

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

Division Bench

Court – I

Customs Appeal No. 283 of 2012

(Arising out of Order-in-Original No.09/2011 dt.30.12.2011 passed by Commissioner of
Customs, Visakhapatnam)

Bagadiya Brothers Pvt Ltd

Bagadiya Mansion, Ground Floor,
Jawahar Nagar, Raipur – 492 001

.....Appellant

VERSUS

**Commissioner of Customs, Central
Excise & Service Tax, Visakhapatnam - I**

Port Area, Visakhapatnam,
Andhra Pradesh – 530 035

.....Respondent

and

Customs Appeal No. 284 of 2012

(Arising out of Order-in-Original No.09/2011 dt.30.12.2011 passed by Commissioner of
Customs, Visakhapatnam)

Anand Kumar Agrawal, Director

M/s Bagadiya Brothers Pvt Ltd.,
Bagadiya Mansion, Ground Floor,
Jawahar Nagar, Raipur – 492 001

.....Appellant

VERSUS

**Commissioner of Customs, Central
Excise & Service Tax, Visakhapatnam - I**

Port Area, Visakhapatnam,
Andhra Pradesh – 530 035

.....Respondent

Appearance

Shri Hari Radhakrishna, Advocate for the Appellants.

Shri P. Amaresh, Authorized Representative for the Revenue.

Coram:

HON'BLE MR. ANIL CHOUDHARY (JUDICIAL)

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30083-30084/2022

Date of Hearing: 06.09.2022

Date of Decision: 06.09.2022

[Order per: P.V. SUBBA RAO]

Customs Appeal No. 283 of 2012 is filed by M/s Bagadiya Brothers Pvt Ltd.¹ and Customs Appeal No. 284 of 2012 is filed by Shri Anand Kumar Agrawal², Director of the exporter assailing the same Order-in-Original dated 03.01.2012 passed by the Commissioner of Customs, Visakhapatnam³. The operative part of the impugned order is as follows:

" ORDER

- (i) *I confirm the differential duty amounting to Rs.1,18,12,250/- (Rupees One Crore eighteen Lakhs twelve Thousand two Hundred Fifty only) and should be recovered from M/s Bagadiya Brothers Pvt Ltd under first proviso to section 28(1) of the Customs Act, 1962 read with section 28(2) of Customs Act, 1962;*
- (ii) *I order that interest at applicable rate is also to be collected on the amount mentioned at (i) above under Section 28AB of the Customs Act, 1962;*
- (iii) *I order for confiscation of 47249 MT of Iron Ore Fines valued at Rs.21,95,24,400/- exported vide Shipping Bill No.4403514 dt.31.05.08 which was mis-declared of specifications and evaded payment of appropriate export duty under Section 113(i) of the Customs Act, 1962. As the goods were already exported, I am inclined to impose a fine of Rs.4,40,00,000 (Rupees four Crores forty Lakhs only) under section 125 of the Customs Act, 1962 in lieu of confiscation;*
- (iv) *I hold that M/s BBPL are liable for penalty under section 114(ii) and 114A of the Customs Act, 1962 for their omissions and commissions which rendered the goods liable for confiscation. However, I do not impose any penalty on M/s BBPL under section 114(ii) as separate penalty was proposed under section 114A of the Customs Act, 1962;*
- (v) *I order that the amount of Rs.1,18,12,250/- paid by M/s BBPL during the investigation be appropriated towards duty confirmed as at Sl.(i) above;*
- (vi) *I impose a penalty of Rs.1,41,85,056/- (Rupees one Crore forty one Lakhs eighty five Thousand and fifty six only) equivalent to duty and interest on M/s BBPL under section 114A of Customs Act, 1962 for deliberate and wilful suppression of facts with an intention to evade payment of duty;*
- (vii) *I impose a penalty of Rs.20,00,000/- (Rupees twenty Lakhs only) on Shri Anand Kumar Agrawal, Director of M/s BBPL under section 114(ii) of Customs Act, 1962 for his omissions and commissions which rendered the goods liable for confiscation;*
- (viii) *I impose a penalty of Rs.20,00,000/- (Rupees twenty Lakhs only) on Shri Anand Kumar Agrawal, Director of M/s BBPL under section 114AA of Customs Act, 1962 for his omissions and commissions which rendered the goods liable for confiscation;*
- (ix) *I also order that as provided in the proviso to section 114A of Customs Act, 1962, if the interest mentioned at (ii) above is paid within 30 days from the date of the communication of this order, the amount of penalty determined at (vi) above, shall be reduced to*

¹ Exporter

² Agrawal

³ Impugned Order

twenty-five per cent only. The benefit of reduced penalty shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days as referred above.

This order is issued without prejudice to any other action that may be initiated/pending against them under Customs Act, 1962 or any other law for the time being in force."

2. The facts of the case, in brief, are that the Appellant exported iron ore fines which are subject to export duty at Rs.300 per MT. However, if the Fe content of the iron ore fines is below 62% they are exempted from export duty in excess of Rs.50 per MT by Notification No. 62/2007-Cus dated 03.05.2007. In other words, if the Fe content is above 62%, export duty has to be paid at Rs.300 per MT and if it is below 62%, it has to be paid at Rs.50 per MT. The exporter filed a shipping bill dated 31.05.2008 claiming the Fe content to be less than 62%. It also enclosed with it a test report from a private testing laboratory viz., Therapeutics Chemical Research Corporation (TCRC) dated 30.05.2008 which indicated the Fe content as 61.03%. The shipping bill was assessed provisionally by the assessing officer subject to execution of a test bond. The conditions of the bond were that the exporter would abide by the test report of the Central Revenue Control Laboratories (CRCL) and if the Fe content is above 62% it would pay the differential export duty. Samples were drawn and sent for testing to the Central Revenue Control Laboratories who sent the test report dated 25.07.2008 stating that the Fe content is 61.15% by weight.

3. On receipt of the test report, the assessment of the shipping bill was finalised and the test bond executed by the exporter was cancelled by the assessing officer. Thereafter, before loading iron ore fines into the ship, the exporter had taken another sample and got it tested which showed that the Fe content was 62.38% on dry weight basis. After the goods had left India, the overseas buyer had cancelled the order and the exporter sold the goods to another customer in Hong Kong. At the discharge port, a sample of the iron ore fines was again tested and it was found that the Fe content was 62.11% on dry weight basis.

4. The Directorate of Revenue Intelligence (DRI), Visakhapatnam received intelligence that the appellant had misdeclared the Fe content in its Shipping Bill as the test report at the discharge port indicated that the Fe

content was 62.11% and accordingly, the appellant should have paid the export duty at Rs.300 per MT. Based on the intelligence collected and investigation conducted by the DRI, a show cause notice dated 01.07.2011 was issued by the Commissioner of Customs, Visakhapatnam proposing to re-assess the export duty and recover the differential duty at Rs.250 per MT under the proviso to Section 28(1). It also proposed to recover interest under Section 28AB of the Customs Act, 1962, and to hold that the exported goods were liable for confiscation under Section 113(i) of the Customs Act and impose penalties on the exporter under Section 114(ii)/ 114A of the Customs Act. It further proposed to impose penalty on Shri Agrawal, the Director of the exporter.

5. Both the appellants contested the show cause notice and after following due process learned Commissioner had passed the impugned order. Aggrieved by the impugned order, the present appeals are filed.

6. Learned counsel for the appellants submitted as follows:

- (1) The shipping bill was initially assessed provisionally subject to execution of a test bond which required the assessment to be completed as per the test report of CRCL. The test report confirmed the Fe content to be less than 62% and accordingly, the assessments were finalised and the bond was discharged. Therefore, it cannot be said that the appellant has misdeclared anything to invoke the proviso to section 28(1) and raise a demand of differential duty.
- (2) There are four test reports, of which the first two test reports indicated Fe content to be less than 62%, according to which they are liable to pay export duty only at Rs.50 per MT. The third and fourth test reports were obtained by them as per their commercial requirements which had assessed the Fe content on dry weight basis. As far as the assessment of duty on iron ore fines is concerned, the Fe content has to be determined as per CBEC Circular No. 04/2012 dated 17.02.2012 which, following the judgment of the Hon'ble Apex Court in the case of Union of India Vs Gangadhar Narsingdas Aggarwal⁴ clarified as follows:

⁴ 1997 (89) ELT 19 (SC)

"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."

Therefore, the only test reports which have tested Fe content on wet basis must be considered while determining the eligibility of the exemption notification. In this case, the latter two test reports which they have been obtained for commercial requirements had tested Fe content on dry basis. Therefore, the entire basis for the show cause notice is faulty.

- (3) He further submits that as per Section 113, goods which are intended to be exported i.e., export goods, only can be confiscated and not goods which have already been exported. Therefore, the order of confiscation under section 113 cannot be sustained. Consequently, penalties imposed under section 114 also do not survive.
- (4) As far as the penalty under section 114A is concerned, he submits that this can be imposed only if there is a differential duty demanded to be recovered and which has been evaded due to wilful suppression of facts with an intention to evade payment of duty. In their case, there is not only no wilful suppression of facts but no suppression of facts at all. All test reports were presented and it is the department which has decided that the assessment shall be done on the basis of the test report of CRCL and has obtained a bond from it, that the exporter would abide by the test report of the CRCL. As per the test report of the CRCL, no demand can be sustained.

He, therefore, prays that the impugned order may be set aside with consequential relief to both the appellants.

7. Learned Authorized Representative for the Revenue vehemently opposed the appeal and supports the impugned order. He submitted that while it is true that the original two test reports one by the private testing agency and another by the CRCL showed the Fe content to be less than 62%, the appellant had thereafter obtained test reports at the time of shipping and also at the discharge port, both of which showed the Fe content to be higher than 62%. It was incumbent on the appellant to have disclosed this test report to the revenue and pay the differential duty.

8. He further submits that but for the intelligence collected by the DRI and the investigation conducted by them, these test reports would not have come to light. Therefore, the appellant was required to pay the differential duty which it intended to evade by suppressing the test reports which it had obtained subsequently.

9. We have considered the arguments on both sides and perused the records. It is not in dispute that the appellant was exporting Iron ore fines which are chargeable to export duty at Rs.300 per MT if the Fe content is more than 62%. The first question which must be answered is whether this testing has to be done on dry basis or on wet basis. There will be a difference between the two. If 100 gm of sample (wet weight) has 60 gm of Fe and 10 gm of moisture and 30 gm of other substances, the Fe content will be 60% of the total weight on wet weight. If on the other hand, only dry weight is considered, the Fe content will be 60 gm of Fe in 90 gm of dry weight or 66.6%. It was held by the Hon'ble Supreme Court in the case of **Gangadhar Narsingdas Aggarwal** and it has been directed by CBEC's Circular dated 17.02.2012 that the determination of Fe content has to be made on wet MT basis. It is clear from the third test report produced before us dated 20.06.2008 by the appellant and the fourth test report, the extract of which was recorded in para 5(I) of the impugned order that they were on dry basis. The relevant portion of the impugned order is as follows:

*"I. As per the Final Invoice No. BBPL/IOF/EXP/013A/08-09 dt.25.08.2008 of M/s BBPL raised on M/s Transway International Trading Ltd., Hong Kong in respect of the subject export of Iron ore fines by vessel MV TIARA GLOBE and the relevant Bank Certificate of export and realisation dt.13.03.2009 the rate charged is **USD 177.50 per DMT and 62.11% Fe basis** which is based on the CIQ results issued in this regard."*

10. Learned counsel for the appellants clarifies that CIQ refers to discharge port report on basis of which present demand has been confirmed. Since the entire demand is based on test report on dry MT basis, which is contrary to the judgment of the Supreme Court in the case of Gangadhar Narsingdas Aggarwal and also contrary to the CBEC Circular No.04/2012 dated 17.02.2012, we find the entire basis of demand is not sustainable. Consequently, the demand for differential duty and interest cannot be sustained.

11. We further find that the confiscation in the impugned order is under section 113 of the Customs Act which provides for confiscation of export goods. 'Export goods' are defined under section 2(19) of the Act as follows:

"(19) "export goods" means any goods which are to be taken out of India to a place outside India;"

12. Evidently, section 113 contemplates only confiscation of goods which are attempted to be improperly exported and not goods which have actually been exported. The reason for this is once the goods are exported, Indian Customs has no control over the goods and therefore, they cannot be confiscated.

13. We further find that the Commissioner has imposed fine in lieu of confiscation under section 125. As per section 125, the adjudicating authority can give an option of redemption of confiscated goods on payment of fine whenever the goods are confiscated. Evidently, if such an option is given, it is open for the person to whom the option is given to either opt for redemption or not. If the person does not opt for redemption within a period of 150 days, such option becomes void as per sub-section 3 of section 125 unless an appeal is pending against such order. In other words, the confiscation becomes absolute. In this case, where the goods have already left the country, the person has no reason to opt to pay redemption fine. Redemption cannot be forced on the person. The question that arises is what will happen to the confiscated goods. Section 126 of the Act reads as follows:

"126. On confiscation, property to vest in Central Government.—

(1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods."

14. There is another reason why only goods which are attempted to be exported can be confiscated under section 113 and not goods which are already exported. As per Section 126, on confiscation, unless the goods are redeemed on payment of redemption fine, the property vests with the Central Government and it is the responsibility of the officer, adjudging the confiscation, to take and hold possession of the confiscated goods. In a case where the goods have already been exported, it is impossible for the adjudicating authority to take possession of the confiscated goods. In other words, the officer cannot discharge his responsibility under section 126(2) of the Act. Even for this reason, the confiscation under section 113 and the consequential penalty under section 114 cannot be sustained in this case.

15. As far as the penalty imposed under section 114A on the exporter is concerned, we find this section reads as follows:

"SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

Provided that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114."

16. Section 114A provides for imposing a penalty for short levy or non levy of duty by reason of collusion or any wilful misstatement or suppression of facts by the person who is liable to pay the duty or interest. In this case, we do not find any collusion or wilful misstatement or suppression of facts or even any duty liability because the entire demand has been made only by applying the test reports which are on dry MT basis instead of test reports on wet MT basis in violation of the law laid down by the Supreme Court in Gangadhar Narsingdas Aggarwal and also contrary to the directions of the Board in Circular No. 04/2012 dt.17.02.2012 and seeking to re-assess the duty contrary to the test report by the CRCL. In view of the above, we find that the impugned order cannot be sustained and needs to be set aside and we do so.

17. Both appeals are allowed and the impugned order is set aside with consequential relief, if any, to the appellants.

(Dictated and pronounced in the Open Court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)