CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 25218 of 2013

(Arising out of Order-in-Original No.03/2012-Commr. dated 18.10.2012 passed by the Commissioner of Customs, Mangalore.)

M/s. Terapanth Foods Ltd.
'Maitri Bhavan', Plot No.18,
Sector-8,
Gandhidham – 370 201.

Appellant(s)

Versus

The Commissioner of Customs
New Customs House,
Panambur,
Mangalore – 575 010.

Respondent(s)

Appearance:

Shri R. Subramanya, Advocate — For the Appellant

Shri Jathin K.A, AR — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21490 /2023

Date of Hearing: 07.12.2023
Date of Decision: 07.12.2023

Per : R. BHAGYA DEVI

M/s. Terapanth foods Ltd., the appellant exported 22,000 MTS of Iron Ore fines through the Mangalore port. In terms of the Notification No. 62/2007-Cus. dated 3.5.2007, if the Fe content in the iron ore is 62% or less then the duty over and above Rs.50/- PMT shall be exempted. The appellant had paid the export duty at Rs.50/- PMT and also executed a Provisional Duty (PD) bond along with a bank guarantee for Rs.13,75,000/-, the shipping bill was provisionally assessed for want of test results. The samples were tested by the Customs in their laboratory at Cochin and the test report declared that the samples contained Fe content of 62.1% and accordingly, the benefit of the Notification was denied. Aggrieved by this order, the appellant filed an appeal before the Tribunal and the Tribunal vide its Final Order No.1415/2009 dated 16.11.2009 observed that *'the Commissioner should have allowed the request of the exporter to have a retest of the sample drawn by the CRCL, New Delhi. We find that the impugned order has been passed in violation of principles of natural justice'*. An application for Rectification of Mistake (ROM) was filed against this order by the Revenue on the ground that since samples were sent to Central Revenue Control Laboratory (CRCL) New Delhi were returned with a remark that the samples were received in torn condition and hence, a decision was taken by the Commissioner not to send the samples for retesting and accordingly, prayed for modification of the CESTAT order. The Tribunal dismissed the ROM application observing that there is no mistake apparent on the order of the Tribunal and Revenue has not made out a case for Rectification. Aggrieved by this order, the Revenue filed an appeal before the Hon'ble High Court of Karnataka. The Hon'ble High Court vide order dated 14.10.2011 dismissed the appeal filed by the Revenue and directed them to implement the order of the Tribunal. Based on the above order, the appellant requested the Commissioner either to retest the samples or allow them the benefit of the Notification, but the Commissioner vide the impugned order confirmed the differential duty without getting the samples retested and therefore, the appellant is in appeal before us.

2. The learned counsel on behalf of the appellant submitted that as per the certificate issued by M/s. SGS India Private Limited, a reputed international agency for pre-shipment inspection, the Fe content of the consignment was 61.93% and the certificate dated 28.9.2007 issued in the destination port, the Fe content of the consignment was 61.44% and these percentages were within the acceptable norms. Even the samples analysed by the Chemical Examiner at Cochin, the Fe content was 62.1% and this variation could be indicative of some error in sampling and testing. Further, he submitted that by not getting the samples retested and by not obeying the directions of the Honourable High Court of Karnataka, the Commissioner had violated the principles of natural justice.

3. The Authorised Representative on behalf of the Revenue reiterating the findings of the Commissioner relied on the Board's Circular No.4/2012 dated 17.2.2012 to substantiate his argument that the benefit of the Notification cannot be extended.

4. From the records, it is seen that the Notification No.62/2007 dated 3.5.2007 provides the benefit of concessional rate of duty only if the Fe content of iron ore is 62% or less. It is not in dispute that the certificate dated 24.8.2007 issued by M/s. SGS India Private Limited at the time of export showed the Fe content as 61.93% and the destination port showed as 61.44%.

This Tribunal vide its Final Order No.1415/2009 dated 30.11.2009 observed that:

> "2. On a careful consideration of the case records and the submissions made by both sides, we find that the consignment was subjected to assessment of export duty @ 300 PMT as against Rs.55/- PMT for the reason that the iron content ascertained in the consignment was not below 62%. The same was found on test to be 62.1% by the Chemical Examiner, Central Revenue Laboratory, Cochin. In the circumstances, we find that the Commissioner should have allowed the request of the exporter to have a retest of the samples drawn by the CRCL New Delhi.....Accordingly, we vacate the impugned order and remand the matter to the Commissioner to take a fresh decision after a sample of the consignment already drawn is got tested by CRCL New Delhi............"

4.1 A ROM filed against this order was rejected and hence, the above order became final.

4.2 An appeal filed by the Revenue to the High Court was disposed of vide Order No.3/11 dated 14.10.2011 wherein it was observed as follows:

> "5. We have heard the learned counsel for the revenue. From the aforesaid material on record the difference in the iron content is hardly 0.1%. The declaration made by the assessee is given based on the report of the experts received both in India and outside India. The duty payable at Rs.50/- PMT is for an iron content contained with 62%, if it exceeds 62% it is Rs.300/- PMT. Now the difference which sought to be made out is hardly 0.1%. If the provision is made for human error this 0.1% is negligent. That apart when a request is made challenging the report authorities

> accepted the request and sent to Delhi for retesting. Assuming that while sending the sample they sent it well secured and that it was torn during transit, they could very well send one more sample. It is not necessary that they should send back the torn sample when they received from Delhi. Even otherwise the facts of this case we are satisfied that this was not a case where proceedings should have initiated on the basis of difference in iron ore content by 0.1%. That does not disclose that the assessee has disclosed the iron content wrongly with the intention to evade payment of duty.
>
> 6. In these circumstances, if they want to proceed further in the matter as directed by the Tribunal, they should get the sample tested, hear the assessee then only they can proceed further. Firstly, we proceed on the assumption that the department was careful enough to send the sample fully secured. Secondly merely because it was sent back, because it was in torn condition, we are not prepared to accept the contention of the department no other sample is available. Court has to weigh the interest of both revenue and the assessee and in these circumstances the request of the department in our view is not justified. It is to cover their latches they are putting forth the excuses.
>
> In that view of the matter, we do not see any justification to interfere with the order passed by the Tribunal………"

5. The appeal filed by the Revenue was dismissed on the above observations. Therefore, the department had no other option but to implement the order of the Tribunal. In case the samples of the same could not be retested, the benefit of the Notification should have been extended to the appellant as has

been observed by the Hon'ble High Court that the difference was negligible and it could be for various reasons and this difference cannot be attributed to any intention to evade payment of duty especially when the reports by M/s. SGS India Private Limited and the destination port have not been disputed/challenged.

6. In view of the above observations, we do not find any merit in the impugned order and the same is set aside and the appeal is allowed with consequential relief.

(Operative portion of the Order was pronounced in Open Court.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

rv