CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH- COURT NO. – I

CustomsAppeal No. 21505 of 2015
(Arising out of **Order-in-Original** No.VJD-CUSTM-PRV-COM-01-15-16 dated 30.04.2015 passed by Commissioner ofCustoms (Preventive,Vijayawada)

The Kutch Salt & Allied Industries Ltd., .. **APPELLANT**
Maiti Bhavan, Plot No. 18,
Sector-8, Gandhidham,
Kutch, Gujarat – 370 201.

VERSUS

Commissioner of Customs Vijayawada .. **RESPONDENT**
D. No. 55-17-3, 2nd Floor, C-14,
Road No. 2, Industrial Estate,
Vijayawada,
Andhra Pradesh – 520 007.

AND

Customs Appeal No. 21506 of 2015
(Arising out of **Order-in-Original** No.VJD-CUSTM-PRV-COM-01-15-16 dated 30.04.2015 passed by Commissioner of Customs (Preventive, Vijayawada)

Shri Babulal Singhvi .. **APPELLANT**
The Kutch Salt & Allied Industries Ltd.,
Maiti Bhavan, Plot No. 18,
Sector-8, Gandhidham,
Kutch, Gujarat – 370 201.

VERSUS

Commissioner of Customs Vijayawada .. **RESPONDENT**
D. No. 55-17-3, 2nd Floor, C-14,
Road No. 2, Industrial Estate,
Vijayawada,
Andhra Pradesh – 520 007.

APPEARANCE:
Shri V M Doiphode, Advocate for the Appellant.
Shri Pradeep Saxena & Shri P Amaresh, ARs for the Respondent.

CORAM: HON'BLE Mr. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30223-30224/2024

Date of Hearing:12.02.2024
Date of Decision:01.04.2024

[ORDER PER: P.V. SUBBA RAO]

Customs Appeal No. 21505 of 2015is filed by The Kutch Salt & Allied Industries Ltd.[1], and **Customs Appeal No. 21506 of 2015** is filed by the Shri Babulal Singhvi[2] assailing the Order-in-Original[3] dated 30.04.2015 passed by the Commissioner of Customs (Preventive), Vijayawada whereby he confirmed the proposals made in the show cause notice[4] dated 06.02.2015 issued to them. The exporter is assailing the entire impugned order and Shri Babulal is assailing the penalty imposed on him in the impugned order. The operative part of this order is as follows:

a) In terms of Section 18 of the Customs Act, 1962, I finalise the provisional assessment of the said Shipping Bills as detailed in the Annexure to this Order and demand Customs duty of Rs. 1,27,380/- (Rupees One Lakh Twenty Seven Thousand Three Hundred Eighty only) from M/s The Kutch Salt and Allied Industries Ltd., as detailed in Part A of the Annexure to this Order.
b) I demand the differential Customs Duty of Rs. 41,89,834/- (Rupees Forty One Lakhs Eighty Nine Thousand Eight Hundred Thirty Four only) on the Exporter The Kutch Salt and Allied Industries Ltd., as detailed in Part B of the Annexure to this order under Section 28(4) of the Customs Act, 1962.
c) I demand interest at applicable rates on the amounts mentioned at (a) & (b) above, under Section 28AA of the Customs Act, 1962.

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[1] **Exporter**
[2] **Babulal**
[3] **Impugned order**
[4] **SCN**

d) The total quantity of Iron Ore fines exported vide the said three shipping bills, totally valued at Rs. 18,83,87,742/- is held liable for confiscation under Section 113(i) of the Customs Act, 1962. However, since the said Iron Ore is not available for confiscation, I refrain from actual confiscation and consequently I do not impose redemption fine in lieu of confiscation.

e) I hereby appropriate the amount of Rs. 25,83,885/- (Rupees Twenty Five Lakhs Eighty Three Thousand Eight Hundred and Eighty Five only) deposited by them as mentioned in the Annexure to this Order towards Customs duty as demanded at (a) & (b) above.

f) I impose a penalty equivalent to differential customs duty of Rs. 41,89,834/- demanded at (b) above, plus interest up to the date of payment under Section 114A of the Customs Act, 1962 on the Exporter M/s The Kutch Salt and Allied Industries Ltd. If the Exporter satisfies the condition of payment of duty and interest under first proviso to Section 114A, subject to the satisfaction of the second proviso the penalty shall get reduced to 25% of the penalty determined. I am not imposing any penalty under Section 114 of the Customs Act, 1962 in terms of fifth and last proviso of the Section 114A of the Customs Act, 1962.

g) I also impose a penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) under Section 114AA of the Customs Act, 1962 on M/s The Kutch Salt and Allied Industries Ltd.

h) I impose a penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on Babulal Singhvi, Director of M/s The Kutch Salt and Allied Industries Ltd., under Section 114AA of the Customs Act, 1962.

2. We have heard Learned Counsel for the appellant and Learned Authorised Representative for the Revenue and perused the records.

3. Iron ore fines, the goods which are the subject matter of export in these appeals are subject to export customs

duty @20% ad valorem. In dispute in these appeals is the value of the export goods on which duty has to be paid.

4. The exporter entered into a contract with M/s Swiss Singapore Overseas Enterprises Pvt Ltd., Singapore to export 45,000 Metric Tonnes of Iron Ore fines (Wet Metric Tonne Basis) (+/– 10% at seller's option). This contract was amended increasing the quantity to 50,000 Metric Tonnes and also extending the period of shipment. The contract provided for a price to be paid @ US$ 94.00 per Dry Metric Tonne of Iron Ore fines on CFR Main Port, China basis on the basis of 53/52 grade. It also provided for adjustment of the price based on the Fe content and the impurities based on the test report of a testing agency viz., CIQ, China. CFR (also known as C&F) is one of the standard agreements of trade where the price includes the cost of the goods as well as the cost of the freight upto the port indicated therein but not the transit insurance.

5. The exporter then chartered vessel M.V. Great Praise from a Singapore Company to export the goods and filed 3 shipping bills for the purpose. The goods covered by all the 3 shipping bills were exported in this vessel. It declared the value of the export goods on provisional basis because as per its agreement with the buyer, the final price could be determined only on the test report, after the goods reached the destination.

6. The Department also drew samples of the iron ore fines and tested them in the Customs House Laboratory at Visakhapatnam. The case of the assessee is that after the goods were exported, they were tested by the Testing Agency CIQ, whose report was agreed to between the buyer and the seller and the final price was determined and the final commercial invoice was issued in terms of the agreement taking into consideration the test report of M/s CIQ. Learned Counsel for the appellant has taken us through the final commercial invoice placed at page 76 of the appeal book which indicates the total weight of the iron

ore fines as 49,700 (WMT) and 45,351.250 (DMT). The amount in US$ is indicated as US$ 4,263,017.50 calculated @ US$ 94 per DMT. The invoice then makes adjustments in its price. Since the Fe content as per the test report of CIQ was 53.52% instead of 53% a bonus of US$ 23,582.65 was added to the invoice. Since the silica content was 9.05% above the permissible limit of 8.50%, US$ 1.247.16 was deducted as penalty. After adjusting for the amount already paid against the provisional invoice, an amount of US$ 5,106.14 is billed in this invoice. The appellant had paid export duty @ 20% of its FOB value.

7. The case of the Department is that the contract price entered into by the appellant and its overseas buyer should be determined as per the test report of the Chemical Examiner of CRCL (instead of the test report of CIQ) and accordingly the FOB value should be treated as higher than what was indicated, consequently differential export duty should be recovered from the appellant.

8. Further, during the course of investigation, the Department found that the overseas buyer had paid to an overseas agent M/s Reliance Shipping and Trading Ltd., Hong Kong an amount @ US$ 10 per Metric Tonne as "Vessel Freight Charter Arranging Charges for MV Great Praise". This payment was discovered during the investigation. The case of the department is that this was an additional consideration for sale because it has been stated by Shri Babulal before the Customs that this payment was made by the buyer directly to the exporter's agent thereby depressing the value of the goods. In the impugned order, this amount was added to the FOB value to calculate the amount of export duty payable.

9. Learned Counsel for the appellant submits that the impugned order is not correct and cannot be sustained because the transaction value between the buyer and seller is a subject matter of agreement and it cannot be altered by the Revenue. As per Rule 3 of the Customs Valuation

(Determination of Value of Export Goods) Rules 2007[5] unless the declared transaction value is rejected, export duty has to be determined based on the transaction value. This rejection is possible only under Rule 8 of the Export Valuation Rules. There is nothing on record or in the investigation or in the documents enclosed with the show cause notice to indicate that the appellant had received any amount higher than the amount declared in the final invoice. Therefore, export duty cannot be charged on any notional FOB value but has to be charged on the original FOB value. As far as the addition of US$ 10 per MT is concerned, Learned Counsel submits that unlike the Customs Valuation (Determination of Value of Import Goods) Rules 2007[6]which provide for addition of commission to the transaction value, the Export Valuation Rules do not provide for any such addition. He also submits as per the statements given by the appellant during investigation the appellant was not even aware for the amount being paid by the buyer to an agent based in Hong Kong to charter the vessel. Therefore, he prays that the demand is not sustainable and may be set aside with consequential relief to the appellants.

10. Learned AR for the Revenue relies on the impugned order. He further asserts that when there are two conflicting test reports, the test report of the Government Laboratory cannot be ignored in favour of private test report. He relies on the judgments of the Supreme Court in M/s Aban Loyd Chiles Offshore Ltd., Vs Union of India [2008 (227) ELT 24 (SC)] where it has been held as follows:

> *".....The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Committee of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say-yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply*

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[5] Export Valuation Rules
[6]Import Valuation Rules

> *national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid confrontation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield."*

He also relies on the order of this Bench in the case of Kimmi Steels Pvt Ltd., [2019 (368) ELT 92 (Tri-Hyd)] upheld by the Supreme Court reported at [2019 (368) ELT A 40 (SC)].

11. On the question of US$ 10 per MT paid extra, Learned AR submits that in his statement dated 03.01.2023 Shri Babulal Singhvi has accepted that export value was declared by reducing the commission paid by the buyer to their (exporter's) overseas agent for getting them export order. In other words, the commission was not paid to charter the vessel but to procure the export order. Normally, the exporter should have paid the Commission and instead the buyer paid this amount to the agent and the exporter correspondingly reduced the price. These payments were made by the buyer on the advice of the exporter in the designated bank accounts of their agents either as freight charter arrangement charges or as commission. He further stated that these commissions were not declared to the Customs and the value declared to the Customs is to the extent of commissions paid to these overseas agents and if there is any liability to pay export duty on these commissions, they are ready to pay the same.

12. We have considered the submissions by both sides.

13. The two questions to be answered by us in this case are:

a) Can the transaction value between the buyer and seller be modified by the Customs based on the test report of the chemical examiner of CRCL when the price should be finalised as per the test report of CIQ as per the agreement between the buyer and seller?
b) Can the US$ 10 per MT be added as additional consideration for sale in the case?

14. Duties of Customs are levied on the goods imported into India or exported from India as per section 12 of the Customs Act, 1962[7] at the rates specified in the schedules to the Customs Tariff Act, 1975. These duties can be based on quantity (specific rate of duty) or value (ad valorem rates of duty). If duties are to be levied on the value, such value shall be determined as per section 14 of the Act and the Valuation Rules. Section 14 reads as follows:

> "**14. Valuation of goods**.—(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, **for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf**:
>
> Provided that such transaction value **in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage,engineering,design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges** to the extent and in the manner specified in the rules made in this behalf:
>
> ……….."

15. Thus, value for the purpose of determining the duty is the transaction value subject to four conditions (a) that the sale is for delivery at the time and place of exportation; (b) buyer and seller are not related; (c) price is the sole consideration for sale; and (d) subject to other conditions which may be specified by the Rules. The proviso to this section indicates that in case of imported goods, the value of commissions and few other charges have to be included. However, it does not provide for inclusion of commissions in case of exports.

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[7]**Act**

16. The distinction between valuation of export goods and imported goods is also reflected in the respective valuation Rules which fully align with Section 14. Rule 3 and 10 of the Import Valuation Rules deal with the issue and relevant portions of which reads as follows:

> **Rule 3. Determination of the method of valuation. -**
>
> (1) Subject to rule 12**, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10**;
> (2) ..
> (3) ..
> (4) **if the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9**.
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> **Rule 10. Cost and services** . -
>
> (1) In determining the transaction value**, there shall be added to the price actually paid or payable for the imported goods**, -
>
> (a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-
>
> > **(i) commissions and brokerage, except buying commissions**;
> >
> > (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
> >
> > (iii) the cost of packing whether for labour or materials;
> >
> > ………
>
> (4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule."

17. The Customs Export Valuation Rules, however, do not provide for adding any commission to the value of the goods. Rule 3 of these Rules reads as follows:

> **Rule 3. Determination of the method of valuation. -**
>
> (1) **Subject to rule 8, the value of export goods shall be the transaction value.**

> (2) The transaction value shall be accepted even where the buyer and seller are related, provided that the relationship has not influenced the price.
>
> (3) **If the value cannot be determined under the provisions of sub-rule (1) and sub-rule (2), the value shall be determined by proceeding sequentially through rules 4 to 6.**

18. Thus, the distinction between the imports and exports valuation in so far as it pertains to addition of commissions in Section 14 is reflected in the corresponding Valuation Rules. We now proceed to decide the two issues before us:

Redetermining the transaction value based on the test report of CRCL instead of the test report of CIQ

19. To examine this re-determination in the impugned order, we need to examine as to what is transaction value. Transaction value is the price paid or payable by the importer(buyer) to the exporter (seller) as a consideration for the goods which are exported. It is negotiated and agreed to by them in the contract. Nobody else, including the Customs officers have any role in deciding the transaction value because they are strangers to the contract. It determines the rights and liabilities between the buyer and seller. If the transaction value is '$ X', the exporter in India is entitled to receive this amount. Conversely, if the goods are imported into India for transaction value of '$ X', the importer is obliged to remit this amount and no more. If the transaction value is contingent upon certain other factors as per the contract between them, it will have to be determined accordingly. Nobody else who is not a party to the contract, including the Customs officers have any right to add or delete or modify the conditions of the contract.

20. When rejecting the transaction value while determining the value of the imported or export goods, what the Customs officer can do is, if he doubts the truth and accuracy of the transaction value, reject it as the value for the purpose of determining the duty and determine the value for through other methods such as values of contemporaneous imports and exports, etc. Thereafter, the

duty is determined based on such value instead of the transaction value but it does not alter the transaction value. An illustration will make this legal position clear. 'A' imports a luxury car from 'B' in UK for, GBP 10,000 and declares this price. The proper officer, finding this value is too low, rejects the transaction value and determines duty on a higher value based on contemporaneous imports. Duty will have to be paid on the value determined by the officer but the transaction value continues to be GBP 10,000 as agreed and the importer will have to remit this amount to the exporter and he does not have to remit any amount as determined by the officer.

21. In this case, the transaction value as per the agreement has an adjustment clause which provided that the value shall be re-determined as per the test report of CIQ. The Customs officers cannot change this transaction value or the stipulation of the test report of CIQ being the determinant of the transaction value. The report of Chemical examiner, CRCL is irrelevant to the transaction value. It will be a different matter if the testing has to be done for some Customs purpose, say, to determine the nature of the goods or if the availability of the exemption notification depended on the Fe content of the export goods, etc. Then, the customs officers can rely on the CRCL's test report. Thus, the impugned order re-determining the transaction value based on the CRCL test report is not correct and cannot be sustained.

22. The decision of this tribunal in **Kimmi Steels** upheld by the Supreme Court has been relied on by the Revenue. That case was completely different although the goods were iron ore fines in that case as well. During the relevant period in that case, export duty was chargeable on weight with a partial exemption notification if the Fe content was below a certain threshold. There were conflicting test reports regarding the Fe content and in the absence of clarity regarding the entitlement to the exemption notification, it was denied.

23. We answer this question in favour of the exporter and against the Revenue.

Addition of US$ 10 per MT paid by the overseas buyer to M/s. Reliance, Hongkong as commission

24. As is evident from the proviso to sub-section (1) of Section 14 and the Export Valuation Rules, unlike in case of import valuation, Commissions paid cannot be added for the purpose of determining the value in case of exports even if it was paid by the exporter.

25. The case of the Revenue, however, is that the amount paid by the buyer to M/s. Reliance, Hong Kong, the agent, is an additional consideration for sale as this amount which was to be paid by the exporter was, instead paid by the importer and thereby the transaction value was reduced. Therefore, according to the Revenue, price was not the sole consideration for sale in this case.

26. We find that it is true that transaction value either for imports or exports can be the value if:

- **(a) price is the sole consideration for sale;**
- (b) the price is delivery at the time and place of exportation;
- (c) the buyer and seller of the goods are not related; and
- (d) subject to such other conditions as may be specified in the rules made in this behalf

27. If, indeed, the price was not the sole consideration for sale, the transaction value can be rejected under Rule 8 of the Export Valuation Rules and then, it must be re-determined sequentially through Rules 4 to 6. Rule 4 provides for determining the value based on the transaction value of goods of like kind and quality exported at or about the same time. Rule 5 provides for valuation based on a computed value, including cost of production, manufacture or processing of export goods, charges, if any, for the design or brand and an amount towards profit. Rule 6 is a residual

Rule to be applied if Rules 4 and 5 do not apply. None of these Rules provide for addition of an amount as additional consideration for sale.

28. Therefore, this amount of US$ 10 per MT cannot be added as additional consideration for sale to the export price. If there was additional consideration for sale, the proper course would have been to the officer to reject the transaction value and re-determine the value under Rule 4 or Rule 5 or Rule 6 sequentially.

29. Thus, we answer both questions in favour of the appellants and against the Revenue. Both appeals are allowed and impugned order is set aside with consequential reliefs to the assessee.

(Order Pronounced in open court on 01.04.2024)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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