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

Division Bench
Court - I

Appeal No.	Appellant	Respondent	Impugned Order No. & Date
C/3069/2011	Uttam Galva Metallics Limited	CCE, C&ST, Visakhapatnam Cus	O-I-O No. 03/2011, dated 28.09.2011 passed by CC, CH, Visakhapatnam.
C/2987/2011	CCE, C&ST, Visakhapatnam Cus	Uttam Galva Metallics Limited	O-I-O No. 03/2011, dated 28.09.2011 passed by CC, CH, Visakhapatnam.

Appearance
Shri Jitendra Motwani, Advocate for the appellant assessee.

Shri N. Bhanu Kiran, Asst. Commissioner/AR for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 19.02.2019
Date of Decision: 19.02.2019

FINAL ORDER No.A/30380-30381/2019

[Order per: Mr. P. Venkata Subba Rao)

1. Appeal No. C/3069/2011 has been filed by appellant assessee and the appeal No. C/2987/2011 has been filed by the Department against the same impugned order and hence are being taken up together.

2. The appellants herein are engaged in the manufacture of pig iron using coal, iron ore, lime stone and dolomite as raw materials. The process of manufacture of coal in the appellant's factory uses 'coking coal' which is processed into hard coal which is known as coke. Thereafter, coke and sinter (made from pig iron from sintering plant) are put together in a blast furnace to produce pig iron. Coking coal is imported by the appellant from Australia. The dispute in this case is whether the benefit of Sl. No. 68 of the Notification No. 21/2002-Cus, dated 01.03.2002 is available to 'Dawson Weak Coking coal' imported by the appellant vide Bill of Entry No. 774695, dated 17.06.2010 or otherwise. This notification provided exemption from payment of duty in respect of coking coal of ash content below 12%. However, it did not provide any definition of coking coal. Subsequently, vide notification No. 21/2011-Cus, dated 01.03.2011, an explanation was inserted to the effect that coking coal means "*coal having mean reflectance of more than 0.85 and swelling index or crucible swelling number of more than 2".* Subsequently, vide notification No. 31/2011-Cus, dated 24.03.2011, modifications were made to this notification and coking coal was covered at Sl.No. 66A, with description as "coking coal having swelling index or crucible swelling number of '1' and above and mean reflectance of above 0.60, for use in manufacture of iron or steel using Corex, Finex or PCI technology". Further, changes were made subsequently. As far as the bill of entry in question is concerned, this was filed on 17.06.2010 when there was no definition of coking coal in the

notification except that ash content should be below 12%. There were no parameters of CSN or swelling index.

3. It is the case of the Revenue that appellant is not entitled to the benefit of the notification No. 21/2002-Cus, dated 01.03.2002, while it is the case of the appellant that they are entitled to the same. After issuing a show cause notice and following due process, in the impugned order Ld. Commissioner denied them the benefit of this exemption notification and demanded duty of Rs. 1,42,69,077/- and ordered confiscation of 30.066 MT of coal under section 111(m) but did not impose any redemption fine. He also imposed penalty of an amount equal to the duty demanded under section 112 of Customs Act, 1962. Hence this appeal by the assessee. The Department's appeal is on the grounds that the impugned order has not confirmed the demand of interest under section 28(1) which is not correct and that the Commissioner has also erred in not imposing redemption fine under section 125 of Customs Act, 1962 having ordered confiscation of the imported coal under section 111 (m).

4. Ld. Counsel for the appellant assessee would submit that the period of dispute is 01.03.2010 when coking coal of below 12% ash content was exempted vide notification No. 21/2002-Cus (Sl.No.68) and there was no other requirement that coking coal had to meet any parameters during the relevant period. Therefore, they are squarely covered by the exemption notification. He would submit that the issue is no longer *res-integra* and it

has been decided by CESTAT, Chennai in the case of CC Trichy vs. JSW Steel Limited [2012(284) ELT 680 (Tri.-Chennai) in favour of the assessee. In their present case, they are on much better footing inasmuch as the independent surveyors test report (Annexure at page 48 of the appeal) states that the ash content of the coking coal imported vide bill of entry is 8.9%. This report has not been disputed by the department during investigation or in the show cause notice or in the impugned order. The department had sent a sample of the imported coking coal to the Chemical Examiner for testing who reported that the moisture percentage (ARB) as 14.4%, volatile matter (ADB) 30%, Ash (ADB) as 8.1% and CSN as 1.5%. At the end, the Chemical Examiner has reported that coal is other than coking coal. Relying on this test report, the learned Commissioner, in the impugned order denied them the benefit of this exemption notification. In the case of JSW Steel Limited (supra), the CSN value was only 1 and yet the Hon'ble Tribunal accepted that it was coking coal. In view of the above, the benefit of exemption notification is available to them. Subsequent amendment to the notification No. 21/2002-Cus, dated 01.03.2002 show that there is no specific definition of coking coal and this was inserted in the notification as CSN on 24.03.2011, CSN more than 2 on 01.03.2011 etc. During the relevant period, the notification did not have any specific CSN number. Therefore, as long as the coal was accepted as coking coal in trade, they are entitled to the benefit of the exemption notification. It is not in dispute that they placed an order for coking coal and imported the same. It is also not in dispute that they are using imported coking coal to manufacture coke in their factory and in turn, using the coke to manufacture steel. Therefore, it is established that the coal which they have imported vide the bill of entry was coking coal. This is also substantiated even by the test report of the CRCL indicating CSN of 1.5. It is not clear as to why the Chemical Examiner after reporting the CSN of 1.5 remarked that it is not coking coal when all other evidences show contrary. Therefore, they are entitled to the benefit of this exemption notification. Consequently, the demand of differential duty, confiscation of goods, imposition of fine (as sought in the Department's appeal) and imposition of penalty do not survive.

5. Ld. DR would submit that the test report submitted by CRCL cannot be lightly brushed aside. In the absence of any statutory definition of coking coal in the notification, the report of the Chemical Examiner must be accepted. Therefore, Ld. Commissioner has correctly confirmed the demand, denying the benefit of exemption notification and imposed penalties. The only mistake committed by Ld. Commissioner is that having confiscated the imported goods under section 111 (m) of Customs Act, 1962, he has not imposed any redemption fine upon the appellant under section 125. He had an option of either confiscating the goods absolutely or allowing redemption under section 125 for imposition of redemption fine. There is no provision in the Customs Act under which Ld. Commissioner could have confiscated the goods and allowed them to be redeemed

without imposing any redemption fine. Therefore, redemption fine may be imposed and the remaining part of the impugned order may be upheld.

6. We have considered the arguments on both sides and perused the records. The issue to be decided is whether or not the assessee appellant is entitled to the benefit of Sl. No. 68 of the Notification No. 21/2002-Cus, dated 01.03.2002 for the coal imported by them which was declared as coking coal by them and which the department, relying upon the test report of CRCL argues is not coking coal. We find that there was no statutory definition of what is a coking coal in the notification during the relevant period. During subsequent periods, the principal selling index has been tested as a parameter and for some time CSN '1' and at other item CSN '2' was prescribed. Since there was no parameter fixed during the relevant period, the entitlement of the exemption would solely depend whether it had less than 12% ash content and is known in the trade as coking coal. It is not in dispute that assessee placed an order for coking coal. It is also not in dispute that they have received the coal with the test report at the Load Port indicating CSN '4'. It is also not in dispute that the coal is used by the appellant for manufacture of coke and in turn for manufacture of pig iron. Therefore, there is ample evidence to show that coal in question was coking coal. The department's contention is based on the report of CRCL which reported the CSN as 1.5% and ash content of 8% but declared that the imported coal is not coking coal. The reason as to why this coal has been called non-coking coal by CRCL, is not evident from the test report.

The CSN of ‘1’ or more can also be considered as coking coal as the subsequent amendments to the notification indicate. In this particular factual matrix, we find that there is overwhelming evidence that the coal in question was imported and used as coking coal and it has a CSN of ‘4’ (according to the load port survey) or 1.5 (according to the CRCL report). At any rate, this cannot be held to be not coking coal. In the case of JSW Steel Limited (supra) it was held in a similar case that the importer is entitled to the benefit of exemption notification No. 21/2002-Cus, dated 01.03.2002. We find no reason to deviate from the decision of the Coordinate Bench and respectfully follow the same. Accordingly, we find that the appellant is entitled to the benefit of Exemption Notification No. 21/2002-Cus, dated 01.03.2002 in respect of the coking coal imported by them. Therefore, the demand of duty vide the impugned order needs to be set aside and we do so. As the demand has been set aside, the question of interest or penalty also do not arise.

7. As far as the Department’s appeal in C/2987/2011 is concerned, it is on two grounds (a) that no interest has been confirmed by the Commissioner and (b) that no redemption fine has been imposed by the Commissioner under section 125 of the Customs Act, after having confiscated the goods under section 111 (m) of the Customs act, 1962. As far as the interest element is concerned, since we have set aside the demand, the question of interest does not arise. As far as the imposition of redemption fine is concerned, we do find that once the goods are

confiscated under section 111, adjudicating authority has to decide whether an option needs to be given to pay fine in lieu of confiscation of goods under section 125. This option has to be given in respect of all confiscated goods other than prohibited goods and may be given in respect of prohibited goods. Section 126 of the Customs Act also indicates that once the goods are confiscated, the ownership of the goods rests with the Central Government and the adjudicating authority shall take and possession of the confiscated goods. Therefore the Commissioner in this case had the option to either absolutely confiscate the goods or releasing them on payment of redemption fine. There is no scope of confiscating the goods and not taking possession of the same and releasing them without imposing any redemption fine under section 125. In this case, there is no allegation that the goods are prohibited. The confiscation was only on the ground that the goods in question do not match the description in the bill of entry. Since we have found that the goods which were imported are classifiable as coking coal and are entitled to the benefit of the exemption notification, the confiscation itself needs to be set aside and we do so. Therefore, the question of imposing redemption fine does not arise.

8. In view of the above, we find that the assessee's appeal needs to be allowed and the Revenue's appeal needs to be rejected and the impugned order needs to be set aside and we do so.

ORDER

The impugned order is set aside and the assessee's appeal No. C/3069/2011 is allowed and the Revenue's appeal No. C/2987/2011 is rejected.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

Vrg