CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 430 of 2012

[Arising out of Order-in-Appeal Nos. 242 & 243/2011 dated 30/12/2011 passed by the Commissioner of Customs, Bangalore]

Mineral Enterprises Ltd. **....Appellant**
No.300, 1B, 16th Cross, Sadashiva Nagar,
Bangalore - 80

VERSUS

Commissioner of Customs
Mangalore **....Respondent**
New Customs House, Panambur
Mangalore - 575 010
Karnataka

WITH

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APPEARANCE:

Shri G.H. Pradyumna, Advocate — For the Appellant

Smt C.V. Savitha, Superintendent (AR) — For the Respondent

CORAM:

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER
HON'BLE SHRI P. DINESHA, JUDICIAL MEMBER

Final Order Nos. 20032 - 20033 / 2022

Date of Hearing: 07/02/2022

Date of Decision:14/02/2022

Per : P. DINESHA

The appellant is an exporter of iron ore fines/lumps. During the period under challenge, the appellant entered into a contract with overseas buyers for supply of fines/lumps and one of the conditions of the purchase contract between the appellant and the foreign buyers was that the export consignment was required to be subjected to certain tests to determine iron (Fe) and moisture content and thereafter determine the weight of dry quantity of ore by reducing the moisture percentage.

2. It is the case of the appellant that it had declared the moisture percentage @ 9% at the loading port i.e Mangalore and when the same was tested at the recipient's end i.e. the foreign buyer, they have reported the moisture content to be in excess of 0.5% than the declared percentage. For this, the appellant was required to return proportionate advance money received from the overseas buyers which was in terms with the purchase agreement and thus, it had resulted, according to the appellant, in downward revision of the assessable value of the exported goods. Consequently, the export duty paid on the assessable value which was declared on the shipping bill was more which prompted the appellant to seek refund of the same. Accordingly, the appellant requested for refund vide two refund claims dated 24/08/2009. Show-cause notices were issued by the Deputy

Commissioner/Adjudicating Authority proposing to reject their refund claim, in response to which, the appellant filed a detailed reply making the case for refund. But, however, being not satisfied, vide Orders-in-Original passed on 30/11/2010, the adjudicating authority after considering the written submissions as well as after hearing the appellant, had rejected the appellant's refund claim. Aggrieved, the appellant preferred appeals before the First Appellate Authority and the First Appellate Authority also vide common impugned Order-in-Appeal Nos. 242 & 243/2011 dated 30/12/2011 has upheld the rejection as made by the adjudicating authority. Seriously aggrieved by the rejection, the appellant has preferred these appeals before this forum.

3. Heard Shri G.H Pradyumna, learned advocate for the appellant and Smt. C.V. Savitha, learned Superintendent for the Revenue. The contentions of the learned advocate are summarized as below:

- The appellant had exported iron ore/fines vide 8 shipping bills.
- As per the export services, moisture content of the export consignments at the loading port was declared as 9%.
- The appellant was required to furnish provisional duty bonds (PD) binding himself to the fine and penalty that may be imposed in adjudication proceedings.
- The test report furnished by the foreign buyer reported the moisture content in excess of 0.5%.
- The purchase agreement made it mandatory for the appellant to return proportionate sum of money which resulted in downward revision of the transaction value.
- The excess payment as above was Rs. 2,23,696/- (Rupees Two Lakhs Twenty Three Thousand Six Hundred and Ninety Six only) and Rs. 54,84,958/- (Rupees Fifty Four Lakhs Eighty

Four Thousand Nine Hundred and Fifty Eight only) respectively, in each of the appeals.

- Show-cause notice was issued and thereafter adjudication order passed wherein the refund claim was rejected on the ground that the PD bonds executed had been finalized/cancelled, which was not challenged by the appellants.
- The PD bonds had become void and were of no effect as the assessment was deemed as finalized.
- The assessment of export consignment could not be treated as provisional only for the purpose of determining Fe content.
- There is no final order and at no stretch of imagination, the cancellation of PD bonds would be equated to the finalization of provisional assessment.

3.1. He has relied on the following orders:

a. *IJM Gayatri Joint Venture Vs. Commr. of Cus. & C.Ex., Hyderabad -2008 (231) E.L.T. 683 (Tri.-Bang.)*
b. *Commr. of Cus. & C. Ex, Guntur Vs. Alfa Exports (EOU) - 2019 (370) E.L.T. 648 (Tri.-Hyd.)*
c. *Vam Organic Chemicals Ltd. Vs. Collector of Customs, Meerut - 1997 (92) E.L.T. 544 (Tribunal)*

4. Per contra, Smt. Savita, learned AR, relied on the findings of the lower authorities. She would also refer to Section 14 of the Customs Act, 1962 to buttress that valuation of the export goods would be the value at the time and place of exportation and hence, the value declared by the appellant at the time and place of export, i.e Mangalore port, should be taken as the transaction value. She would also contend that the PD bonds obtained were restricted to the backdrop of Foreign Trade Policy Regulations and that since the test

reports indicated the Fe content in the iron ore exported to be less than 63.99%, there was nothing left to the lower authorities to initiate any action in terms of the FTP and hence, the PD bonds were cancelled and returned to the exporter on 04/03/2009 and 23/03/2009 itself. This was also for the reason that there was no ground for the lower authority to impose penalty and fine and hence, she would submit that the provisional assessment stood finalized.

5. Heard both sides and we have gone through the documents placed on record as well as various case-law referred to during the course of argument.

5.1. We have gone through the copies of PD/test bond as on record and only condition reads as below:

> *"Now the conditions of the above written bond is such that:*
>
> *1) If the test results shown that the FE contents is more than the allowable limit of 63.99% then the exporter shall pay to the President of India on any fine or penalty that is imposed in adjudication proceedings.*
>
> *Then the above written bond shall be void and of no effect, otherwise the same shall remain on full force and virtue."*

From the above, it is clear that the exporter shall pay any fine or penalty, which is imposed in adjudication proceedings, if the Fe content is more than 63.99%. There is no dispute as regards the Fe content in the export consignment, from the report of the Chemical Examiner CRCL, Cochin, which showed Fe content to be less than 63.99% and which has been accepted by both the appellant as well as the Revenue. The liability to pay fine or penalty arises only when the Fe content is more than 63.99% but when it is proved that the Fe content was much below the threshold, naturally the PD bond will have no effect and the same stood cancelled. This, in our view, is just the starting point, the same requires the finalization of the provisional assessments since the actual duty liability is involved and hence adjudication has to take place to determine the same. The requirement of law is that a provisional assessment, if treated as such, shall be treated as provisional for all practical purposes. Section 18 of the Customs Act, 1962 lays down the provisional assessment of Duty; sub-section (4) incorporates the refund, if any, to be granted, within three months from the date of assessment of Duty finally andsub-section (5) refers to unjust enrichment, which is not the case here since the Revenue has never alleged about *unjust enrichment.*

From the above, it is clear that the statute mandates the passing of the final assessment since a provisional assessment will have to be taken to its logical conclusion, by passing a final assessment order after obtaining necessary information or any report or any other document that the Officer may require, as prescribed under Section 18(1) ibid.It is also for the reason that a provisional assessment is in the nature of an interim order, which is not enforceable. Otherwise, granting of time as in Section 18(4) becomes otiose.Other than this, law does not recognize any deeming fiction to treat a provisional assessment as the final one. Hence, a provisional assessment will always remain as a provisional one. There is no shortcut as a deemed finalization since the authorities can only collect the tax/duty as permissible under law. Hence, the non-finalization of the provisional assessment has lead to a situation where the duty paid by the unsuspecting assessee has been retained in full without following the process of law since we have observed hereinabove that a provisional assessment will not automatically become final but the same has to be taken to its logical conclusion by passing a final order.

6. In view of the above, we do not approve the reasons adopted by the lower authorities for which, the same are unsustainable.

7. Consequently, the impugned order is set aside; appeals are allowed by way of remand to the adjudicating authority with a direction to pass a speaking order finalizing the assessment. Moreover, as both the parties have accepted the Fe content from the report of CRCL, Cochin, the valuation of the goods shall also be carried out adopting the correct value and consequential refund worked out and granted to the appellant.

8. In view of the above, the appeals are allowed on the above terms with consequential benefits, if any, as per law.

(Order pronounced in the Open Court on **14/02/2022**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P. DINESHA)
JUDICIAL MEMBER

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