying the benefit of the Notification No. 21/2002 (Sr. No. 68) and charging 5% Basic Customs duty as per Sr. No. 70 of the said notification which resulted into the impugned demand of duty and interest under section 18(3) of the Customs Act, 1962. Being aggrieved with the Final Assessment orders, the respondent had preferred appeals before the Commissioner of Customs (Appeals), Jamnagar, who vide OIA No. 35 & 36/Commr (A) JMN 2009 dated 27.07.2009 set aside the final assessment orders and allowed the appeals by way of remand to the original adjudication authority with direction that assessment be finalized after restesting of the sample and following the principle of natural justice. During de novo proceeding in compliance of the said OIA, the adjudication authority has again confirmed the demand with insignificant alteration in his order by observing that the sample for impugned goods are neither available with the department nor submitted by the respondent and by relying upon technical opinion given by the Chemical Examiner. Being aggrieved by these impugned orders, respondent again filed appeal before the Commissioner (Appeals) who set aside both the orders-in-original and allow the appeals filed by the Respondent. Being aggrieved by the orders-in-appeal no. 38-39/-COMMR(A)/JMN/2011 dated 28/06/2011, Revenue filed the present the appeals.

2. Shri Rakesh Bhashkar, Learned Superintendent (Authorised Representative) appearing on behalf of the Revenue reiterates the grounds of the appeals. He further submits that the learned Commissioner (Appeals) has not considered the fact that in the present consignment in dispute, the test report and technical opinion given by the Chemical examiner goes against the Respondent and, therefore, they are not eligible for exemption under Sr. no. 68 of Notification no.

21/2002-Cus dated 01/03/2002. He submits that the entry of the exemption notification exempts "coking coal of ash content below 12%". He submits that irrespective of Ash content the good should be coking coal and it does not clarify as coking coal, it will come out of the purview of the said Sr. no. 68 of Notification no. 21/2002-Cus dated 01/03/2002. The learned Commissioner (Appeal) has erred in setting aside test report and technical opinion of the Chemical Examiner, Custom Laboratory, Kandla by simply relying on the load port report given by the private agencies. It has been held that the Chemical Examiner reports as well as subsequent opinion are silent about the finding of the crucial parameters namely Mean Reflectance and Swelling Index or Crucible Swelling Number (CSN). He submits that the Chemical Examiner report is very clear that the goods tested by the Chemical examiner is 'other than coking coal' and on the basis of subsequent opinion, there is no reason for Learned Commissioner (Appeals) to disregard the same by relying on the Load Port test reports. He further submits that as per the Chemical Examiner, the CSN was found to be less than 3, hence, it is not a 'coking coal' and goods fall out of Sr. no. 68 of Notification of 21/2002-Cus dated 01/03/2002, hence become ineligible for nil rate of Custom duty. On the basis of his above submission, he prayed for allowing the Revenue's appeal.

3. On the other hand, Shri Manish Jain, Learned Counsel appearing on behalf of the Respondent submits that in the first round of remand order by the Commissioner's (Appeals) categorical finding was given for retesting of the goods and the first test report was completely set aside. Since no retest was done, the Adjudicating Authority was not correct in relying on the earlier test report. He further submits that subsequent opinion given by the Chemical Examiner with reference to the earlier test report indicates that the test results of sample under reference shows that the CSN is less than 3. Hence, these are 'other than coal'. He submits that it is nowhere mentioned in the test report that the CSN is less than 3 and without carrying fresh retest, the statement that the CSN is less than 3 is absolutely without any basis. Therefore, the Commissioner (Appeal) has rightly rejected the test report as well as the subsequent report of the Chemical Examiner. He submits that in the identical case, the exemption was granted in the various following judgments:

1. JSW Steel Ltd. vs CCE 2015 (12) TMI 1389-CESTAT
2. Uttam Galva Metallics Ltd. vs CCE 2019 (4) TMI 1703-Cestat
3. CC vs JSW Steels ltd 2013(1) TMI 301- CESTAT
4. Adani Exports Ltd. Vs CC 2010 (249) ELT 93 (T)
5. Terapanth Food Ltd. vs CCE, 2010 (262) ELT 428 (T)
6. Taurion & Steel Co. Pvt. Ltd. vs CCE, 2009 (241) ELT 390 (T)

4. We have carefully considered the submission made by both the sides and perused the records. We find that this appeal is against the impugned order which was passed in the second round of appeal before the Commissioner (Appeals). The Commissioner (Appeals) in the first round of appeal, remanded the matter to the Adjudicating Authority by giving the following finding:

"5.6 Appellant's contention that the imported goods are 'coking coal' is based on the Invoices, bills of Lading, the certificate of origin and the Analysis certificate done as per ISO methods by Independent Australian Laboratory Certificates wherein the description of the goods tested conforms to the standards of "Australian Coking Coal" with total moisture content is 9.8% (ARB), ash 9.2% (DB), Volatile matter 25.4% (DB), Sulphur 0.54%(DB) and CSN 7. The Chemical Examiner, Customs Laboratory, Kandla instead of carrying out tests on the given five parameters of the test memo, had conducted tests on only two of them which were not conclusive to hld that the imported Coal was 'other than coking coal' chargeable to duty. Having regard to the facts of the present case and the kind of variations in tests results of samples, the appellant's request for re-testing of the samples sounds genuine and well reasoned particularly in the light of their contention that another consignment from the same lot from the same vessel 'MV Pilion' imported vide B/E No. 181166 dt. 27.02.2007 by M/s Austral Coke & Projects Ltd. and discharged at Kandfla was cleared by CH Kandla as "Australian Coking Coal' without raising any objection as to its eligibility for exemption which cannot he ignored in this case. However, I reject the contention of the appellant that the samples were not drawn in their presence as the adjudicating authority has clearly brought out in the impugned orders that the samples were drawn in the presence of authorized representative of the appellant whose stamp and signature was available on the examination report. However, as the Assessments were finalized on the basis of the test report which itself was incomplete and by denying the request of the appellant for retesting of the samples, I set aside the impugned Final Assessment Orders and remit the matters to the original authority with the direction that samples of the subject goods shall, in the interest of justice, be retested in the Central Laboratory (CRCL) or any such reliable laboratory equipped with the necessary instruments and resources to ensure that the standard testing procedure is really followed for which the cost shall be borne by the appellant. Taking into consideration the results of re-test, the lower authority shall finalize the assessments in a transparent manner by passing fresh order by following the principles of natural justice and opportunity of representation and personal hearing to the appellant. The appellant shall be at liberty to take up all the contentions raised by them in their present grounds of appeal and any other grounds before the adjudicating authority when the matter comes up for decision in terms of this remand order.

5.7 Consequently, both the impugned final assessment orders are set aside and the fe1s filed by the appellant are allowed by way of remand to the original adjudicating authority in the above terms."

From the reading of the above finding of the earlier remand order of the Commissioner (Appeal). It is very clear that the Learned Commissioner (Appeals) has clearly held that the parameters in the test report are not conclusive and directed the Adjudicating Authority to get the retest done. In this position, the earlier report become nonest and the same cannot be used again for re-adjudication of the case. The only option left with the Adjudicating Authority was to get the retest done and since it was not possible, the earlier test report could not have been relied upon for passing the de novo adjudication order. Needless to say that the first appellate order dated 27/07/2009 whereby the matter was remanded to the Adjudicating Authority was accepted by the Revenue and no appeal was filed against that. As regard the case by the Adjudicating Authority, it was observed that the Chemical Examiner in the opinion dated 13/10/2010 stated that "test results of sample in reference shows the CSN less than 3. Hence, the goods are other than coking coal". On perusal of the test report, we find that only two parameters i.e. total moisture content = 2.5% and Ash content on ADB= 8.9% was given whereas no parameters of CSN was mentioned in the test results. Therefore, in the opinion, the statements made by the Chemical Examiner that the test result show the CSN less than 3 is absolutely incorrect. The Learned Commissioner (Appeal) also observed this serious discrepancy in the opinion of the Chemical Examiner. As per the exemption entry, we find that the only content is in respect of coking coal is the Ash Content should be less than 12. As per the test report itself, there is no dispute that ash content is 8.9% which is less than 12%. Therefore, the goods i.e. imported coking coal purchased by the respondent on high sea basis is clearly covered under the entry no. 68 of the Notification No. 21/2002-Cus dated 01/03/2002. In view of above, we find that the entire adjudication order is not sustainable only on the grounds that the same was passed only by relying the earlier test report and the opinion of the Chemical Examiner. As we opined that the test report after the first appellate order became nonest and the same could not have been relied upon. We also point out that the Chemical Examiner's report showing the CSN less than 3 is absolutely without any basis. Therefore, adjudication order passed on wrong footing was correctly set aside by the Learned Commissioner (Appeal). As per our above observation, there is absolutely no infirmity in the impugned order. Accordingly, the same is upheld. Both the appeals filed by the Revenue are dismissed.

(Pronounced in the open court on 26.11.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Diksha