

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
REGIONAL BENCH – COURT NO.1**

Customs Appeal No. 75506 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS(PORT)/KS/474/2023 dated: 15.06.2023 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s. Moorgate Industries (I) Pvt. Ltd.

(56 Jatin Das Road, 2nd Floor, Kolkata-700029, W.B.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(Customs House, 15/1 Strand Road Kolkata- 700001.)

...Respondent

APPEARANCE :

Present for the Appellant: Mr. Jnanesh Mohanty & Ms. Shreya Mundhra, Advocate

Present for the Respondent: Mr. Subrata Debnath, Authorised Representative

CORAM:

HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No...77639/2023

DATE OF HEARING :30.11.2023

DATE OF DECISION : 30.11.2023

PER: RAJEEV TANDON

M/s. Moorgate Industries Pvt. Ltd. have filed the present appeal assailing the Order in Appeal No. KOL/CUS(PORT)/KS/474/2023 dated 15 June 2023. The present appeal, that has been filed by the appellant is in the second round of litigation in respect of exports of 24203MT(WMT) of Iron Ore Fines made vide Shipping Bill No. 7545595 dated 24.07.2017. The said exports were made in terms of an agreement entered into with the overseas buyer bearing No. MIL/SINO/01 dated 13.07.2017. The appellant contends

that in terms of the said agreement, the value of iron ore fines was to be determined on the basis of Certificate of Inspection and Quality (CIQ) analysis conducted at the port of discharge as to the wet quantity of shipment and the dry quantity shall be determined by deducting the free moisture from such wet quantity. In case of variation between the weight at the point of discharge and the load port the average thereof would be arrived at, for all purposes.

2. Dispute in the present appeal concerns the 'Fe' content in iron ore fines exported vide the above referred Shipping Bill and the consequent determination of value for purposes of levy of export duty. The appellant filed the Shipping Bill intimating the iron content therein as 57.30% and moisture content as 8.98%. This was said to be based on the load port analysis, report obtained from a duly recognised testing concern- M/s. Mitra S.K. Pvt. Ltd. (MSK). As per record the discharge port report/CIQ indicated the iron content as 57.53% and moisture. The appellant submits that both the load port and the discharge port report confirms the iron content as below 58% whereby the product was classifiable under heading 26011142, attracting NIL rate of duty in terms of Notification No. 15/2016-Cus dated 01.03. 2016.

3. During the earlier round of litigation, the proper officer had finalised the assessment, based on the test report of the CRCL, which had determined the iron content as 62.4% and moisture content as 5.5%, thereby denying the benefit of NIL rate of Customs export duty. The appellant therefore states that the valuation of export consignment was worked out ignoring the actual monetary value received as per the BRC and an export duty of 30% was confirmed by the department. In short, the plea taken by the appellant

is that the assessment of goods exported was carried out, ignoring the test report of the load port as well as the discharges port, the bank realisation certificate submitted by the appellant and assessment done, based merely on the test report drawn by the Custom House Laboratory, Kolkata indicating the iron content as more than 58% classifying the same under 26011131, attracting export duty, at the rate of 30% ad valorem, and confirming the demand of duty on the grounds of the iron content as determined on the basis of dry metric ton. They also point out that the test results of the Custom House Laboratory, based on which the assessment was undertaken, was never disclosed to them nor a copy of the said test report made over to them.

4. It has been argued by the appellant that the issue relating to valuation of iron ore fines, is no longer res integra and has been settled by the Hon'ble apex court, in the case of **Union of India Vs. Gangadhar Narsinghdas Agarwal**¹, wherein the Hon'ble Court has held that for the assessment of iron ore fines the determination of iron content shall be on WMT basis. The appellant also relied upon the Hon'ble Bombay High Courts decision in the case of **M/s. V.M Salgaonkar Brothers and Others Vs. Commissioner**² as well as the decision of this Tribunal in the case of **M/s. Bagadia Brothers Pvt. Ltd. Vs. Commissioner**³ in support of their contention. On the aspect of the wide variation in the moisture content reported by the load port, as well as in the discharge port report at 9% vis a vis the CRCL report at 5.5%, the appellant submits that the same is on account of delay in

1. 1997 (89) ELT 19 SC

2. 2022 (9) TMI 1306 Bombay, HC

3. 2023 (9) TMI 827 CESTAT, Kolkata

testing as well as incorrect sampling. The following chart indicates the position in this regard:

Sl. No.	Shipping Bill No.	Shipping Bill date	CHA- Government Laboratory Report date	No. of days between Shipping Bill date and CHL Report date	Government recognized private Laboratory Report date	No. of days between Shipping Bill date and Government recognized Private Laboratory Report date
1.	7545595	24.07.2017	19.09.2017	57	09.08.2017	16

5. Thus the appellant vehemently argues that the CRCL report is unacceptable as to be the basis for determining the value of the iron ore fines. Another ground for which they hold the CRCL report as non-acceptable is for the fact that despite the said report being available and generated in 2017, yet the same was not provided to the appellant till the second round of litigation. The claim being that they had been denied an opportunity to prefer an appeal and argue their case against the said report for retesting of the samples. The appellant, therefore contends that for this reason alone, the impugned order is liable to be set aside as the relied upon report is nothing short of being a fallacy.

6. The learned Authorised Representative for the department, Shri Subrata Debnath, however supports the order in appeal and points out that the iron content being over 62%, (62.4% to be precise) on Dry Weight basis and moisture content being 5.5% (that is more than 58% of iron content), the tariff entry for export goods automatically changed from RITC 26011142 (iron ore fines with a Fe content 55 to 58%) to RITC26011131.

7. The primary issue, therefore, to be decided is whether the CRCL report can be accepted and the assessment of the export goods carried out based

thereon. We note that the appellant has challenged the acceptability of the CRCL report only for the following two reasons.

a. That the said report had not been supplied to them despite the same being available with the authorities way back in 2017, thereby depriving them to effectively argue, on the said issue, in the first round of litigation and

b. That the CRCL samples were not drawn and tested in accordance with the procedure as set out in BS1405 -2010

8. It is an accepted position that the aforesaid CRCL report was not supplied by the department to the appellant and has been only supplied to them now during the second and present round of litigation. For this reason of non supply of the test report alone, the acceptability of the CRCL test report can be safely given a go by. However, we note and as pointed out by the learned Advocate that during the present round of litigation before the lower authorities, they had filed detailed submissions in the matter, including the procedure and manner of drawal of samples as per BIS, and state as:

"In the Bureau of India Standard 1405-2010, the procedure for drawal of sample has been elaborately explained. In the said Standard, it has been clearly stated that for determination of Fe content and Moisture content, the sample should be drawn in specific quantity and to be sealed in air-tight container with suitable lids. For determination of moisture the sample should be tested as quick as possible after the sample is taken and the Moisture determination shall be determined as per IS 11690. Some of the standards of BIS 1405-2010 is reproduced below:

11.2.2.- Preparation of moisture sample:

From the moisture sample prepared from each gross sample, two samples of 1 Kg. each shall be obtained by increment reduction method after mixing the sample on a non-moisture absorbent surface. These samples shall be sealed in an air tight container with suitable lid and send for moisture determination.

11.2.3- Laboratory sample for chemical analysis:

The laboratory samples shall be obtained after the material in pulverized to pass through 150 microns.

4. This method is not applicable to divide samples containing high moisture content, of sticky iron ore. However, samples may be sufficiently dried before division.

12.1- Moisture samples:

To avoid any change in Moisture content, the Moisture determination shall be done as quickly as possible, after sample is taken. Moisture determination shall be determined as per IS 11690.

8.1. In the present case, it nowhere comes on record that the sample of Customs House Laboratory were drawn in strict adherence to the BIS Standards, as also contained in the Board's Circular. Moreover, the sample is alleged to be drawn by the Customs Officer at the back of the appellant and without the knowledge of the exporter, which is against the statutory mandates provided under Section 144 of the Customs Act, 1962. They thus state that the Test Report given on the basis of the sample which was not drawn as per BIS, cannot be considered for any proceedings and the said Test Report is not valid for the purpose of determination of Fe content or moisture content. On the other hand, the sample had been drawn by

M/s. Mitra S.K. Private Limited, following the procedure laid down in BIS 1405-2010 as stated in the said Board's Circular No. 12/2014-Cus dated 17.11.2014, issued from File No. 465/8/2013-Cus V.

8.2. The appellant have placed on record a copy the detailed Test Report showing the % of Fe, Al_2O_3 , SiO_2 , S.P and Moisture. They have also shown test protocols against every chemical composition. For ready reference, the contents of the said Test report issued by Mitra S.K. Pvt. Ltd. is reproduced below:

" CERTIFICATE OF QUALITY "

JOB REF:JH/IEC/10-2017/00049-

DATE	:	
NAME OF COMMODITY	:	IRON ORE FINES
QUANTITY	:	23,650 WMT
PACKING	:	IN BULK
COUNTRY OF ORIGIN	:	
NAME OF CARRYING VESSEL	:	MV. AKIJ HERITAGE
INSPECTION DATE	:	02.08.2017 TO 04.08.2017
PORT OF LOADING	:	HALDIA PORT, INDIA
PORT OF DISCHARGE	:	

THIS IS REPORT that we have attended loading of Iron Ore Fines per MV JOSCO SUZHOU for the purpose of drawing samples as per BIS 1405-2010 to determine the quality parameters.

Analysis result reported by our laboratory is as under:

SPECIFICATIONS:	RESULTS	TEST PROTOCOLS
CHEMICAL COMPOSITION (ON DRY BASIS)		
Fe	57.30 PCT	IS 1493 (Part-I): 1981 RA 2011
AI2O3	5.38 PCT	IS 1493 (Part-I): 1981 RA 2011
SIO2	5.40 PCT	IS 1493 (Part-I): 1981 RA 2011
S	0.010 PCT	ISO 4689-3: 2015
P	0.040 PCT	IS 1493-1959 RA 2011

MOISTURE : 8.98 PCT

SIZE :

ABOVE 10 MM : 7.84 PCT

BELOW 0.15 MM : 17.32 PCT

WEATHER CONDITION :

ISSUED AT LOADING PORT : HALDIA PORT, INDIA

This certificate reflects our findings at the time, date and place of inspection only and does not refer to any other matter.

Sd/-

FOR Mitra S.K. Private Limited”

The contention, thus being, that the Customs Lab Report is cryptic and incomplete without showing the adherence to BIS Standards and protocols and method of testing and hence the same cannot be considered as valid. Moreover, when the goods have been tested in terms of BIS Standard by a reputed lab as identified in the contractual agreement between the buyer and the seller M/s. Mitra S.K. Private Limited, which shows an Fe content 57.3% and Moisture Content 8.98%, little remains to doubt its authenticity and acceptability. Since the report of the Customs Lab is cryptic and incomplete without showing the BIS Standard and protocol and method of testing, it is noticed that the appellant sought to cross examine the Customs Officer who had drawn the sample and the Chemical Examiner who had tested the sample.

9. It is thus evident that the CRCL test report is not only cryptic, but it is also not clear whether the same was in accordance with the prescribed standards. The fact that the sample was tested nearly two months after its drawal and had not been stored in accordance with the prescribed conditions, the reliability of the test result, therefore is not only doubtful but also unreliable. We also note that the Board's Circular- 12/2014-Cus clearly states that the sample is to be drawn in accordance with the BIS standards.

10. It is informed that the sample was found to be kept in plastic bags and not in air tight containers with appropriate lids. As the sample has not been drawn in accordance with laid down standards, the test results thereof cannot form the basis of any decision making process. On the aspect of drawal of sample and its reliance the Hon'ble Apex Court, in the case of

M/s. Tata Chemicals Ltd. Vs. Commissioner of Custom (Preventive)

Jamnagar⁴, had the following to say:

"Clearly the samples drawn by the Inspector in the present case, have been drawn contrary to the express provisions of IS 436. On this count also, the samples being drawn not in accordance with law, test reports based on the same cannot be looked at."

11. It is a settled position of law that when the goods are tested after considerable delay from the date of drawal, the same cannot be accepted. Further, for reasons not to reject the load port certificate given by reputed professionals, reliance in this regard can be derived from the ratio of the law in the following cases.

(i) M/s. Alpine international Vs. C.C, Mangalore⁵,

"5. On a careful consideration of the issue, I find that the samples were drawn on 27.08.2005. The Chemical Examiners rest report is dated 06.03.2006. From this it is very clear that nearly six months have elapsed from the time of export to the date of testing. There is much force in the learned Advocate's contention that there is likelihood of evaporation of moisture and a test conducted after lapse of time would definitely will not give the same iron content which was found at the time of export. The case law relied on by the learned Advocate is also relevant for the present

4. 2015(320) ELT 45 SC.

5. 2008 (224) ELT 332 (Tri-Bang)

case as in that case also the commodity was iron ore and a similar situation was examined. Moreover, the certificate produced by the appellant has been issued by a reputed testing company. The fact that the sample was not drawn in the presence of department officers is not a very strong ground to reject the test results. Hence in my view, the impugned order is not sustainable. I set aside the same and allow the appeal with consequential relief."

(ii) M/s. Bagadiya Brothers Pvt. Ltd. Vs. C.C. & C.Ex., Vizag6,

"10. In view of the above discussions, we pass the following orders:

i) direct the assessing officers to determine Fe content on WMT basis by deducting the moisture given in the test reports of NABL accredited government approved Private Laboratory;

ii) convert the % age of Fe on DMT basis to % age of Fe on WMT basis by applying the universally recognized formula for determination of classification of IOF exported. The formula is :-

$$\text{Iron content} = \text{Fe} \times (100 - M) / 100$$

(on as received basis)

Where Fe is % age of iron content on dry basis,

M is moisture content in the sample.

iii) finalise the assessments accordingly.

(iii) M/s. Mineral Enterprises Ltd. Vs. C.C, Mangalore⁷,

"9. We also find that revenue aggrieved by such an order and they took this matter in a Civil Appeal before the Hon'ble Supreme Court and the Apex Court 1997 (89) ELT 19 (SC) have upheld the decision of the Hon'ble High Court of Bombay. The ratio of the said decision is that whenever any sample has to be tested, it has to be tested in the condition in which goods were exported. If it be so, we find that the Deputy Chief Chemist report as reproduced herein above cannot be relied upon by the Revenue.

10.....

11. We also find that the reliance placed by the learned Counsel on the above said case has strong force. In that case also an identical issue was decided by this Bench and upheld that testing of a sample after 6 months will not give same iron content, which was found at the time of export."

12. The fact of the case that both the load port and discharge port test report confirm that the samples have been drawn in adherence to the procedure laid down under the BIS, we find that the discharge port/CIQ in

7. 2010 (253) ELT 241 (Tri-Bang)

the present case would be the decisive factor for the determination of the iron content in the export product. This stand is substantiated by the fact that the remittance has also been received in proportion thereof only.

13. A perusal of the records indicates that the sample of iron ore meant for export was got tested at the port by M/s. S.K Mitra Pvt. Ltd. in accordance with the contractual obligations. Following the test protocols as prescribed by the BIS, the iron ore fines were found to contain iron as 57.30% on Dry Weight Basis and moisture content as 8.98%. At the port of discharge, the iron content upon testing on dry basis was found to be 57.53% and moisture at 9.35%. There is near harmony in the said test reports. The sale proceeds were realised by the exporter as per the contract in accordance with the percentage of iron ascertained on Dry Weight Basis. Furthermore, as per the provisions of law, the valuation of iron ore fines has to be done on WMT basis as held in the case of **Union of India Vs. Gangadhar Narsinghdas Agarwal¹**, by the Hon'ble Apex Court and recorded as under:

"4. Mr. Baypayee, the learned Counsel for the Revenue, strongly contended that the method of determining the iron content in the iron ore and the iron fines is to first eliminate the moisture and then the other impurities and ascertain the content of iron and determine its percentage without taking the moisture into consideration. This, he submitted, was the method which is normally employed under the ISI standard as well as by Chemical Analysts who are called upon to determine iron content in lumpy iron ore or iron ore fines. It is immaterial what method one adopts for the purposes of separating the iron content from

the lumpy iron ore but the percentage has to be determined from the total weight which was available at the given point of time after the iron content is determined. 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 content from the rest of the impurities inclusive of moisture and thereafter ascertain in which category the lumpy iron ore would fall for the purposes of charging duty under the aforesaid Notifications. This view which the learned Single Judge took and which came to be affirmed by the Division Bench of the High Court appears to us to be the correct view to take, for the reason that if the percentage of iron content is determined after ignoring the moisture the percentage would not be relatable to the lumpy iron ore weighed at the relevant point of time for the purposes of charging duty. We, therefore, do not think that the High Court committed any mistake in the view it took. Even if two views were possible the view taken by the High Court being a plausible one would not call for intervention by this court."

13.1. The test report in the present matter is also contrary to the circular issued by the CBEC. In the case cited above, Hon'ble Apex Court it has been clarified that for the purpose of charging export duty, the assessment of iron ore fines for determination of Fe content shall be on Wet Metric Ton (WMT) basis, after deducting the weight of impurities (inclusive of moisture) out of the total weight/gross weight, to arrive at the net Fe content. In the present case the Fe content of iron ore fines has been determined by the Custom

House, Laboratory, Kolkata on dry basis and therefore, the said report cannot be relied upon for the purpose of finalization of the subject shipping bill.

13.2. In support of his contention, that when the samples were tested on dry basis, then the percentage of the Fe content cannot be relied upon for the purpose of determination of export duty, the learned Advocate also placed reliance upon the judgement of the Tribunal in the case of **General Nice Mineral Resources (I) Pvt. Ltd. Vs. CCE, Vijayawada**⁸.

14. We note that a very strong observation made by the learned Advocate is that the test report of a reputed laboratory had certified the Fe content as 57.30% and moisture content at 8.98% at the load port while similarly the discharge port report indicated the Fe content as 57.53% and moisture content as 9.35%, which samples were tested and recorded to be so done as per BIS. Based on the Fe content indicated in discharge port, the buyer of the goods has remitted the final payment of USD 472080.00, to the appellant through proper banking channels.

14.1. The appellant has also drawn our attention to the fact that the Director of Mines, had also issued Form-I permitting the export of iron ore fines. The said permit were issued only after chemical analysis by Government Laboratories of the mining department and the Fe content indicated in such permits were on record placed by the appellant were well below 58%. Suffice to state that while discrediting the report of CRCL, as not having

8. 2017 (352) ELT 94 (Tri-Hyd).

analysed the test samples in accordance with laid down norms and therefore the said test report holds no significance and cannot be relied upon and that they have collaterally tendered sufficient independent evidence in support of their stance to state that the Fe content of the iron ore fines exported was far short of threshold levels as prescribed for being subjected to export duty.

15. Finally the advocate pleaded that the issue relating to valuation of iron ore fines is no more res integra in view of the settled position of law declared by the Hon'ble High Court of Bombay at Goa, decided in Writ Petition No. 216 of 2022, dated 23.09.2022. In the said case, Hon'ble High Court had held that, in so far as, the assessment of Iron Ore Fines was concerned, they shall be governed by the principles of law in regard to classification, as laid down by the Hon'ble Supreme Court, in the case of **Union of India Vs. Gangadhar Narsinghdas Agarwal¹**, (Supra).

16. It would be pertinent to place on record the concerned test reports of the load port as well as that the discharge port. The same are scanned below, indicating Fe content on dry basis to be less than 58%.

Mitra S. K. Private Limited

Shraachi Centre (5th Floor)

74B, Acharya Jagadish Chandra Bose Road

Kolkata - 700 016, West Bengal, India

[CIN : U51909WB1956PTC023003]

T : 91 33 22172249 / 40143000 / 22650006 / 22650007

F : 91 33 22650008

E : info@mitrask.com

TESTING INSPECTION

MSK

REF. NO.: WB/945

Dated: 09/08/2017

CERTIFICATE OF QUALITY

We hereby certify that on request of M/s. Moorgate Industries India Pvt. Ltd. representative samples were collected from a consignment of Iron Ore Fines at Haldia port during loading into MV. AKIJ HERITAGE from 02-08-2017 to 04-08-2017 and a composite sample was prepared and tested in our Laboratory with the following findings.

Name of Vessel : MV. AKIJ HERITAGE

Quantity : 23,650 MT.

1.	Job Ref. No.	: J11/IEC/IO-2017/00049
2.	Port and Country of Loading	: Haldia Port, India
3.	Date and Time of Arrival of Vessel	: 2252 HRS.ON 01-08-2017
4.	Date and Time of Loading Commencement	: 1240 HRS.ON 02-08-2017
5.	Date and Time of Loading Completion	: 1050 HRS.ON 04-08-2017
6.	Date of Sailing	: 04-08-2017

SAMPLING DETAILS

7.	Date of Commencement of Sampling	: 02-08-2017
8.	Date of Completion of Sampling	: 04-08-2017
9.	Location of Sampling	: Berth No. 13, HDC, Haldia
10.	Method of Sampling	: IS 1405:2010

ISO 9001:2008

Certified for H.O.

Central Lab & Haldia Site

Certificate

W : www.mitrask.com

[Terms & Conditions as applicable, overleaf.]

Mitra S. K. Private Limited

Shrachi Centre (5th Floor)

74B, Acharya Jagadish Chandra Bose Road

Kolkata - 700 016, West Bengal, India

[CIN : US1809WB1956PTC023037]

T : 91 33 22172219 / 40143000 / 22650006 / 22680007

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MSK

TESTING & INSPECTION

CHEMICAL COMPOSITION (ON DRY BASIS)

	Test Method	Test Result	Unit
11. Fe	IS 1493(Part-1) :1981 RA 2011	57.30	PCT
12. SiO2	IS 1493(Part-1) :1981 RA 2011	5.40	PCT
13. Al2O3	IS 1493(Part-1) :1981 RA 2011	5.38	PCT
14. P	IS 1493-1959 RA 2011	0.040	PCT
15. S	ISO 4689-3:2015	0.010	PCT

PHYSICAL COMPOSITION

16. Moisture (Determined at 105 °C)	8.98	PCT
17. Above 10 MM	3.03	PCT
18. Below 150 MICRON	19.64	PCT
19. Below 10 MM	96.97	PCT

For Mitra S. K. Private Limited

Prepared by:

Authorised Signatory

ISO 9001:2008

Certified for I.O.

Central Lab & Model Site

Certificate

W : www.mitrask.com

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中华人民共和国出入境检验检疫

ENTRY-EXIT INSPECTION AND QUARANTINE

OF THE PEOPLE'S REPUBLIC OF CHINA

正本

ORIGINAL

品质证书

CERTIFICATE OF QUALITY

共1页, 第1页Page1of1

编号 No.: 117000006036602003

收货人

Consignee SHANGHAI ESTEEL CO.,LTD

发货人

Consignor ***

品名

Description of Goods IRON ORE FINES

报检数量/重量

Quantity/Weight Declared **23650WMT

合同号

Contract No. BP170704INF

发票号

Invoice No. BP170704INFWA-P/172

提单或运单号

B/L or Way Bill No. 01

到货地点

Place of Arrival TANGSHAN

到货日期

Date of Arrival 30 Aug.,2017

运输工具

Means of Conveyance M.V. AKIJ HERITAGE

启运地

Place of Despatch INDIA

卸毕日期

Date of Completion of Discharge 31 Aug.,2017

检验日期

Date of Inspection 2017-09-08

THIS IS TO CERTIFY THAT, AT THE REQUEST OF CONSIGNEE, BASING ON THE STANDARD SN/T 1797.1-2008, THE REPRESENTATIVE SAMPLES WERE TAKEN FROM THE GOODS AND FURTHER, THE OBTAINED SAMPLES WERE PREPARED & ANALYSED ACCORDING TO THE CONTRACT NO. BP170704INF AND GB STANDARD WITH THE RESULTS IN DETAIL AS FOLLOWS:

SPECIFICATIONS:

CHEMICAL (DRY BASIS)

Fe 57.53%

SiO2 5.75%

Al2O3 5.98%

P 0.055%

S 0.015%

MOISTURE 9.35%

PHYSICAL COMPOSITION (ON NATURAL BASIS)

SIZE: 0-10mm 94.00%

检验检疫

ENTRY-EXIT INSPECTION AND QUARANTINE

官方印章

Official Stamp

签发地点Place of Issue JINGTANG PORT, CHINA

签证日期Date of Issue 08 Sep.,2017

授权签字人Authorized Officer PAN SHOUJU

签名Signature

我们已对货物进行了检验。不能因我们签发本证书而免除卖方或其他方面根据合同和法律所承担的产品质量责任和其他责任。All inspection is carried out in conformity with the best of the knowledge and skill. This certificate does not in any respect absolve the seller and other related parties from his contractual and legal obligations especially when product quality is concerned.

[ce-1(2000.1.1)]

AA2388049

由 扫描全能王 扫描创建

We also note that the impugned test reports dwell at length on the manner of drawal, storage and analysis of the samples carried out, which indicates their adherence to BIS prescriptions.

17. Further, the Gangadhar case was also analysed by the Hon’ble High

Court, Bombay in the case of **V.M Salgaocar Brothers and Others Ltd. Vs. Union of India⁹**, wherein the Hon'ble High Court in para 42 of its order laid down certain guidelines and principles required to be adhered to and for ease of the analysts/chemists and others concerned. The relevant extract thereof is reproduced hereunder:

"40. The Revenue carried Gangadhar's case to the Supreme Court. The Supreme Court observed that the duty was required to be determined on the weight of the commodity at the relevant point of time, namely, in the case of lumpy iron ore where the percentage of iron was 60% or more but less than 63%, the duty was restricted to Rs. 6/- per metric ton; where it was 58% or more but less than 60%, it was restricted to Rs. 5/- per metric ton and where it was less than 58%, it was restricted to Rs. 4/- per metric ton. It was observed that under both the notifications i.e. notification dated 24.07.1967 and notification dated 31.08.1968, the Government exempted lumpy iron ore duty relatable to weight depending on the iron content in iron ore fines. The Supreme Court observed that the question before the High Court was whether the percentage of iron content had to be determined after ignoring moisture in the lump or the percentage had to be determined taking into account all the impurities including moisture. The Supreme Court observed that

9. 2022 (9) TMI 1306 Bombay, High Court.

the Revenue opted for the first method whereas Gangadhar/the assessee contented that the percentage had to be determined taking all the impurities including moisture into account. The Supreme Court recorded the Revenue's contention that the method of determining the iron ore content and the iron fines was to first eliminate the moisture and then the other impurities and ascertain the iron content and determine its percentage taking moisture into consideration. The Revenue contended that this being the method which was normally employed under the Indian Standard as well as the chemical analysts, who were called upon to determine the iron content in lumpy iron ore or iron ore fines. The Supreme Court in such context observed that it was immaterial what method one adopts for the purposes of separating the iron content from the lumpy iron ore, but the percentage had to be determined from the total weight which was available at the given point of time when the iron content was determined. That was because the duty was relatable to weight and therefore, once the iron content is determined keeping in mind the total weight, the percentage can be determined from the iron content from the rest of the impurities inclusive of moisture and thereafter, ascertain in which category the lumpy iron ore would fall for the purposes of charging duty under the aforesaid notifications.

41. The Supreme Court accordingly confirmed the view taken by High Court observing that if the content of the iron ore is determined after ignoring the moisture, the percentage would be

relatable to the lumpy iron ore weight at the relevant point of time for the purposes of charging duty. The Supreme Court observed that even if two views were possible the view taken by the High Court being a plausible one would not call for intervention by the Supreme Court order.....

42. It is thus clear that the Supreme Court in affirming the view of the learned Single Judge as also the learned Division Bench in the case of Gangadhar Agarwal (supra) has approved the WMT method considering the fact that the goods (iron ore) is required to be considered in its natural form at the time of its export which contain the moisture and other impurities. The following are the principles which can be culled out from the said three judgments in Gangadhar Agarwal's case in regard to the classification of the Fe (iron) content in the iron ore for the purpose of levy export duty:-

(i) The iron ore when subjected to export, is exported in its natural condition so as to include impurities and moisture.

(ii) It is not in dispute that there is no method or formula to determine the iron contents while the goods are in moist condition. The percentage of iron content in the iron ore is calculated by adopting a certain formula such formula has no scientific backing and the formula is based on approximate conclusion. Such formula is recognized not only in our country but also universally.

(iii) It is a recognized practice to determine iron content in the goods (iron ore) in moist condition on an appropriate basis by

finding out the iron content in dry sample analysis. What is relevant is the condition in which iron ore is presented to the Customs Authorities for export namely, the condition of the goods on the date of the export. If the condition of the goods on the date of the export is such, that it contains impurities and moisture and that it is not purely only iron ore then, in that regard, the universally applied formula would become applicable to determine the percentage of iron ore in the condition of the goods on the date of the export.

(iv) The government having accepted one principle in holding the exporter to the condition of the goods on the date of the export, a different principle cannot be adopted while determining the customs duty. Thus, if the weightmen of the exportable goods is made while it is in moist condition, then it cannot be accepted that the iron content cannot be determined while the goods are in moist condition.

(v) It is not correct for the Revenue to take a position that as it is not possible by a physical analysis to determine the iron ore content in moist lumpy iron ore or moist iron ore fines, because moist iron ore fines and moist iron ore has to be dried for finding out the iron contents to be determined by the method of analysis extended by the Indian Standard Institute and the result of such analysis, by applying such method must be made applicable directly or straight away to determine the iron content in the iron ore being exported, as it is not the practice that lumpy iron

ore and moist iron ore fines are dried for the purpose of determining the iron contents.

(vi) Although it is true that there is a mathematical formula by which on the basis of the result of such analysis, the iron content in moist lumpy iron ore and moist iron ore fines, can be easily determined. Such formula is being regularly applied by the expert laboratories not only in India but also other countries. A certificate issued by such laboratories in regard to the iron content in the moist iron ore and moist lumpy iron ore being exported, indicating the percentage of the iron content in the goods subject matter of export, needs to be accepted.

(vii) Merely because in respect of moist iron ore, iron content cannot be determined directly by physical analysis, this cannot lead to a result that the iron ore content cannot be determined at all ore that the assessee should be deprived of its just claim on such footing.

(viii) It is immaterial what method one adopts for the purpose of separating the iron content from the lumpy iron ore but the percentage has to be determined from the total weight which was available at the given point of time "after the iron content is determined." This is because the duty is relatable to weight and therefore once the iron content is determined, keeping in mind

the total weight, the percentage of iron ore can be determined separating the iron content from rest of the impurities inclusive of moisture and thereafter to be ascertained in which category the lumpy iron ore would fall for the purpose of charging duty under the Tariff items/notification.

(ix) The percentage of iron ore content is determined after ignoring the moisture, the percentage would not be relatable to the lumpy iron ore weighed at the relevant time for the purpose of charging duty.”

18. We also note that the factual matrix of the present case is quite similar to that of **M/s. Vedanta Ltd. Vs. Commissioner of Customs (Preventive) Bhubeneshwar**¹⁰. The coordinate bench of the Tribunal had held in that case that the samples were required to be tested as early as possible and had held the inordinate delay of over a hundred days as unforgivable. We note and as pointed out earlier, even in the present case, there was inordinate delay in testing the samples which is virtually suicidal to the outcome of the test results.

19. In view of aforestated findings and observations and the pronouncements of the Apex Court and the Hon'ble Bombay High Court and

the law as laid down, referred to in earlier paras, we find no legal substance in the order of the learned Commissioner (Appeals), and are of the view that the learned Commissioner was in error of law in passing the impugned judgement. We therefore set aside the same and allow the appeal with consequential relief if any.

(Operative part of the order was pronounced in the open Court)

**Sd/-
(Ashok Jindal)
Member (Judicial)**

**Sd/-
(Rajeev Tandon)
Member (Technical)**

K.M.