

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

DIVISION BENCH – COURT NO. 1

Customs APPEAL No.82/2009

(Arising out of **Order-in-Appeal** No. 89/2008 (V-II) Cus, dated 30.12.2008 passed by
Commissioner of Customs & Central Excise (Appeals), Visakhapatnam)

Fomento Resources Pvt. Ltd.

F-1, Ist Floor, Oceanic Apartments,
Behind Hanuman Temple, Miramar,
PANAJI – 403 001.
Goa

..

APPELLANT

VERSUS

**Commissioner of Customs,
Vijayawada**

Customs Preventive Commissionerate,
D.No. 55-17-3, 2nd Floor, C-14,
Road No.2, Industrial Estate,
VIJAYAWADA – 520 007.
Andhra Pradesh

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RESPONDENT

Appearance

Shri M.S. Nagaraja, Advocate for the appellant

Shri C. Mallikharjun Reddy, Superintendent/AR for the Respondent.

Coram: Hon'ble Mr. S.S. GARG, MEMBER (JUDICIAL)

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

FINAL ORDER No. A/30637/2019

Date of Hearing: 10.07.2019

Date of Decision: 15.07.2019

[ORDER PER: Mr. P. VENKATA SUBBA RAO]

1. This appeal is filed against the Order-in-Appeal No. 89/2008 (V-II) Cus, dated 30.12.2008. The appellants herein are exporters of Iron Ore

Fines and they filed shipping bill No. 32, dt. 27.08.2007 of 41,308 MT of Iron Ore Fines declaring the iron content as 61%. Iron Ore Fines were leviable to export duty during the period @ Rs. 300/- per MT. However, if the Fe content of the fines is less than or equal to 62%, then they were eligible for exemption in excess of Rs. 50/- per MT as per Notification No. 62/2007-Cus, dated 03.05.2007, which reads as follows:

"Iron Ore Fines – Effective rate of export duty

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts iron ore fines of Fe content 62% and below falling under heading No. 11 of the Second Schedule to the Customs Tariff Act, 1975 (51 of 1975), when exported out of India, from so much of the duty of customs leviable thereon which is specified in the said Second Schedule, as is in excess of the amount calculated at the rate of Rs.50 per tonne."

2. The appellant declared the iron content in their Iron ore fines as below 62%. A sample was drawn by the Officers of the Customs in the presence of the appellant and it was sent for testing to the Customs Laboratory. The report of the laboratory was as follows:

CUSTOM HOUSE, KAKINADA		
TEST MEMO No. 257		
The following sample is forwarded to ascertain whether the sample is IRON ORE FINE or not.		
1. Name of the Exporter	Prime Mineral Exports Pvt. Ltd.	
2. Shipping Bill No.	32 / 27/08/2007	
3. Name of the Vessel	M.V. HENG CHANG	
4. Date of Sample drawn		
Sample drawn by me		
Sd/- xx xx xx Signature of the Exporter	Sd/- xx xx xx Inspector of C/E Custom House KAKINADA.	Sd/- xx xx xx Supdt. Of C/E Incharge Custom House KAKINADA
Sample	Description	Results
C.L. <u>906-Ekod</u>	IRON ORE FINES	The sample is in the form of brown powder and small lumps. It is composed of mainly oxides of iron together with small amounts of oxides of Al, and silicon % TOTAL Fe 62.91 The sealed remarkent record P.V.R. Sarma 4.9.07
Sd/- xx xx xx V. SURESH Chemical Examiner Grade-I Custom House Laboratory, VISAKHAPATNAM – 35.		

3. The test report declared the Fe content in the iron ore as 62.91%. The appellant also drew samples of iron ore fines and got them tested at the Load Port. The buyer of the iron ore fines also got them tested at the Discharge Port. Both these reports shows that iron content is less than 62%. The Load Port inspection certificate issued by Italab (Goa) Pvt. Ltd.

shows the Fe content as 61.78%. The test report at the Discharge Port certificate shows Fe content of 61.96%. Both these reports clearly indicate that the iron content has been determined on dry basis after drying the samples at 105 Degrees Celsius.

4. At the time of export, the appellant paid export duty @ Rs. 50/- per MT only as is applicable to iron ore fines containing Fe content of 62% or less. The assessment of the shipping bills was provisional subject to provisional assessment bond by the appellant for some other purpose. As the Chemical Examiner's test report showed the iron content of 62.91%, the exporter was advised to pay differential duty as applicable along with interest. In reply, the Exporter submitted an unsigned memo of reply contesting the test report.

5. After following the necessary procedures but not giving the appellant a copy of the Chemical Examiner's test report, the Asst. Commissioner, vide his speaking order No. 2/2008-Cus, dt. 17.03.2008, finalised the assessment denying the benefit of exemption notification and confirmed the differential duty of Rs. 1,03,27,000/- along with interest. Aggrieved, the appellant appealed to the first appellate authority who upheld the order. In the earlier round of litigation, the Tribunal had directed that a copy of the test report to be provided to the appellant and it has been so provided.

6. Ld. Counsel for the appellant submits that there are three test reports in this regard, two of which were by the Laboratories which are detailed and spell out the methodology adopted to determine the Fe content and the

results. One was done at the Load Port and the other one was done at the Discharge Port. Both these reports show that the Fe content on dry basis was below 62%. There is a third report of the Chemical Examiner which shows the Fe content as above 62%. However, this report, as can be seen, was very cryptic and it does not indicate what method was adopted for analysis. It also does not give the moisture percentage of iron ore fines. Further, it does not indicate whether the Fe content indicated was on dry basis or on wet basis. He draws the attention of the Bench to the CBEC Circular No. 4/2012-Cus, datd 17.02.2012, which reads as follows:

“CIRCULAR NO. 04/2012-Cus dated 17.2.2012

Subject: Adoption of uniform Customs Procedure for calculating the contents of Iron Ore – clarification regarding.

Several references have been received in the Board highlighting divergent practices for calculation of iron contents from Iron Ore being followed at different Ports for charging Export duty. In this regard two types of calculation methods are being followed i.e. on the basis of Wet Metric Ton (WMT) and other on the basis of Dry Metric Ton (DMT).

2. Hon’ble Supreme Court in the matter of Civil Appeal No. 7539 of 1995 in case of Union of India Vs Gangadhar Narsingdas Aggarwal [1997(89) ELT 19(SC)] in order to arrive at the Iron (Fe) contents out of Iron Ore, had held that-

‘that is because the duty is relatable to weight and therefore, once the iron content is determined keeping in mind the total weight, the percentage can be determined separating the iron contents from the rest of the impurities

inclusive of moisture and thereafter ascertain in which category the lumpy iron would fall for the purpose of charging duty....'

3. In light of the observation by the Apex Court that export duty is chargeable according to Fe contents, and to maintain uniformity all over the custom houses, it is clarified that for the purpose of charging of export duty the assessment of Iron ore for determination of Fe contents shall be made on Wet Metric Ton (WMT) basis which in other words mean deducting the weight of impurities (inclusive of moisture) out of the total weight/Gross Weight to arrive at Net Fe contents.

4. In case of any difficulty in arriving at the net Fe content, assessment may be based on test result which directly determines the Fe contents.

5. Pending assessments on the issue, if any, should be finalized accordingly.

6. Difficulties, if any, faced in the implementation of this circular, may be immediately brought to the notice of the Board.”

7. He would submit that the CBEC have themselves clarified that Fe content should be considered on wet MT basis and not on dry MT basis. The assessee's submits that if the moisture content is also reckoned, the Fe content will fall below 61% already reported. The Chemical Examiner's test report does not indicate whether the Fe content was on dry basis or on wet basis and this itself vitiates its validity. Since the Department seeks to deny them the benefit of exemption based on this test report, it was incumbent upon them to have established that they are not entitled to its benefit. He further submits that this doubt could have been clarified if they were given a copy of the Chemical Examiner's test report during the relevant period and

they were allowed to cross examine the Chemical Examiner. It was further possible for them to have a re-test done using the spare sample drawn at the same time. However, the department has done none of this and therefore their principles of natural justice have been violated. In view of the above, the Chemical examiner's test report should not be relied upon and they should not be denied the benefit of exemption notification based on this report and their assertion as substantiated by their test reports at the Discharge Port and Load Port should be considered.

8. Countering the arguments, Ld. DR submits that firstly, there is only one test report which was based on an authentic sample. The sample in case of the test report by the Chemical Examiner was drawn in the presence of both Customs Officers and the exporter. Both have duly signed on the test memo. This is the only test report which is based on the sample which is drawn authentically. As far as the other two reports are concerned, there was no Customs Officer when the samples were drawn. Section 144 of the Customs Act empowers the proper Officers of Customs to take samples of goods which have been imported or being exported for the purpose of examination and testing. Such sample was only sent to the Chemical Examiner. He further submits that Hon'ble Apex Court in the case of Reliance Cellulose Products Limited vs. CCE, Hyderabad as reported at [1997(93)ELT 646 (SC)] has categorically held that the test report of the Chemical Examiner and the Chief Chemist of the Government, unless demonstrated to be erroneous, cannot be lightly brushed aside on the basis of the opinion of some private persons obtained by the assessee. Therefore, the validity of the test reports from the two private testing agencies

obtained by the assessee being not authorised laboratories for the purpose of customs, cannot be relied upon. Not only are these reports of some private persons but even the authenticity of the samples drawn is not established. It is not clear as to who has drawn the sample and in whose presence.

9. On the other hand, the sample which has gone to the Chemical Examiner was drawn by the Customs Officers in the presence of Exporter and signed by both. Therefore, the only reliable test report is the Chemical Examiner's test report which shows the iron content to be more than 62%. Accordingly, the differential duty as confirmed by the original authority and upheld by the first appellate authority needs to be affirmed.

10. We have considered the arguments on both sides and perused the records.

11. This is an unusual case in which there are three test reports indicating different levels of iron content. None of the three test reports are perfect. The test reports produced by the appellant are detailed and elaborate and indicate Fe content of below 62%. However, the samples were collected behind the back of the Customs Officers. Therefore, there is always a doubt as to how the samples were drawn. The test reports are as good as samples drawn. One cannot be termed a "diabetic or HIV positive" based on a blood test unless it is certain that it was his blood which was tested and not the blood of anybody else. Similarly, the test reports cannot be relied upon unless the samples were drawn authentically from the export goods. In this

respect, the only authentic sample which was drawn was sent to the Chemical Examiner because it was drawn in the presence of Customs Officers and Exporter and signed by both the parties. Further, the test report of the Chemical Examiner or the Chief Chemist cannot be brushed aside in favour of reports of private persons as has been held by Hon'ble Supreme Court in the case of Reliance Cellulose Products Limited (supra). On the other hand, the Chemical Examiner's test report is extremely cryptic. It does not indicate as to how the sample was tested and whether the percentage of Fe indicated was on dry basis or on wet basis. If there is a moisture percentage of 7 or 8%, there will be a large difference between the Fe content on dry weight basis and wet weight basis. In the CBEC Circular dt. 17.02.2012, it has been categorically instructed that Fe content should be reckoned on wet MT basis. This problem and ambiguity could have been sorted out had the copy of the Chemical Examiner's test report was given to the assessee and they were given an opportunity of cross examination during the adjudication proceedings. The methodology adopted as well as whether the Fe content indicated in their report was on wet or dry basis, could have been ascertained. Further, if there was a dispute, the spare sample could have been sent for re-testing. Since none of these exercises was done, it is difficult to conclude that the Chemical Examiner's test report showed Fe content on wet MT basis. Therefore, the authenticity of this test report is also doubtful. In conclusion, we find none of the three test reports can be relied upon. Usually, any declaration made in the import/export documents are accepted unless there is evidence to the contrary.

12. In view of the above, we find that the department could not sufficiently establish that the declaration made by the appellant in the shipping bill that the Fe content of iron ore fine was below 62% was incorrect.

13. Under these circumstances, we find that the confirmation of differential duty demand by the Asst. Commissioner and its affirmation by the impugned order are not sustainable and is liable to be set aside.

14. The impugned order is set aside and the appeal is allowed with consequential benefits, if any.

(Pronounced in open court on 15.07.2019)

(S.S. GARG)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)