

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

REGIONAL BENCH – COURT NO. 01

Customs Appeal No. 11199 of 2014

[Arising Out Of OIA-13-2014-CUS-COMMA-A—JMR Dated- 17/01/2014 Passed By
Commissioner of CUSTOMS-JAMNAGAR(PREV)]

Messrs Rawmin Mining And Industrial Pvt Ltd

.....Appellant

94-A, Mittal Court,
224, Nariman Point,
Mumbai, Maharashtra

VERSUS

C.C.-Jamnagar(prev)

.....Respondent

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

APPEARANCE:

Shri. Sudhanshu Bissa, Advocate for the Appellant

Shri. Himanshu P Shrimali, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO. 10923 /2024

DATE OF HEARING:19.04.2024

DATE OF DECISION:24.04.2024

SOMESH AROA

Messrs Rawmin Mining and Industries Private Limited (hereinafter referred to as "the appellant") is a company and a 100% EOU, and engaged into export of Bauxite. During the period of Feb, 2013, the appellant vide sale-purchase contract dated 21.01.2013 entered into an arrangement with M / s Minermet S.A., for sale and supply of Metallurgical Grade Gibbsite Bauxite of Indian Origin. In terms of the said agreement, the value of the

consignment of the said goods was to be calculated on the basis of its weight in Dry Metric Tonne basis which was to be ascertained at the discharge port after verification of the moisture content of the consignment shipped by the appellant. A copy of this contract dated 21.01.2013 entered into between the appellant and the foreign purchaser is part of the record. In pursuance of the said contract, the appellant exported 55,000 Wet Mt of "Metallurgical Grade Gibbsite of Indian Origin" from Porbandar Port under the provisional invoice dated 27.02.2013 and Shipping Bill No. 000126 dated 27.02.2013 and customs duty to the tune of Rs. 93,12,977/- also came to be paid by the appellant on the FOB value indicated in the said documents. The FOB value of the said consignment was calculated on the basis of weight of the consignment in Wet metric tonne instead of its weight in Dry Metric Tonne basis, as agreed to under, the terms of the subject agreement and which weight became available later. Moreover, instead of export of 55,000 Wet Metric Tonne of bauxite, the appellant actually shipped only a quantity of 54,600 Wet metric tonne and therefore, there was a short shipment of 400 mt of bauxite in the said consignment. This short shipment was duly certified vide the Short Shipment Notice No. 54 dated 08.03.2013 issued by the Superintendent of Customs, Porbandar. Thus, on account of aforesaid errors, excess customs duty came to be discharged by the appellant in the export of aforesaid consignment.

2. Now, in view of the short shipment of 400 mt of bauxite, the appellant initially vide letter dated 01.04.2013 filed a refund claim of Rs. 67.731/- towards the excess amount of duty paid by them on short shipped quantity.

However, the said refund claim came to be returned back to the appellant with a query memo dated 12.04.2013 pointing out various discrepancies in the refund claim. Subsequent to the filing of the aforesaid refund claim, an amended invoice dated 19.04.2013 was issued by the appellant, in view of the final determination of the correct weight of the subject consignment in Dry Metric Tonne basis at the port of discharge by SGS China vide certificate dated 15.04.2013. The FOB value of 16.77,500 USD as calculated by the appellant in their provisional invoice was re- calculated in terms of the contract, and was reduced to 14,37,235.06 USD. Therefore, in view of this re-determination of FOB value, the appellant re-submitted the refund claim vide letter dated 04.06.2013, thereby claiming the refund of Rs. 13,33,879/- on account of short shipment as well as on account of erroneous calculation of FOB value of the subject consignment. Copy of the re-submitted refund application along with the certificate issued by SGS China dated 15.04.2013 are part of the record. However, the Assistant Commissioner vide order dated 22.08.2013 sanctioned the refund of an amount only to the extent of Rs. 67,731/-. Though the adjudicating authority has acknowledged that the refund claim was re-submitted on 04.06.2013, but he failed to take note of the correct calculation of the excess amount of duty paid by the appellant.

3. Against the said order of the Assistant Commissioner, the appellants filed an appeal before the Commissioner (Appeals) thereby raising a grievance of non-consideration of part of their refund claim. However, the claim made by the appellant, the Commissioner (Appeals) rejected the

appeal filed by the appellant. The Commissioner (Appeals) has held that the short shipment was to the extent of 400 MT and therefore, the refund claim of only Rs. 67,731/- was admissible to the appellant. Now, being aggrieved and feeling dis-satisfied by the rejection of remaining refund by the the Commissioner (Appeals), the appellant prefer the present appeals on following amongst other grounds.

4. The impugned order passed by the Appellate authority suffers from gross violation of principles of natural justice in as much the basis on which the refund of Rs. 12 ,66,148/- has been held to be unsustainable has never been put to the appellant and therefore, the appellant was never in a position to explain or justify the eligibility of refund claim of Rs. 12 ,66,148/-.It is a undisputed fact on record of the case that the adjudicating authority had clearly overlooked the refund claim to the extent of Rs. 12 ,66.148/- The appeal was filed by the appellant before the appellate authority raising grievance of non-consideration of part of refund claim filed by the appellant and therefore, the sole issue before the appellate authority was whether the refund claim of Rs. 12,66,148/- was considered by the adjudicating authority or not. Moreover, it is also a matter of fact on record that no show cause notice has ever been issued to the appellant raising dispute regarding the eligibility of the refund claim filed by the appellant. In this scenario, the Commissioner (Appeals) had no jurisdiction to unilaterally reject the refund claim of Rs. 12,66,148/- without putting the appellant to notice of the grounds and objections relied upon by the appellate authority

while rejecting the refund claim in the final order. If the appellate authority was inclined to decide the eligibility of refund claim by himself, then the doubts or objections against the eligibility of the refund claim should have been communicated to the appellant, so as to enable them to justify and explain the calculation of refund entitled to the appellant. Such objections were never communicated to the appellant either during the pendency of appeal or during the course of personal hearing in this appeal. On the contrary, without adhering to such settled principles of adjudication, the appellate authority has unilaterally taken up the issue of eligibility of the appellant's refund claim and rejected the same on completely erroneous and incorrect basis. Though the Commissioner (Appeals) has prima-facie referred to various documents while justifying his conclusion, however, the critical details mentioned in the said documents have been overlooked while concluding the case against the appellant. If an opportunity would have been granted to the appellant in the present case, the appellant would have been in a position to clarify and to bring to the appellate authorities' notice such important details explaining calculation of the refund claim eligible to the appellant. However, not only has the appellate authority contravened the settled principles of legal jurisprudence by not affording an effective opportunity to the appellant to justify the admissibility of the refund claim, but there has been a gross violation inasmuch as the refund claim has been rejected without any application of mind to the documentary evidence on record of the case. The impugned order having been passed in such utter

disregard to the principles of natural justice is therefore, required to be quashed and set aside at once in the interest of justice.

4.1 The appellate authority in the impugned order has held that because short shipment of only 400 Mt of bauxite had been claimed by the appellant, the attributable amount of duty of Rs. 67,731/- was only required to be refunded to the appellant. The appellate authority has also noted that though the new invoice raised by the appellant was for a quantity of 48,372.209 MT but as no short shipment notice to the said extent had been submitted, the said claim was unsubstantiated. In this regard, the appellate authority has made reference to the initial invoice issued by the appellant. The shipping bill dated 27.02.2013 for the concerned transaction and concluded that as the initial supply was supposed to be 55000 MT and in view of the short shipment notice of 400 MT, the appellant was required to discharge duty for the-54600 MT supplied by them. However, there is a glaring error in the said logic of the appellate authority because the excess payment of duty was not only attributable to the short shipment of 400 Mt but was also attributable due to the weight difference on the basis of moisture content of the consignment. In terms of the agreement between the appellant and their foreign purchaser, the value of consignment supplied to the foreign purchaser was required to be calculated in terms of its Dry Metric Ton weight and accordingly, even the customs duty was required to be discharged by the appellant on such value. However, at the time of export of the subject consignment, the appellant mistakenly recorded the

Wet Metric Tonne weight of 55,000 Mt of Bauxite in their provisional invoice. This error was also incorporated in the shipping bill and accordingly, the appellant erroneously discharged customs duty of Rs. 93,12,977/- on the FOB value of Rs. 9,04,17,250/- (i.e. 16,77,500 USD) which was calculated on the total weight of 55,000 Wet MT instead of its weight in Dry Metric Tonne. It was only at the port of discharge and on the basis of certificate issued by SGS China dated 15.04.2013, that the correct weight of the subject consignment in Dry metric Tonne basis was ascertained and the amount payable was determined for the said quantity of bauxite. Thus, in the present case, undisputedly the quantum of duty paid by the appellant had been Rs. 93,12,977/-; whereas the correct duty payable on the subject transaction was only Rs. 79,79,097/- and therefore, the appellants were legally eligible to refund of entire amount of Rs. 13,33,879/- and not just the refund of Rs. 67,731/- attributable to short shipment of 400 Mt as held by the Commissioner (Appeals). The Appellate Tribunal in the case of BORAX MORARJI LTD. vs. Collector of Customs reported in 1991 (55) ELT 113, while dealing with an identical case has held that the assessee therein was eligible to refund of excess customs duty paid on account of difference attributable to the net weight of the subject consignment. Hence, in view of the aforesaid facts and circumstance, even the refund claim of Rs. 12,66,148/- should have been allowed to the appellant and the impugned order passed by the Commissioner (Appeals) rejecting the aforesaid claim without any proper justification is required to be quashed and set aside in the interest of justice.

4.2 The appellant also submits that the present refund claim has been filed by the appellant in the month of June, 2013 and therefore, the Revenue is under a legal obligation to pay interest for the delay in paying the refund as held by the Hon'ble Supreme Court in case of Ranbaxy Laboratories Ltd. 2011 (273) ELT.3 (SC), the Hon'ble Gujarat High Court in case of Afrique Tradelinks Pvt. Ltd. - 2004 (61) RLT 726 (Guj.) and the Hon'ble Rajasthan High Court in case of J.K. Cement Works 2004 (170) ELT 4 (Raj.); and the judgement of the Hon'ble Rajasthan High Court has also been upheld by the Hon'ble Supreme Court as reported in 2005 (179) ELT A150 (SC) whereas the Larger Bench of this Hon'ble Tribunal has also held in case of Jayant Glass Ltd. 2004 (165) ELT 516 that interest was payable for the period commencing after three months of the date of making application if the claim was ultimately paid by the Department irrespective of the reasons for which the claim for refund was not paid within three months from the date of receipt of application. Therefore, appropriate order for paying interest on refund of Rs. 12,66,148/- is also required to be passed in this appeal. The reasons and basis on which the refund claim of Rs. 12,66,148/- has been rejected was never put to the appellant for their expiation.

5. During the course of hearing while pleading for the above grounds of appeal, the advocate for the appellant made following further submissions, both on merits as well as alternatively on the point of need to follow principles of natural justice and reasoned order in the matter. The advocate for the appellant relies on the following judgments, *inter alia* to emphasise

that transaction value in case export of goods has been accepted to be for the weight as found at the port of disembarkation and therefore transaction value has to be construed accordingly and refund allowed to them. M/s. ORE CAST (INDIA) V/s. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & S. TAX, BBSR-I AND COMMISSIONER OF CUSTOMS (PREVENTIVE, BHUBANESWAR V/s. M/s. ORE CAST (INDIA) as reported in 2023 (10) 757 – CESTAT KOLKATA. He also pleaded that at this stage of litigation and in any case department cannot be allowed to raise requirement of challenging Bills of Entry as is now the requirement after ITC case, in case matter is remanded, department should not be allowed to take a ground that assessment order while making refund was not challenged. Also as part of the refund has already been sanctioned by the department without raising such objection and that decision in the case of ITC of the Hon'ble Supreme Court as reported in 2019 (368) ELT 216 (S.C) became available later. Further he specifically relied upon the decision of the Division Bench in the matter of M/S PRESIDENCY EXPORTS & INDUSTRIES LIMITED V/S. COMMISSIONER OF CUSOTMS (PORT), KOLKATA as reported in 2023 (12) TMI 83 – CESTAT KOLKATA. The party also placed reliance on the following case laws:

- CCE & ST, Visakhapatnam V/s. Mideast Integrated Steels Ltd.- 2019(366) ELT 925 (Tri.-Hyd.)
- CC, Vijaywada V/s. Bharat Mines & Minerals-2019(370) ELT 986 (Tri.-Hyd.)
- CC, Kolkata V/s. M/s. Sesa Goa Ltd.-2014(8) TMI 213-CESTAT Kolkata
- CC, Kolkata V/s. CNG Exports-2017(6) TMI 611-CESTAT Kolkata

- Dimension Data India Pvt.Ltd. V/s. CC-2021(376) ELT 192 (Bom.)
- Commr. V / s Dimension Data India Pvt.Ltd.-2022(379) ELT A39(S.C.)
- Borax Morarji Ltd. V/s. Collector of Customs-1991(55) ELT 113 (Tribunal)
- Jagdish Timber Mart V/s. CCE, Visakhapatnam-2019(370) ELT 1174(Tri.-Hyd.)
- Aman Medical Products Ltd. V/s. CC, Delhi-2010(250) ELT 30 (Del.)

6. Learned AR on the other hand, emphasises that it is the 'goods as imported or as exported' which are subject matter of levy of export and import. He placed reliance on the decision of Larger Bench of this Tribunal in the matter of BORAX MORARJI LTD. V/S COLLECTOR OF CUSTOMS as reported in 1991 (55) ELT 113 (Tribunal).

6.1 Learned AR also places reliance on the decision of COMMISSIONER OF CUSTOMS, VIJAYAWADA V/S. KIMMI STEELS PVT. LTD., reported in 2019 (368) ELT 92 (Tri.- Hyd.) . And on the matter of JOSHI STEEL INDUSTRIES VS. COLLECTOR reported in 2005 (179) ELT A39 (S.C) and COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX., GUNTUR V/S. ASHAPURA MINECHEM LTD. reported in 2019 (370) ELT 847 (Tri.- Hyd)

6.2 Learned AR endorsed through reiteration the findings on the above given by the lower authorities to justify the impugned order.

7. Considered the adversarial submissions. The Court in this case finds that goods i.e "Metallurgical Grade Gibbstic Bauxite of Indian Origin" were exported from port in India and the goods were described on the basis of invoice dated 27.02.2013 from Porbandar port. And Customs Duty was discharged on the basis of FOB value indicated in the export documents. The

duty discharged was not as per Dry Metric Tonnage basis. it was as per the contract that the quantum of weighment between the Indian Exporter and Foreign Importer at port of discharge quantity (on the Dry Weight basis) after giving weightage for moisture content (that was found to be 11.45%) by M/s. SGS technical consultant engaged by both parties under the contract that was to be the basis. Therefore instead of initial shipped quantity from the port of embarkation i.e. Porbandar of 54,600 of “Metallurgical Grade Gibbstic Bauxite of Indian Origin”, quantity of 48372.209 MT was found alone after reduction of stated moisture content by Agency of SGS. It is to be noted that description given in various documents in the port of export was “Metallurgical Grade Gibbstic Bauxite of Indian Origin”. Learned Commissioner (Appeals) also noticed that the goods exported, there was no Mate’s receipt of short shipment receipt at the port of discharge, to justify the reduced quantity of 48372.209 MT as claimed by the appellant. The appellants claim to the quantity based on the contract entered into by them with their importer party which allowed them to arrive at the revised price based on Dry Weight. The relevant condition of contract entered relating quantity is culled out as follows:-

- "1. Quantity
- The Buyer hereby agrees to buy from the Seller and the Seller agrees to sell to the Buyer, 1 shipload of 70,000.00 Metric Tons 10% , shipping tolerance, of Bauxite, on FOBST basis during February 2013. The +/- 10% shipping tolerance to be at Buyer's option.
2. Guaranteed Specifications
- Bauxite, ex Porbandar, Gujarat, India, with the following guaranteed specifications:

Parameter	Typical- Gujarat
A1203	42% min with rejection below 41%

SiO2	11% max
Fe2O3	18% max
TiO2	3.5% max
CaO	3% max
Monohydrate	3% max
Moisture	8% max with rejection above 10%
Size 0-100 mm	95% min
Size 100-150 mm	5% max

3. Price

The Price for Bauxite is US \$ 30.50 per DMT on FOBST Porbandar Port, and applicable for adjustment, if any, on quality bonus and penalties as defined hereunder:

Bonus and/or Penalties:

Al₂O₃

- a) If Al₂O₃> 42%, the bonus is US \$ 0.50/mt for every 1% higher, pro rata.
- b) If Al₂O₃< 42%, the penalty is US \$ 0.50/mt for every 1% lower, pro rata.
- c) Buyer reserves the right to reject the shipment if Al₂O₃ content certified by SGS India Pvt. Ltd., India at load port is below 41 %.

SiO₂

- a) No bonus and penalties for Bauxite supplied with SiO₂ contents between 7 -10 %.
- b) If SiO₂<7% the bonus is US \$ 0.50/mt for every 1% lower, pro rata.
- c) If SiO₂>10% the penalty is US \$ 0.50/mt for every 1% higher, pro rata.
- d) Buyer reserves the right to reject the shipment if the Silica contents certified by SGS India Pvt. Ltd., India, at load port are over 11 %.

CaO

- a) If CaO<3% the bonus is US \$ 0.20/mt for every 1% lower, pro rata.
- b) If CaO>3% the penalty is US \$ 0.20/mt for every 1% higher, pro rata.

Moisture : If Moisture >8 % the penalty is US \$ 0.20/mt for every 1% higher, pro rata, upto 10 % max. Buyer reserves the right to reject the shipment if the Moisture contents certified by SGS India Pvt. Ltd., India, at load port are over 10 %.

Analysis for moisture and particle size carried out by SGS India Pvt. Ltd., India, at the load-port, shall be final and binding on both parties.

Analysis for moisture and particle size carried out by SGS India Pvt. Ltd., India, at the load-port, shall be final and binding on both parties.”

On the basis of 11.45 %, moisture content found by SGS, appellants became entitled to lesser amount due to lesser quantity as per the contract, and as per the invocation of penal clause, which also allowed discretion to reject or not reject. The refund in impugned proceeding of stated, excess duty paid by them is consequent to such re-negotiated priced as per contract. This

Court finds that there was akinness of situation in 2023 (10) TMI 757 in the matter of M/S. ORE CAST (INDIA) V/S. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & S.TAX, BBSR-I AND COMMISSIONER OF CUSTOMS (PREVENTIVE), BHUBANESHWAR VERSUS M/S. ORE CASE (INDIA) in which case due to ferrous content being less than 60% (i.e. 59.11% in that case) as per the agreement, the consignment had become liable to be rejected or the price reworked, after re-negotiation. In the instant case also the terms as culled out above indicate that the buyer has right to reject the shipment if moisture content certified by SGS India Pvt. Ltd., is found to be over 10% from of what is declared at the load port i.e. Porbandar in this case. In the case, of Ore cast (India) (cited supra), it was held that once the price is reworked on the basis of Ferrous content, export duty to be paid also becomes re-workable. And appellant exporter becomes eligible for the refund, consequent to such testing and reworking of price at the port of discharge. This Court finds that in the present case in the transaction of exports of goods at the time of export same were described "Metallurgical Grade Gibbstic Bauxite of Indian Origin" and the price was indicated in the shipping bills and assessment of duty was done as per shipping bill dated 27 February 2013. The definition of export goods and export has been given in Section 18 and Section 19 of the Customs Act, 1962 reads as follows:-

(18)"export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(19)"export goods" means any goods which are to be taken out of India to a place outside India;"

7.1 The transaction value in relation to export goods as available in

Section 14 of the Customs Act, 1962 as follows:

14. Valuation of goods.

"(1)For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

PROVIDED that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

PROVIDED FURTHER that the rules made in this behalf may provide for,-

(i)the circumstances in which the buyer and the seller shall be deemed to be related;

(ii)the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii)the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

PROVIDED ALSO that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50."

(Emphasis Supplied)

From the above statutory provisions, it has becomes clear that what is exported are goods as presented for export at Indian port with the value having been indicated as the transaction value being the value for export from India for delivery at the time in place of exportation (being India) in the case of export goods and such value commonly taken as FOB value.

Under the circumstances, the goods exported were as per above description of "Metallurgical Grade Gibbstic Bauxite" and goods were assessed in the country of exportation as per the price initially agreed. The goods remained in the sea and were during the shipment exposed to moisture. The moisture over and above permissible was found at the port of discharge and price was renegotiated and the fresh price was arrived at to avoid termination of contract due to slightly higher moisture content. Situation to that extent was similar to the contract of M/S. ORE CASE (INDIA) V/S. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & S.TAX, BBSR-I AND COMMISSIONER OF CUSTOMS (PREVENTIVE), BHUBANESHWAR reported in 2023 (10) 757 – CESTAT KOLKATA. Excepting that instead of humidity element it was ferrous content in that case. It is to be noted in that case, it is on record that assessment at the time of exportation was on provisional basis and subjected to the final outcome of ferrous contents. The ferrous contents in any case cannot be different, in normal course at either of the ports of export and import. However, in this case, it is not coming on records, as to whether the assessment was provisional, or whether the department was made aware of likely variance in prices due to higher moisture content which is likely to happen even in course of shipment being in the sea. Further whether any moisture content was declared in India at the time of export is not forthcoming. Again it has to be decided as to what was the export goods at the time of exportation and what was the price at the time of exportation as per the statutory provisions, indicated above. Matter is therefore, remanded back to the original adjudicating authority to check up on all these

facts specially if the assessment was provisional or department was aware of the contract which provided for variance in price at the later stage. Further, since the department has not raised the issue initially that appeal was required to be filed by the party as per the decision of ITC case (cited supra). Department is precluded from raising the same in the instant remand proceeding. Party is free to raise its other legal objection if any.

8. Appeal disposed of by way or remand.

(Pronounced in the open Court on 24.04.2024)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi