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

Division Bench

Court – I

Customs Appeal No. 525 of 2010

(Arising out of Order-in-Appeal No.03/2010 (V-II) Cus dt.26.03.2010 passed by CCCE (Appeals), Visakhapatnam)

Steer Overseas Pvt Ltd
103, Shahid Nagar, 2nd Floor,
Bhubaneshwar – 751 007 **......Appellant**

VERSUS

Commissioner of Customs, Vijayawada
Customs Preventive Commissionerate,
D.No.55-17-3, 2nd Floor, C-14, Road No.2,
Industrial Estate, Vijayawada, AP – 520 007 **......Respondent**

Appearance
Shri Derick Sam, Advocate for the appellant.
Shri Mir Anwar Mohiuddin, Authorized Representative for the respondent.

Coram:
HON'BLE Dr. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30329/2020

Date of Hearing: 22.01.2020
Date of Decision: 22.01.2020

[Order per: Dr. D.M. MISRA.]

This appeal has been filed against Order-in-Appeal No.03/2010 (V-II) CUS dt.26.02.2010 passed by the Commissioner of Customs, Central Excise (Appeals), Visakhapatnam.

2. Briefly stated, the facts of the case are that the appellants are engaged in the export of Iron Ore Fines and during the relevant period, they had filed 55 shipping bills all dated 27.10.2007 for export of iron ore fines of 22,000 MT declaring its Fe content between 61% to 61.5%. They claimed benefit of exemption notification No. 62/2007-

CUS dated 03.05.2007 accordingly. The export duty payable after the benefit of the said notification was Rs.50/- PMT whereas the normal rate of duty was Rs.300/- PMT. Pending test report of the sample of Iron Ore Fines, the goods were assessed provisionally applying the concessional rate of Rs.50/- PMT. Representative samples were drawn by the department in appellant's presence and sent it to the chemical examiner, Customs House, Visakhapatnam against test memo dated 27.10.2007 to ascertain the Fe content of the iron ore fines. The test report dated 14.11.2007 revealed the Fe content of the sample as 62.7%. The appellant was accordingly advised to pay the differential duty @ Rs.250/- PMT. They had challenged the said direction before the Hon'ble Andhra Pradesh High Court. The Hon'ble High Court disposed of the writ petition observing that the department is required to conduct necessary enquiry under the Customs Act, 1962 and pass assessment order in accordance with law. Thereafter, the sample was retested at CRCL, New Delhi on 08.01.2009. The Director, CRCL by its report dated 15.10.2009 informed that the Fe content of the sample was 62.7%. Consequently, after hearing the appellant, the adjudicating authority assessed the shipping bills finally, denying the benefit of the said exemption notification. Aggrieved by the said order, the appellant filed an appeal before the learned Commissioner of Customs (Appeals), who in turn rejected their appeal. Hence, the present appeal.

3. Learned advocate for the appellant, at the outset, submitted that while filing the shipping bills for assessment of the iron ore fines, they obtained necessary test report, which indicated the Fe content of the iron ore fines below 62%. Accordingly, they claimed the benefit of the

said exemption notification. It is his contention that the first test report of the Department was erroneous where under the Fe content was found to be more than 62%. He has further contended that the retest was conducted on 15.10.2009 i.e., after a lapse of one year and eleven months and hence the said test report cannot be relied upon in arriving at the Fe content of the iron ore fines. Hence, the appellants are eligible to the benefit of the Notification.

4. Per contra, learned AR for the Revenue has submitted that the samples both for initial test and retest had been drawn in accordance with the procedure laid down under the Customs Act and the Rules made there under. It is his contention that the test report submitted by the appellant obtained privately belongs to samples drawn by the appellant unilaterally without following procedure laid down under the Customs Act nor in the presence of the officers of the department. Therefore, the said test report cannot prevail over the test report obtained from the Government Laboratories. In support he has referred to the judgment of the Hon'ble Supreme Court in the case of *Reliance Cellulose Products Ltd vs Collector of Central Excise, Hyderabad [1997 (93) ELT 646 (SC)].*

5. We have carefully considered the submissions advanced by both sides. The short issue involved in the present appeal for determination is whether the appellants are entitled to the benefit of exemption notification No.62/2007-CUS dated 03.05.2007 on export of iron ore fines with Fe content claimed to be less than 62%. To ascertain the Fe content so as to extend the benefit of said exemption notification, sample was drawn and tested in the Customs Laboratory, Visakhapatnam, where its Fe content was reported as 62.67%. The

said sample was retested at the CRCL, New Delhi to ascertain its Fe content, when the case was remanded by the Hon'ble Andhra Pradesh High Court, while disposing the writ petition filed by the appellant challenging the initial test report. In the retest also the Fe content of the iron ore fines was found to be more than 62%. The learned advocate for the appellant submits to reject both the test reports and to accept the private test report initially filed by the appellant along with shipping bill where the Fe content was declared by the appellant on the basis of the said test report between 61% to 61.5%. We do not find merit in the contention of the advocate being contrary to the principle of law in this regard laid down by the Hon'ble Supreme Court in Reliance Cellulose Products Ltd (supra). Their Lordship observed as below:

> *"12. These orders are now under challenge before this Court. We were referred to a number of test reports obtained by the appellant from various persons and on the basis of these opinion, the reports of the Departmental Chemical Examiner and also the Chief Chemist were assailed. We are of the view that the Assistant Collector cannot be said to have erred in relying upon the reports given by the Chemical Examiner and the Chief Chemist. It may be that in a given case, the report of the Chief Chemist may be demonstrated to be palpably wrong. In such a case, the Court may direct re-examination of the whole issue. But that is not the case here. It has not been shown that the Chemical Examiner or the Chief Chemist were in error in their analysis in any way. The views expressed by the Chief Examiner and Chief Chemist of the Government cannot be lightly brushed aside on the basis of opinion of some private persons obtained by the appellant.*
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> *13. Under Rule 56 of the Central Excise Rules, the Central Excise Officer is empowered to take samples for the purpose of testing the samples. He has to communicate the result of such tests to the manufacturer. If the manufacturer is aggrieved by the result of the test, he can request the Assistant Collector that the samples be re-tested. That procedure has been followed. Therefore, there is no procedural infirmity in the order of the Assistant Collector nor has it been established that the Assistant Collector was wrong in relying on the report of Chemical Examiner and Chief Chemist in preference to the opinion obtained by RCPL from some private individuals."*

6. Needless to emphasize the samples drawn by the department had been in accordance with the procedure prescribed under the

Customs Act and the Rules made thereunder; also in the presence of both the parties i.e., department as well as the representative of the appellant, whereas the samples drawn by the appellant and tested in private laboratory was without the knowledge or presence of the departmental officer. Hence, test report of the said samples in our opinion cannot be relied upon against the test report of the Government laboratories. In the result, the impugned order is upheld and the appeal being devoid of merits, accordingly, dismissed.

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

(Dr. D.M. MISRA)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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