

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench
Court - I

Appeal No. C/536/2009

(Arising out of Order-in-Appeal No.12/2009 V-II Cus dated 04.05.2009 passed by CCCE
& ST (Appeals), Visakhapatnam)

CC, Vijayawada

..... Appellant(s)

Vs.

Kimmi Steels Pvt Ltd

..... Respondent(s)

Appearance

Smt B.V. Siva Naga Kumari, Commissioner/AR for the Appellant.

Shri M.S. Nagaraja, Advocate for the Respondent.

Coram:

HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)

HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 26.09.2018

Date of Decision: 12.11.2018

FINAL ORDER No. A/31423/2018

[Order per: P.V. Subba Rao.]

1. This appeal is preferred by the revenue against the Order-in-Appeal No. 12/2009 V-II Cus dated 04.05.2009.

2. The respondent herein is an exporter of iron ore which is subject to export duty @ Rs.300/Metric Ton (MT). However, if the iron content of the iron ore fines is 62% and below, Exemption Notification No. 62/2007-Customs dated 03.11.2007 applies and only an export duty of Rs.50/MT has to be paid. The respondent herein filed Shipping Bill No.25 dated 04.07.2007 for export of 42.05 WMT of iron ore fines on payment of duty @ Rs.50/MT. The samples of the iron ore fines were sent for testing and based on the chemical examiner's report, the Asst. Commissioner, Customs, Kakinada

passed the Order-in-Original demanding the differential customs duty of Rs.1,05,12,500/- as test report from CRCL showed the iron content to be 62.52% i.e., above 62%. On appeal, the first appellate authority passed the impugned order setting aside the Order-in-Original and allowing the appeal relying on the order of the Tribunal in the case of Taurion Iron & Steel Company Pvt Ltd [2009 (241) ELT 390 (Tri-Bang)]. Aggrieved by this order of the first appellate authority the present appeal is preferred by the revenue. Learned counsel for the respondent submits that iron ore fines were analyzed thrice. First, the sample drawn by the customs in the presence of the exporter's representative was sent to the chemical examiner, CRCL, Visakhapatnam for testing. At the time of export at the load port samples were again drawn by M/s Mitra SK Pvt Ltd, accredited assayer, 09.07.2007. At the port of destination, the sample was against tested by the Inspection and Quarantine of People's Republic of China. The test report of the chemical examiner showed the iron content as 62.52% while the test report of M/s Mitra SK showed the entire content as 60.80% and moisture content of 4.60%. The test report by the Chinese authorities at the destination port also showed the iron content as 60.74% and moisture content of 4.36%. It is his submission that accredited Government Testing agency at the load port as well as the discharge port showed the iron ore content to be below 61% and therefore these reports have been relied upon by the first appellate authority while allowing their appeal. It is his further submission that both these reports indicate the moisture content of iron ore fines while the test report of CRCL does not indicate the moisture content. Therefore, it is not clear whether the iron content has been taken on wet basis or on dry basis. It is his submission that there can be a significant difference in the iron ore content depending upon how the iron

ore is tested. It has been established that iron ore content must be determine on wet basis and not on dry basis as has been held by the Hon'ble Supreme Court in the case of Gangadhar Narsingdas Aggrawal [1997 (89) ELT 19 (SC)] which was followed in the subsequent decisions. CBEC has also issued Circular No.4/2012 dated 17.02.2012 in which it was clarified " that for the purpose of charging of export duty the assessment of iron ore for determination of Fe content shall be made on Wet Metric Ton (WMT) basis which in other words means deducting weight of impurities (inclusive of moisture) out of the total weight/ Gross weight to arrive at Net Fe contents". He takes us through the findings of the first appellate authority which was as follows:

"I have carefully gone through the submissions made by the appellants vide their grounds of appeal as well as written submissions made at the time of personal hearing. While deciding the case, I rely upon the judgment of the Honourable CESTAT, Bangalore in the case of Taurion Iron & Steel Company Pvt. Ltd., vs. the Commissioner of Central Excise, Visakhapatnam in the final order No.69/09 dated 30.1.2009. In the said judgment, the Tribunal held that "we do not find any strong reason for rejecting the test report produced by the appellant from two sources, one from the reputed testing organization and the other from the destination port. The evidence also have been produced that payment has been made based on the test results at the destination port. When it is less than 62% depending upon, the shortage, the penalties have been paid by the exporter. In view of these factors, we find that the impugned order which has been passed in a very cursory manner without taking into the account the submissions of the party is liable to be set aside....." The subject case is an identical case wherein the appellants have produced two test reports, one from the reputed testing organization and the other from the destination port, which showed that the iron content is less than 62%. They have also produced evidence that the payment has been made basing on the test results at the destination port."

3. Therefore, he argued that the ratio of the decision of the Tribunal in the case of Taurion Iron & Steel Company Pvt Ltd (supra) squarely applies to their case and it has been rightly applied by the first appellate authority while deciding the order in their favour.

4. Learned Commissioner (AR) submits that the first appellate authority has wrongly set aside the demand confirmed by the original authority

relying upon the test reports whose samples were not drawn in the presence of the departmental officers as well as the exporters. Of the two samples, one is drawn and tested outside the jurisdiction of India by the Chinese authorities while the other one is drawn by the testing agency but not in the presence of the Customs officers. The only authentic sample which was drawn in the presence of the exporter as well as the Customs officers is sample which was sent to CRCL for testing. The test reports are as good as the sample which have been drawn and unless the sample is correctly drawn, the test report will not be representative. It is her further submission that there is nothing in the test report of the CRCL to indicate that it is tested on dry weight basis and not on wet weight basis and therefore it cannot be simply brushed aside. She relied upon the case of Reliance Cellulose Products Ltd [1997 (93) ELT 646 (SC)] which was referred in Godrej Industries Ltd [2003 (161) ELT 68 (Bom.)] to assert that test reports of CRCL need to be relied upon. It is her submission that the only authentic test report is that of CRCL because the sample was drawn in the presence of both the exporter and the Customs officers and it is an official test report. The test report at destination port is of the Chinese authorities while the test report at load port is by an independent testing agency of sample drawn by them when the customs officers were not present. She would submit that in view of these, the test report of CRCL cannot be brushed aside as has been done by the first appellate authority. She also draws our attention to the fact in the case of Taurion Iron & Steel Company Pvt Ltd (supra) the assessee had requested for a re-test and it was denied by the Revenue and this rejection was seen as denial of principles of natural justice. Such is not the case here. It is her submission that the Exemption Notification No.62/2007-Customs is an exception to the general rule and hence should

be strictly construed against the respondent. There is nothing in the test report of the chemical examiner which shows that iron content in the test report of CRCL is on dry basis. It also does not indicate that it is on wet basis. Therefore, in this case, the benefit of doubt should go against the respondent who are claiming the benefit of the notification as has been held by the Constitutional Bench of the Hon'ble Supreme Court in the case of CC, Mumbai Vs M/s Dilip Kumar & Co and others [Civil Appeal No.3327/2007].

5. We have considered the arguments on both sides. There are three test reports in this case by CRCL, accredited Testing agency at the load port and the Chinese authorities at the destination port. The case is similar to the case of Taurion Iron & Steel Company Pvt Ltd (supra). There are two doubts in this case, whether the CRCL test reports is on wet basis or on dry basis because the report does not state either way. The second doubt is the authenticity of the samples which were drawn at the load port by the accredited agency as one of the parties to the dispute was not available while the sample was being drawn. When the samples were taken at the destination port neither party was available because it was done by the Chinese authorities. In a similar case, Taurion Iron & Steel Co. Pvt Ltd (supra) and Mineral Enterprises Ltd [2010 (253) ELT 241 (Tri-Bang)] reliance was placed on the two reports which have contradicted the findings of the CRCL on the ground that CRCL test reports does not specify the moisture content. The first appellate authority has correctly relied upon this decision as it was applicable during the relevant period. One major difference was that in the case Taurion Iron & Steel Co. Pvt Ltd (supra), request for retest by the assessee was rejected thereby denying principles of natural justice which is not the case here. The legal position has changed after the decision of the Constitutional Bench of the Hon'ble Supreme Court

in the case of CC, Mumbai Vs M/s Dilip Kumar & Co and others [supra] as it has been settled that any exemption notification must be construed strictly and any benefit of doubt must go to the revenue. In this case, there are two doubts. One is regarding the authenticity of the sample drawn by the independent test agency without presence of the customs officers and the other is whether the test report of the CRCL is on wet basis or dry basis. The benefit of both these doubts will go in favour of the revenue for the simple reason that the exemption notification has to be strictly construed. In view of the above, we find that the appeal is liable to be allowed and the impugned order is liable to be set aside and we do so.

6. The impugned order is set aside and the appeal is allowed.

(Pronounced in the Open Court on 12.11.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)
Veda

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)