Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 3

Customs Appeal No. 10999 of 2019-DB

(Arising out of OIA-JAM-CUSTM-PRV-COM-009-18-19Dated-06/03/2019passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-JAMNAGAR(PREV))

Shre Electromelts Limited ....**Appellant**
Coke Unit 3/4 Kartikey Complex Kalanala
Bhavnagar, Gujarat

VERSUS

C.C.-JAMNAGAR(PREV) ....**Respondent**
Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

APPEARANCE:
Shri. Mainish Jain, Advocate for the Appellant
Shri G. Kirupanandan, Authorised Representative for the Respondent

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

Final Order No. A/ 11383 /2022

DATE OF HEARING:19.07.2022
DATE OF DECISION:15.11.2022

RAMESH NAIR

The present appeal has been filed by appellant against OIO No. JAM-CUSTM-PRV-COM-009-18-19 dated 06-03-2019 passed by Commissioner of Customs, Jamnagar in a remand proceeding. Under this OIO adjudicating authority has denied the benefit of Exemption Notification No. 21/2002-Cus dated 01.03.2022 available on import of Coking Coal and confirmed a demands against the appellant.

2. The brief facts of the case are that appellant was issued Show Cause Notice proposing to deny benefit of Notification No. 21/2002-Cus. In adjudication Ld. Commissioner of Customs vide OIO dated 04.02.2011 denied the benefit of the exemption and confirmed the customs duty demand alongwith redemption fine and penalty after relying the test report issued by the chemical examiner, customs house lab. Being aggrieved with the OIO appellant preferred an appeal before the Tribunal. In appeals, CESTAT vide Final order No. A/10298-10299/ 2018 dated 06.02.2018 remanded the matter to the adjudicating authority for re-test of the sample. Under this de novo adjudication order dated 06.03.2019 without retesting

the samples Ld. Commissioner confirmed the demand. Hence, the present appeal.

3. Shri. Manish Jain, Learned Counsel appearing on behalf of the appellant argued that the adjudicating authority have not followed the remand direction passed by the Hon'ble CESTAT for re-testing the samples. On this ground alone the impugned order is liable to be set aside. He placed reliance on the following decisions.

- Commissioner of C. Ex. & Customs, Nasik Vs. Dj. Malpani – 2010 (258) ELT 185 (Bom)
- Bandana Overseas Vs. Commissioner of Customs (Port), Kolkata – 2013 (295) ELT 76 (Tri. Kolkata)
- Am Tech Industries Vs. Union of India – 2017 (347) ELT 257 (Guj)
- Commissioner of Central Excise, Vapi Vs. Sterlite Industries (I) Ltd. – 2013 (295) ELT 57 (Tri. Ahmd.)

3.1 He submits that Ld. Commissioner vide impugned order without conducting the re-testing of remnant sample relied on the letter dated 13.12.2010 and concluded that the request for retesting has already been considered. In any case, letter dated 13.12.2010 cannot be treated as retest as first test report dated 08.10.2010 did not tested CSN despite the test memo dated 04.10.2010 which clearly required chemical examiner to test CSN. Thus, opinion /letter dated 13.12.2010 as re-test liable to be set aside.

3.2 He also submits that the present issue is squarely covered in favour of appellants by the CESTAT Final Order No. A/12238-12239/2019 dated 26.11.2019

3.3 He submits that load port certificate and discharge port certificate clearly states that imported goods are coking coal. These certificates are issued by very reputed organizations and there is no reason for revenue for not accepting the same. Further, transactions between parties and the documents fully confirm that the goods being dealt with is coking coal/ coking coal of Australian Origin. He placed reliance on the following decisions;

- JSW Steel Ltd., Vs. CCE 2015(12) TMI -1389 –CESTAT
- Uttam Galva Metallics Ltd. Vs. CCE- 2019(4) TMI 1703- CESTAT
- CC Vs. JSW Steels Ltd. 2013(1) TMI 301 –CESTAT
- Adani Exports Ltd. Vs. CC 2010 (249) ELT 93 (T)
- Terapanth Foods Ltd. Vs. CCE, 2010 (262) ELT 428 (T)

- Taurion & Steel Co. Pvt. Ltd. Vs. CCE, 2009 (241) ELT 390(T)

3.4 He further submits that Sr. No. 68/68A of Notification No. 21/2002-Cus dated 01.03.2002 (as amended) refers to grant exemption to Coking Coal having ash content below 12% and of ash content of 12% or more. CSN is not provided as criteria in the exemption Notification. Thus extraneous parameters cannot be used by revenue to deny the exemption.

3.5 Without prejudice the above, he also submits that coal having 1CSN can be considered as coking coal. He placed reliance on the decision in the case of JSW Steel Ltd. Vs. CCE 2015(12)TMI -1389-CESTAT.

3.6 He also submits that exporter loaded 45,584 MT. of Coking Coal on vessel named M.V. Bottiglieri Ambition, the said vessel reached on Pipavav on 03.10.2010 and unloaded 19,800MT of Coking Coal at Pipavav and thereafter sailed to Kandla where balance qty. of coking coal was unloaded. At Kndala port one importer i.e United Coke vide BE No. 2264287 dated 20.10.2010 granted benefit of exemption under Notification No. 21/2021 after treating the imported goods as coking coal after finalisation of provisional assessment. Thus benefit of exemption was granted to same goods supplied by same supplier and imported under same vessel.

4. On the other hand Shri G. Kirupanandan, learned Superintendent (Authorized Representative) relies on the impugned order.

5. On careful consideration of the submission made by both sides and perusal of records, we find that Tribunal vide final order dated 06.02.22018 on going through the chemical test report at load port and the chemical test report of the department found that the parameters do not match and once there are contradictions on the test reports, hence remanded the matter to adjudicating authority for re-test of sample. On directions of the CESTAT, Ld. Adjudicating authority also requested the Deputy Commissioner of Customs, Pipavav to get the remnant sample re-tested. However Deputy Commissioner vide letter dated 08.01.2019 informed that said sample is not available with their office. In absence of availability of remnant sample, ld. Adjudicating authority decided the present matter on the basis of available evidences and old reports and held that original test report of the Chemical examiner concluded that the sample was other than coking coal, therefore the consignment of 16500 Mts. of imported coal is liable to be re-assessed as 'Coal other than coking coal'.

6. However we observed that in the present case appellant has submitted vital facts before the Adjudicating authority that

> *" vessel MV Bottiglieri Ambition arrived in India with the total quantity of 65,404 MT. coking coal in bulk. Out of this, the importer has imported 16500 MT. The balance cargo was imported by other Indian buyers which was uploaded at Kandla. Since all had imported one and the same goods which had arrived into India on the same vessel, the importer had filed an application under RTI Act, 2005 with Customs House, Kandla with a request to provide statues of Bills of Entry and liability to pay differential duty on the same grounds as covered in the notice. The reply received from custom house, Kandla reveals that assessment on the bills of entry filed by them have been duly finalized.*
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> *As per the information gathered, declarations regarding the description and classification of goods being coking coal have been duly accepted. Since the goods imported formed part of the common bulk consignment of 65,404 MT and requested to follow the final assessment orders passed in Kandla for the same part-consignment and drop the proceedings."*

However the Ld. Adjudicating authority nowhere given any finding on this vital facts, which are very important for deciding the issue that whether the imported coal is coking coal or other than coking coal in the absence of retesting of sample.

7. Therefore, these above aspects need to be reconsidered. We, therefore, set aside the impugned order and remand the matter to the Adjudicating Authority to decide the matter afresh after affording an opportunity of personal hearing to the appellants. Since the matter is remanded for second time, the Adjudicating Authority shall pass an order within a period of three months from the date of this order. All the issues are kept open. Appeal is allowed by way of remand to the Adjudicating Authority.

(Pronounced in the open court on 15.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PRACHI