

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Customs Appeal No. 76153 of 2015

(Arising out of the Order-in-Appeal No. 41/CUS/CCP/B/2015 dated 28.09.2015 passed by Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s Ore Cast (India),

N-5/395. IRC Village, Nayapalli. Bhubaneswar-751015.

...Appellant (s)

VERSUS

Commissioner of Customs, Central Excise & S. Tax, BBSR-I.

C. R. Building, Rajaswa, Vihar, P.O. Vani Vihar, Bhubaneswar-751007 (Odisha).

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...Respondent(s)

With

Customs Appeal No. 75011 of 2016

(Arising out of the Order-in-Appeal No. 41/CUS/CCP/B/2015 dated 28.09.2015 passed by Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

Commissioner of Customs (Preventive), Bhubaneswar.

C. R. Building, Rajaswa, Vihar, P.O. Vani Vihar, Bhubaneswar-751007 (Odisha).

...Appellant (s)

VERSUS

M/s Ore Cast (India),

N-5/395. IRC Village, Nayapalli. Bhubaneswar-751015.

.

...Respondent(s)

APPEARANCE :

Shri S. C. Choudhury, & Mr. N. Malick, both Consultant for the Assessee-Appellant

Shri S. Debnath, Authorized Representative for the Revenue-Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.....77285-77286/2023

DATE OF HEARING : 10.10.2023

DATE OF DECISION : 10.10.2023

PER K. ANPAZHAKAN :

M/s Orecast (India), engaged in import, export and Merchant trading as a Star Export House, exported 34000 MT of Iron Ore fines

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having Fe content of 61% (rejection level- below 60%) at a Unit price of USD 153 Per MT, as per Contract dated 13.04.2011. They have paid export duty amounting to Rs.4,22,58,967/-. In the original contract, the last date of shipment was 05.05.2011, which got extended upto 25.05.2011. As per Addendum dated 31.05.2011, the rejection level of Fe content in the iron ore fines was amended to below 58% from 60% in the earlier contract. The export price was also reduced to USD 125 Per MT. Since, the exporter has already paid duty @USD 153 Per MT, they have filed refund claim on the ground that the overseas supplier has allowed them price rebate @28\$ Per MT, in terms of Addendum No.3 dated 31.05.2011 to the contract dated 13.04.2011, on 08.08.2011.

2. The Asst Commissioner, Paradeep rejected the refund on the following grounds:

“(i) As per Section 27(I) of the Customs Act, 1962, the application has not been filed within one year of payment of duty.

(ii) The date of filing of complete application should be reckoned as the date of filing of refund application.

(ii) The date of payment of duty in this case is 11.5.2011 where as the date of filing of complete application is 23.11.2012 which is beyond one year in terms of Section 27(I) of the Customs Act, 1962.

(iv) The Shipping bill dated 9.5.2011 though filed after introduction of self-assessment in Customs w.e.f. 8.4.2011, the shipping bill has not been reassessed by the exporter though value & quantity has been changed.

(v) The refund claim was directly filed after three months which was not proper.”

3. On appeal, the Commissioner (Appeals) the Commissioner (Appeals) partly allowed the refund and partly rejected the refund.

4. Aggrieved against the rejection of refund of Rs.66,43,390/-, the Appellant filed appeal before this Tribunal. The Department also filed

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appeal against the sanctioning of refund of Rs.6,76,254/-. As both the decisions emanate from the common Order-in-Appeal, both are taken up together for decision.

4. In their grounds of appeal, the Appellant made the following submissions:

(i) Valuation of export goods attracting ad valorem rate of export duty is to be done in accordance with the provisions of Section 14 of the Customs Act, 1962 read with the Customs Valuation (determination of value of Export Goods) Rules, 2007. Section 14(1) states that where the export goods are sold by the exporter 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, the value of the export goods shall be the 'transaction value' of such goods, that is to say, the price actually paid or payable for the goods, is relevant for determination of export duty payable thereon. Thus, if the buyer and seller are not related and if the price is the sole consideration, the transaction value at the time and place of export will be the assessable value.

(ii) Ministry of Finance issued Circular No. 37/2007-Cus dated 9.10.2007 wherein under para 4 it has been clarified that 'transaction value' is the primary basis for valuation of export goods and the method specified in Rule 3 will be applicable in the vast majority cases of export by acceptance of declared value.

(iii) Vide Circular No. 18/2008-Cus dated 10.11.2008, the Ministry has held that from 01.01.2009, transaction value will form the basis and export duty will be calculated simply on FOB price. Rule 3(3) of the

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Export valuation Rules, provides that if the value cannot be determined under sub-rule (1) and sub-rule (2), the value shall be determined by proceeding sequentially through rule 4 to 6.

(iv) In the instant case, the export of goods is made at the time and place of exportation through Paradeep Port, the buyer and seller are not related and the price paid or payable for the export goods is secured by an irrevocable Letter of Credit . Hence, the transaction fulfills all the essential elements of transaction value contemplated under Section 14(1) of the Customs Act, 1962 and Revenue is obliged to accept the 'transaction value' as clarified by the Ministry in the aforementioned two Circulars.

(v) In the present case, the above said directions of the Ministry have not been complied with by the Adjudicating Officer or by the Commissioner (Appeals).

(vi) As per clause-9 of the Contract, i.e. on 'Sampling & Analysis', the test result of the chemical composition of the export product by Intertek India Pvt. Ltd., was binding on the seller and buyer of goods and the sale price was accepted by both. Since the chemical composition of Fe was not within the guaranteed limits of 60%, the Contract price was required to be adjusted in the light of clause-5 of the Contract read with Addendum No. 3 dated 31.5.2011 (Annexure-9) on the basis of which the Buyer's banker got the letter of credit amended by reducing the FOB value USD 52,02,000 to USD 42,50,000 and intimated the same to the exporter's Banker, namely, Bank of Baroda, Mumbai on 01.06.2011 and Commercial invoice No. OCI/ZHGCL/001/11-12 dated 01.06.2011 (Annexure-10) for USD 39,75,200.30 was issued to the

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Buyer for 33673 WMT/31763.740 DMT of Iron ore fines. BRC certified that USD 39,75,200.30 equivalent to Rs.17,80,79,565/- has been received.

(vii) In the subject Shipping Bill, the assessment was made provisional subject to test result of the sample. Out of 34000 WMT declared in the subject Shipping Bill, 327 WMT of such goods could not be loaded into the vessel.

(viii) Pursuant to the condition under Clause 9 of the Contract, Intertek India Pvt. Ltd., the authorized surveyor submitted the "Certificate of weight" and "Certificate of Quality" vide its letter dated 23.05.2011. According to the said certificate, the chemical composition, moisture and physical specification was as under:-

- a) Chemical composition (on dry basis)
- | | | |
|----------|-----|-----------|
| Fe | ... | 59.11 PCT |
| SIO2 | ... | 4.55 PCT |
| AI2O3 | ... | 5.57 PCT |
| P | ... | 0.055 PCT |
| S | ... | 0.013 PCT |
| Moisture | ... | 5.67 PCT |
- b) Physical specification (on Natural Basis)
- | | | |
|------------------|-----|------------|
| Above 10 mm | ... | 2.47 PCT |
| Below 10 mm | ... | 97.53 PCT |
| Below 150 Micron | ... | 21.44 PCT. |

(ix) Thus, the difference between the figures shown in the Shipping Bill dated 09.5.2011 and the Certificate of Intertek India are as under:-

Description	As per Shipping Bill	As per Intertek India
Quantity	34000 WMT	33,673 WMT
Fe Content	61%	59.11%
Moisture	Max.8%	5.67

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(x) In order to accommodate these discrepancies, the exporter requested the buyer to amend the LC clauses and the same was done by an Addendum No. 3 dated 31.05.2011 by mutual agreement by amending the relevant Clauses. As per Addendum 3, the export price was reduced to USD 125 Per MT. Since, the exporter has already paid duty @USD 153 Per MT, they have filed refund claim of Export Duty of Rs.66,41,508/- paid as per the assessment made in the Shipping Bill dated 09.05.2011.

(xi) BRC has certified that USD 39,75,200.30 equivalent to Rs.17,80,79,565/- has been received. Accordingly, the Appellant contended that they are eligible for the refund of Rs.66,41,508/-.

5. The Revenue has filed appeal against the impugned order on the following grounds:

“(i). The Commissioner (Appeals) has allowed partial relief to the exporter by considering the unit price of the export goods “iron ore fines” at 59.11% Fe content based on certificate issued by Intertek India Pvt. Ltd., on dated 23.5.2011.

(ii). The subject shipping bill dated 9.5.2011 was filed by the exporter pursuant to the introduction of self-assessment provision in the Customs Act w.e.f. 8.4.2011 who has paid duties on self-assessment basis on 11.5.2011. Even after changes in value and quantity of export goods, the Shipping Bill has not been reassessed by the exporter and directly filed the refund application on 8.8.2011 which is beyond one year of the date of payment of duty as provided under Section 27(I) of the Customs Act, 1962.

(iii). Hon’ble Apex Court in the case of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd., reported in 2000 (120) ELT 285 (S.C.) has held that where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a refund claim on the

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ground that the adjudicating authority has committed an error in passing his order.

(iv). In view of the above, Shipping Bill filed by the exporter pursuant to the introduction of self-assessment provision in the Customs Act w.e.f. 8.4.2011, which has neither been reassessed nor the assessment challenged by the exporter has attained its finality."

6. Heard both sides and perused the appeal documents.

7. We observe that the Appellant has executed a contract dated 14.04.2011, as per which the agreed price of Iron Ore was US\$ 153 per DMT. The Appellant have paid export duty amounting to Rs.4,22,58,967/-on the basis of this agreed price. As per Clause 9 of the Contract, Intertek India Pvt. Ltd., the authorized surveyor submitted the "Certificate of weight" and "Certificate of Quality" vide its letter dated 23.05.2011. As per this certificate, the Fe content was 59.11%. As per the agreement, if the Fe content is less than 60%, then the contract is liable to be rejected. Since the chemical composition of Fe was not within the guaranteed limits of 60%, the Contract price was required to be adjusted in the light of clause-5 of the Contract. Accordingly, Addendum No. 3 dated 31.5.2011 was signed on mutual agreement. In the original contract, the last date of shipment was 05.05.2011, which got extended upto 25.05.2011. As per Addendum dated 31.05.2011, the rejection level of Fe content in the iron ore fines was amended to below 58% from 60% in the original Contract. The export price was also reduced to USD 125 Per MT. Since, the exporter has already paid duty by adopting @USD 153 Per DMT, they have filed refund claim on the ground that the overseas supplier has allowed the revised price of USD 125 Per MT. The original adjudicating authority

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rejected their refund claim, however, the Appellate authority partially allowed the refund claim.

8. The Commissioner (Appeals) partially allowed the refund on the basis of the following observations and method of work sheet, which is reproduced below:

“5.8. It may be further submitted that the certificate of quality issued by intertek India Pvt. Ltd., have certified the Fe content as 59.11% with 5.67% moisture content contained in the iron ore fines before exportation. It therefore follows that the Assessing Authority should have reassessed the value on the basis of on 59.11% Fe content and quantity on 5.67% moisture basis. But unfortunately this exercise has not been done by the Customs Authority. if the base price of iron ore fines with 61% Fe content is taken at USD 153.00/PDMT, then the price at 59.11% of FE content should be 148.260 USD/PDMT. There is no hitch to adopt such price for the goods exported on 19.5.2011. I therefore, hold that there is substance in the arguments of the appellant for reassessing the value of export goods and granting of refund if any. Further, the claim is found acceptable for the simple reason that the certificate of quantity and quality issued by Intertek India Pvt. Ltd, are continent to make assessment of export of goods. It was, thus required to re-determine the quantity and quality of Iron ore fines on the basis of these certificates. The Assistant Commissioner has not taken the appellant’s contentions for undisclosed reasons. I hold that there is merit to make re-assessment of assessment made earlier. In view of the above, the recalculation of duty liability on the goods is worked out as under:-

Table

Sl. No.	Description	Unit	Quantity/Value
1.	Quantity dispatched (Fe 59.11% basis and moisture 5.67%	WMT	34000.00
2.	Quantity short shipped as per short shipment notice dated 19.5.2011	WMT	327.000
3.	Quantity dispatched (Sl No. 1- Sl. No. 2)	WMT	33673.000
4.	Less; moisture 5.67%		1909.259
5.	Quantity actually dispatched	DMT	31763.740
6.	Basic Rate /DMT (Fe 59.11%) is reduced from basic	USD	148.260

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	rate USD 153/DMT(Fe 61%)		
7.	Basic price @148.260X31763.740	USD	4,709,292.092
8.	Rate of exchange	Rs	44,15
9.	Assessable value	Rs	20,79,15,246.00
10.	Export duty @ 20% Adv.	Rs	4,15,83,049.00
11.	Cess @ Re1/- per WMT on 33673 WMT	Rs	33673.00
12.	Education Cess @ 2% on cess	Rs	674.00
13.	Secondary & Higher Education Cess @ 1/- on cess	Rs	337.00
14.	Advance supervision charge	Rs.	25,000.00
15.	Total duty payable	Rs	4,16,42,733.00
16.	Duty already paid	Rs	4,23,18,987.00
17.	Duty refundable	Rs	6,76,254.00

As per the above calculation, the appellants are entitled to refund of excess duty of Rs.6,76,254/- and I extend the said benefit in their favour.”

9. We observe that the method adopted by the Commissioner (Appeals) mentioned above is not proper. In the original contract dated 13.04.2011, there was a provision for reducing the price when the Fe content is less than 61%. However, this contract in total will be rejected when the Fe content is less than 60%. In this case as per the Certificate issued by Intertek, the Fe content was 59.11%. Accordingly, the original contract dated 13.04.2011, was liable to be rejected and the terms of arriving at the revised price as per the original contract no longer exists. In view of the Report from Intertek, the agreement was reworked and Addendum 3 dated 31.05.2011 was mutually accepted. As per this Addendum, the revised price agreed was USD 125, wherein the contract will be rejected if the Fe content is less than 58%.

10. Section 14(1) states that where the export goods are sold by the exporter for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related

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and price is the sole consideration for the sale, the value of the export goods shall be the 'transaction value' of such goods, that is to say, the price actually paid or payable for the goods, is relevant for determination of export duty payable thereon. Thus, if the buyer and seller are not related and if the price is the sole consideration, the transaction value at the time and place of export will be the assessable value. Thus, we agree with the contention of the Appellant that the assessable value of the goods exported with 59.11% Fe content would be USD125. Accordingly, we hold that the Appellant was liable to pay export duty on the basis of assessable value of USD 125 Per MT. Since the Appellant has already paid export duty by adopting USD 153 per MT, we hold that they are eligible for refund of the excess duty paid. Since the Appellant are eligible for the excess customs duty, the department's appeal challenging the partly allowed refund is not sustainable. Accordingly, the department's appeal is liable to be rejected.

11. In view of the above discussion, we allow the appeal filed by the Appellant and reject the department's appeal.

(Dictated and pronounced in the open Court)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar