CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 2540 of 2011
(Arising out of Order-in-Appeal No. 41/2011 dated 19.05.2011 passed by the Commissioner of Customs (Appeals), Bangalore)

M/s. Kineta Minerals & Metals Ltd.,
No.566, Road No.31, Jubilee Hills,
Hyderabad 500 034.

Appellant(s)

VERSUS

The Commissioner of Customs,
CR Building, Queens Road,
Bangalore – 560001.

Respondent(s)

APPEARANCE:

Mr. Syed Peeran, Advocate and Ms. Ashwini Nag, Advocate for the Appellant

Mr.K.A. Jathin, Deputy Commissioner(AR) for the Respondent

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

Final Order No. 20978 /2024

DATE OF HEARING: 07.06.2024

DATE OF DECISION: 09.10.2024

PER : DR. D.M. MISRA

This is an appeal filed against Order-in-Appeal No. 41/2011 dated 19.05.2011 passed by the Commissioner of Customs (Appeals), Bangalore.

2. Briefly stated the facts of the case are that the appellant had filed a refund claim on 08.04.2009 claiming refund of export duty of Rs.50,25,500/- being the excess duty @ Rs.250/- per metric tonne paid at the time of export of Iron Ore under Shipping Bill No.100/07 dated 30.04.2007. The refund claim

was though sanctioned by the adjudicating authority but directed to be credited to the Consumer Welfare Fund. Aggrieved by the said order, they filed appeal before the learned Commissioner(Appeals) who in turn rejected their appeal. Hence, the present appeal.

3. At the outset, the learned advocate for the appellant has submitted that the appellant had entered into a contract dated 14.04.2007 with M/s. Steelmet PTE Ltd., Singapore for supply of 44000MT of Iron Ore fines. Under Clause 4 of the said contract, the price of the Iron Ore fines was fixed at USD59 per Dry Metric Tonne (DMT) on FOB basis. The terms and conditions of the contract was based on the Gencon 94 standard. For the said export consignment of 44000 WMT, the appellant filed Shipping Bill No.100/07 dated 30.04.2007. They paid export duty @ Rs.300/- per MT along with cess of Rs.44,000/- as applicable at the relevant time. The export duty on Iron Ore fines with Fe content of 62% and below was fixed at Rs.50/- per MT vide Notification No.62/2007-Cus dated 30.05.2007. The appellant received the Let Export Order on 04.05.2007 and loaded the impugned goods into the vessel on 05.05.2007. The appellant could not load the entire quantity of goods and short shipped the quantity of 20,102MT of Iron Ore fines and the vessel sailed on 19.05.2007. The shipping bill was finally assessed on 26.03.2009 for export duty on the quantity of 20,102 MT @ Rs.50/- per MT and cess @ Rs.1 per MT. The appellant claimed

refund of export duty of Rs.1,22,18,798/- on 01.04.2009; however the excess export duty paid on account of reduction in rate vide Notification No.67/2007 amounting to Rs.50,25,500/- was rejected on the ground that the appellant failed to produce documents to rebut the presumption under Section 28D of the Customs Act, 1962.

3.1. He has submitted that both the authorities below have erred as the impugned goods have been exported and sold to the foreign buyers in terms of the contract at the FOB price. Further, in terms of the International Commercial Terms for FOB transactions published by the International Chamber of Commerce, the seller delivers the goods on board a vessel by bearing all costs and risks up to the point of loading, including export clearance; and as per Gencon 94, all taxes, charges, duties, the exporter is required to pay the same customarily levied on the cargo. He has submitted that the appellant has realised export proceeds from the foreign buyer only to the tune of USD 1,119,126 as against USD 2,388,320 initially agreed for supply of 44000 WMT. Also, they have placed the certified copy of cost sheet as well as bank certificate of export realisation duly verified in support of their refund claim of the excess duty paid. He has submitted that incidence of duty cannot be passed on to the buyer when the export was done in terms of FOB contract. In support, he has referred to the judgment of the Hon’ble High

Court of Andhra Pradesh in the case ***of Asia Pacific Commodities Ltd. Vs. Asst. Commissioner of Customs*** [2012(280) ELT 481 (AP)] and the decisions of this Tribunal in the case of ***Muneer Enterprises Vs. CC, Mangalore*** [2024(3) TMI 1054]; ***Dream Logistics Company India Pvt. Ltd. Vs. CC, Mangalore*** [2017-TIOL-1918-CESTAT-BANG] and in ***Krisloskar Ferrous Industries Ltd. Vs. CC*** [2018(11) TMI 764 – CESTAT BANGALORE]. Further he has submitted that this Tribunal in the case of ***Sesa Goa Ltd. Vs. CCE, Bhubaneswar*** [2014(313) ELT 317 (Tri. Kolkata)] held that the FOB price of export goods cannot be considered as cum-duty price for determination of export duty; therefore the excess duty paid is refundable to them.

4. Learned AR for the Revenue reiterated the findings of the learned Commissioner(Appeals). He has submitted that in view of the provisions of Section 28D of the Customs Act, 1962, the burden lies on the appellant to establish that the incidence of duty claimed as refund has not been passed on to the buyers of the goods. Further, he has submitted that as per the Board's Circular No.18/2008-Cus dated 10.11.2008, a policy decision was taken till 31.12.2008, the practice of computation of export duty and cesses taking the FOB price as cum-duty price to be continued. Thus, the refund amount though sanctioned has been correctly transferred to the Consumer Welfare Fund by the lower authorities.

5. In his rejoinder, the learned advocate has submitted that reference to the circular No.18/2008-Cus dated 10.11.2008 by the learned AR for the Revenue is misplaced as the said circular was issued by the Board with the objective of clarifying the computation of export duty under Section 14 of the Customs Act which is computed by working backwards from FOB price declared by the exporter. The said circular was issued in response to certain doubt raised about the existing practice of computation of export duty for the period prior to 31.03.2008. Subsequently the practice was changed from 01.01.2009 insofar as the transaction value i.e. the price actually paid or payable for the goods for delivery at the time and place of exportation under Section 14 of the Customs Act, 1962 ought to be held to be relevant. Therefore, the amount realised against the FOB price be taken into consideration for determination of the transaction value. In ***Sesa Goa Ltd.' s*** case (supra), it was affirmed that FOB price of the goods be the transaction value and cannot be treated as cum-duty price for determination of export duty.

6. Heard both sides and perused the records.

7. The short question involved in the present appeal is whether the appellant are entitled to refund of Rs.50,25,500/- being the excess export duty paid on account of downward

revision of export duty from Rs.300/- per MT of Iron Ore fines to Rs.50/- per MT.

8. It is not in dispute that the authorities below had sanctioned the refund acknowledging reduction in the export duty paid on Iron Ore fines; however the refund amount instead of being given to the appellant, directed to be transferred to the Consumer Welfare Fund observing that the appellant had failed to discharge the burden to show that incidence of duty had not been passed on to others. Responding to the finding of the authorities below, the learned advocate for the appellant referred to the cost sheet, financial statements for the period 2009-10 and the Chartered Accountant's certificate to establish that the excess amount of duty paid at the time of provisional assessment of the shipping bill was not passed on to the overseas buyer but borne by them. The learned Commissioner in the impugned order, on the other hand, without analysing the documents concluded that appellant had only placed the balance sheet for the year 2007-08 and 2009-10 but failed to produce any bills, vouchers, receipts relating to various expenses relatable to cost of the goods for verification and rejected the argument of the appellant that the incidence of export duty was borne by them and not passed on to the overseas buyers. On going through the cost sheet duly certified by the Chartered Accountant enclosed with the appeal paper book, we find that in

arriving the cost of the material, the export duty amount was calculated @ Rs.51/- per MT for 20102 MT, which was shown separately and not included in the FOB value. Also, the bank realisation amount on export of the goods perfectly tallies with the total FOB value shown in the cost sheet i.e. USD 1,119,126.03. Cost sheet enclosed with the appeal memo is as below:

NAME OF CARRYING VESSEL : M.V. AIFANOURIOUS
: QUANTITY MT 20,102.000
LESS : MOISTURE 4.06 PCT 816.141
DMT 19,285.859 59.00 1,137,865.67

CHEMICAL COMPOSITIONS:

FE	60.54 PCT
AL203	4.68
SIO2	5.39 PCT
P	0.065
S	0.012 PCT
MOISTURE	3.33 PCT

FOR FE CONTENT (61.00 - 60.54 = 0.46%) x 1.94 x 19,285.859 = DMT 17210.70
FOR EXCESS OF AL203 (4.68-4.00=0.68%)*0.05*19265.859 = DMT 655.72
FOR EXCESS OF SIO2 (5.39-4.50=0.89%)*0.05*19285.859 = DMT 858.22 18724.64

Total Value USD 1,119,141.03
Less: Bank Charges USD 15.00
1,119,126.03

(Conversion Rate @ Rs. 40.90) Sale Value 45,772,255.00

SUPPLIERS	Quantity	Material Cost	Transportation	Total		
Sun Minerals	12,078.65	2,085.00	(incl.transportation)	25,183,985		
Rajapur Minerals	6,036.14	2,150.00	(incl.transportation)	12,977,701		
Niketan Builders Pvt. Ltd	982.83	2,150.00	(incl.transportation)	2,113,085		
Limra Minerals	2,448.38	2.150.00	(incl transportation)	5,264,017		
Cost of Material	21,546.00			45,538,788	45,538,788	
Customs Duty (20102 MT @ Rs. 51.00 PMT)					1,025,202	
Stevedoring & Cargo Handling Charges @ Rs. 200.00 PMT (incl. service tax @12.36%)					4,841,817	
Administration & Misc. Expenses (21546MT@ Rs.169 PMT incl.ECGC, Marine Insurance & Sampling)					3,641,274	
		Total Expenses			55,047,081	55,047,081.00
		Net Profit / Loss				(9,274,826.00)
		Customs Duty Receivable 20102 MT @ Rs. 250 PMT				5,025,500.00

For SAGAR & ASSOCIATES
CHARTERED ACCOUNTANTS
PARTNER
21654
28/8/09

HYDERABAD

9. Further in their balance sheet for the year 2009-10 to 2022-23, a total amount of Rs.1,47,40,095/- of which Rs.50,25,000/- is shown in the head of 'Other Current Assets / Other non-current assets / Deposits Recoverable / Deposits Receivables', which has been certified by the Chartered Accountant and Rs.50,25,000/- is a part of the said total amount reflected in the balance sheet. The Hon'ble Andhra Pradesh High Court in the case of Asia Pacific Commodities Ltd. (supra), more

or less analysing a similar FOB value contract rejecting the contention of Department that bar of unjust enrichment is applicable in such cases observed as follows:

> ***21.*** *As per the above clause all export duties, taxes, levies etc., on cargo present or future in India shall be for seller's account and all import duties, taxes, levies etc., present or future in the country of destination shall be for buyer's account. Further all taxes/duties on freight and vessel is to vessel owner's account. Buyer's obligations are found in Part B of FOB contract. As per point B2 read with B6 the buyer must obtain any import license where applicable and pay all customs formalities for the import of goods and where necessary for their transit through any country. From a perusal of the FOB contract terms in Incoterms, there cannot be any doubt that it is always the duty and obligation of the seller to bear the costs of customs formalities as well as the duties, taxes and charges payable upon export.*
>
> ***22.*** *In these appeals, the invoice value is also FOB value. Therefore it cannot be said to include the duty paid under the Cess Act and, therefore, the presumption under Section 28D of the Act stands rebutted by the appellants. The CCE (A) went utterly wrong in construing the point A6 ignoring paragraph 14 of Incoterms as well as the sale contract between the appellant and buyer. Therefore the CESTAT was justified in holding that the finding of CCE (A) that FOB value included the cess is unsustainable. We accordingly hold that the principle of unjust enrichment does not bar the refund claims under Section 27 read with 28D of the Act and the point is accordingly answered in favour of the appellants.*

Further, this Tribunal in **Muneer Enterprises'** case (supra), in similar circumstances analysing the admissibility of refund of export duty paid consequent to issuance of Notification No.62/2007 dated 03.05.2007, on export of Iron Ore fines against FOB contracts held that incidence of duty has not been passed on to overseas buyers.

10. Further, the Circular No.18/2008-Cust dated 10.11.2008 referred to by the Department in support of their case is not applicable to the facts of the present case inasmuch as under the said Circular, the practice of determination of assessable value of export of goods was continued to be from cum-duty price on back ward calculation till 31.12.2008 in consonance with long standing practice followed by various Customs Houses; however, the practice was discontinued w.e.f. 01.01.2009.

11. Thus, following the aforesaid precedent, the records of the case and evidences placed by the appellant, we do not find merit in the impugned order. Consequently, the impugned order is set aside being devoid of merit and the appeal is allowed with consequential relief.

(Order pronounced on 09.10.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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