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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75902 of 2024

C/CROSS/75504/2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar : Appellant
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Chamong Tea Exports Pvt.Ltd. : Respondent
2, N.C.Dutta Sarani Sagar Estate, Unit No. 1, 5th Floor,
Kolkata, West Bengal-700001.

Customs Appeal No. 75903 of 2024

C/CROSS/75503/2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar : Appellant
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Chamong Tea Exports Pvt.Ltd. : Respondent
2, N.C.Dutta Sarani Sagar Estate, Unit No. 1, 5th Floor,
Kolkata, West Bengal-700001.

Customs Appeal No. 76010 of 2024

C/CROSS/75508/2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar : Appellant
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Yashovardhan Lohia : Respondent
4, Alipore Park Road, Kolkata-27

Customs Appeal No. 76011 of 2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar : Appellant
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Gordhan Jagwani **: Respondent**
568, Block-N, New Alipore, Kolkata

Customs Appeal No. 76012 of 2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar **: Appellant**
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Anil Jagwani **: Respondent**
568, Block-N, New Alipore, Kolkata

Customs Appeal No. 76013 of 2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar **: Appellant**
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Ashok Kumar Lohia **: Respondent**
4, Alipore Park Road, Kolkata-27

Customs Appeal No. 76014 of 2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar **: Appellant**
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Anil Jagwani **: Respondent**
568, Block-N, New Alipore, Kolkata

Customs Appeal No. 76015 of 2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar **: Appellant**
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Gordhan Jagwani **: Respondent**
568, Block-N, New Alipore, Kolkata

Customs Appeal No. 76016 of 2024

C/CROSS/75509/2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar **: Appellant**
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Yashovardhan Lohia **: Respondent**
4, Alipore Park Road, Kolkata-27

Customs Appeal No. 76017 of 2024

C/CROSS/75506/2024

(Arising out of Order-in-Original No.CC(P)/BBSR/CUS/No.03/COMMISSIONER/2024 dated 01.02.2014 passed by Commissioner of Customs(Preventive), Bhubaneshwar)

Commissioner of Customs (Prev), Bhubaneshwar **: Appellant**
C.R.Building, Rajaswa Vihar, Bhubaneswar, Odihsa-751007

VERSUS

M/s. Ashok Kumar Lohia **: Respondent**
4, Alipore Park Road, Kolkata-27

APPEARANCE:

Shri Subrata Debnath, Authorized Representative for the Appellant

Shri Arvind Bahety, Advocate for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76756-76765/ 2024

DATE OF HEARING :22.08.2024

DATE OF DECISION:30.08.2024

Order : [Per Shri Ashok Jindal]

All appeals are having a common issue. Therefore, all are disposed of by a common order. Revenue has filed these appeals and Respondent has also filed cross objection to the appeal filed by the Revenue.

2. The brief facts of the case are that the respondents exported certain consignments of iron ore fines (hereinafter referred to as "**IOF**") under the cover of **13 Shipping Bills** through **5 vessels** and to **4 different overseas buyers**from 2 different ports, namely, **Haldia** and **Paradip**. The details of the 13 Shipping Bills filed by the respondent have been encapsulated in the table hereunder

Table No. 1

Sl. No.	Ref No.	Vessel	Shipping Bill No. and date	WMT (Quantity)	Name of the Overseas Buyer	Customs Duty Paid by the Appellant (Rs.)	Differential Duty Demanded by the Department (Rs.)
1	1A	MV Anarita	4403750 27.02.2017	13850	Trios Corporation Limited, Singapore	1,51,71,899	4,97,62,334
2	1B	MV Anarita	4404046 27.02.2017	42783		0	
3	2A	AP Drzic	4951641 24.03.2017	11860	Global Minore Pte. Limited	1,37,23,562	4,24,47,654
4	2B	AP Drzic	4951639 24.03.2017	40300		0	
5	3A	Pacific Pride	5932026 08.05.2017	7700	Bagadiya Brothers Singapore Pte. Limited	56,42,580	87,50,786
6	3B	Pacific Pride	5932766 08.05.2017	2684		0	
7	3C	Pacific Pride	5932571 08.05.2017	9616		0	

8	3D	Pacific Pride	6005016 11.05.2017	18850		1,51,09,618	1,23,16,625
9	3E	Pacific Pride	6001201 11.05.2017	19700		0	
10	4A	Jewel of Shinas	8626453 11.09.2017	38000	M/s KTP Exports Pte. Limited, Singapore	0	3,15,74,010
11	4B	Jewel of Shinas	8626464 13.09.2017	17000		1,42,25,558	
12	5A	St. Cergue	1179674 28.11.2017	24200	M/s KTP Exports Pte. Limited, Singapore	2,00,18,543	1,69,64,286
13	5B	St. Cergue	1172290 27.11.2017	35400		2,71,25,604	
TOTAL						**11,10,17,364**	**16,18,15,695**

- **Shipping bills mentioned at Sl Nos. 1-4 and 8-13 were filed at the Paradip port.**
- **Shipping Bills mentioned at Sl. Nos. 5-7 were filed at the Haldia Port.**

2.1. It is the case of the Revenue, based on DRI investigation, that the respondentt exported 5 consignments of high-grade IOF (Fe> 58%) by artificially splitting them into 7 Shipping bills of high-grade IOF (Fe>58%) wherein customs duty at the rate of 30% was discharged and 6 Shipping bills of low-grade IOF (Fe<58%), wherein no duty was paid and also undervalued all the 5 consignments, thereby evading duty of customs with respect to each of the 5 consignments. Based on the aforesaid allegation, two show cause notices were issued to the respondent demanding differential customs duty to the tune of **Rs. 16,18,15,695/-**(Rs. 15,30,64,909/- + Rs. 87,50,786/-). The impugned notices placed reliance upon the test reports of the independent testing agencies viz., M/s. SGS India Private Limited, M/s. Mitra SK Private Limited and CIQ, China (nominated and engaged by the overseas buyers) which tested the cargo/consignments in the 5 vessels on a consolidated basis, both at the load port and the discharge port.The shipper had engaged Ms. Inspectorate Griffith and Ms. SGS India Private Limited who had drawn samples with respect to each of the shipping bills. During the course of the investigation the respondent was constrained to pay an amount of Rs. 8 Crores towards the alleged differential duty demand.

2.2. The respondent denied and disputed the allegations contained in the impugned notice, inter-alia submitting that the methodology adopted in the test reports relied upon by the Revenue was incorrect in so far as the Fe content was required to be determined on WMT basis as against the DMT Basis of testing. The respondent submitted that its has been settled by a number of judgements by the Hon’ble Supreme Court, Hon’ble High Court and the Hon’ble Tribunal that for the purpose of classification of IOF, the Fe content is to be determined on the WMT Basis.

2.3. Despite sustaining the allegation of having split a single consignment into multiple shipping bills the demand for differential customs duty with respect to the 5 consignments was dropped by the Ld. Adjudicating Authority vide two Orders-In-Original bearing Nos02/Commissioner/2024 dated 08 January 2024 and 03/Commissioner/2024 dated 18 January2024 on the premise that the Fe Content of the aggregate/consolidated consignments exported through a single vessel was less than 58% on WMT basis after a thread bare analysis of the legal position concerning the subject issue. The Fe Content on the WMT Basis of the aggregate/consolidated consignment was computed as follows

Table No. 2

Consignment No.	**Table No. 1**		**Vessel Name**	**WMT (Quantity)**	**Fe Content on WMT Basis (percentage)**
	Sl. No.	**Ref. No.**			
1	1,2	1A+1B	MV Anarita	56633	54.79
2	3,4	2A+2B	AP Drzic	51960	54.35
3	5,6,7,8,9	3A+3B+3C+3D+3E	MV Pacific Pride	58550	56.53
4	10,11	5A+5B	Jewel of Shinas	53139	56.02
5	12,13	6A+6B	MV St.	59600	54.94

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Further the charge with respect to undervaluation was also categorically dropped by the Ld. Adjudicating Authority in the favour of the respondent. In any event, when the FE content on WMT basis for all the 5 consignments is less than 58 there is no export duty in view of Notification No. 27/2011 – Cus. dated 01 March 2011.

2.4. Although the demand for differential duty was dropped by the Ld. Adjudicating Authority, penalty under Section 114AA of the Customs Act, 1962 (hereinafter referred to as the "**Customs Act**") was imposed on the respondents Company and the Co-respondents. Further the Ld. Adjudicating Authority rendered an extraneous observation with respect to one of the Shipping Bills bearing No. **6005016** dated **11 May 2017,** comprised in the consignment exported vide MV Pacific Pride that the Fe Content (WMT Basis) when calculated on isolated basis for the said shipping bill was more than 58 percent and as such the duty of customs was rightly paid by the Respondent.

2.5. Against the aforesaid two OIOs the Department has preferred an Appeal before this Tribunal. The Respondents have also filed the cross-objections against the impugned orders.

3. The Ld. Authorized Representative appearing on behalf of the Revenue submits that the Respondent has intentionally split the 5 consignment of high grade IOF content more than 58% by splitting them into 7 shipping bills of high grade IOF more than 58% wherein at the customs duty at the rate of 30% was discharged and shipping bills were deliberately shown of low grade IOF content less than 58% to avoid payment of duty and also under value all the consignments.
4. Therefore, impugned orders are to be set aside.

5. The Respondent submits as under:

A.1 "The Respondent would like to state that the impugned notice proceeded on the assumption that one single consignment of high-grade IOF was being artificially split into two or more shipping bills of high-grade and low-grade IOF in order to evade payment of customs duty. Despite the allegation of having split a single consignment into multiple shipping bills, the demand for differential Customs duty was dropped by the Ld. Adjudicating Authority on the premise that the Fe content of the aggregate/consolidated consignments exported through a single vessel was less than 58% when computed on WMT basis.

A.2 However, in the said OIO, the Ld. Adjudicating Authority held that export duty was rightly paid on one of the shipping bills bearing no. 6005016 dated 11 May 2017 as the Fe content with respect to the said shipping bill when viewed on an isolated basis was more than

58% under the WMT test conditions. In this regard, the Appellant would like to submit that when the learned adjudicating authority has sustained the allegation in the Notices that a single consignment exported by a single vessel was being artificially split into multiple shipping bills and dropped the entire demand for differential duty on the premise that the Fe content of each of the 5 consignments exported through 5 vessels on a consolidated basis was less than 58% it could not have rendered an in-consistent and extraneous finding as regards the correctness of the duty paid with respect to shipping bill no. 6005016 dated 11 May 2017 on an isolated basis. "

6. The Respondent relied on the decision of this Tribunal in the case of M/s. Global Associates Vs. Commissioner of Customs (Preventive), Bhubaneshwar in Customs Appeal Bearing No. 75107 of 2020 vide final order no. 7522-7523/2022 dated 11th March, 2024. To say that the Fe content on WMT treating the whole consignment as one consignment. Therefore, the allegation of the Department is not sustainable and no Excise duty is payable.
7. It is his submission that in their own case, if the Fe content on WMT basis is computed on the basis of single consignment then the Fe content would come out less than 58%. Therefore, no export duty is payable by the appellant and the same has been upheld by the Ld. Adjudicating Authority.
8. He further submitted that without prejudice the department cannot pick evidence which are

against the assessee and reserve those which are in their favour. He further submitted that the proposal of imposition of penalty under Section 114AA cannot be segregated from the demand of duty and the same cannot be sustained when there is no duty implication.

9. He also submitted that imposition of penalty under Section 114AA on the respondent solely on the basis of statement of the accused which is unsustainable.

10. In view of this it is prayed that impugned order qua confirming duty against shipping bill no. 60056/016 dated 11th May, 2017 be set aside and rest of the order be affirmed.

11. Heard the parties. Considered the submissions.

12. We find that the allegation in this case against the Respondent is that they had splitted their 5 export consignment into 13 consignments in which 7 consignments Fe content is more than 58% and on which Respondent discharged duty at the rate of 30% and remaining 6 shipping bills where the test report shows that the Fe content is less than 58% the Respondent did not discharge the export duty.

13. Therefore, it is alleged that appellant has splitted their 5 consignment into 13 consignment to avoid payment of duty partly.

14. In these set of facts, the proceedings were initiated against the Respondent whether the Respondent has intentionally or deliberately splitted their 5 consignment into 13 consignment and paid duty accordingly which is to be examined and if the allegation of the Department is taken up as correct that there are 5

consignments, in that circumstances IOF Fe content is to be determined on WMT basis as held by the Hon'ble Bombay High Court in the case of V.M.Salgaocar Vs. The Assistant Commissioner of Customs (Export), Goa [2022 (9) TMI 1306].

15. The said decision has been provided by this Tribunal in the case of M/s. Bagadiya Brothers Pvt. Ltd Vs. Commissioner of Customs (Port) Calcutta & Commissioner of Customs of Bhubaneshwar reported in 2023 [9], wherein this Tribunal observed as under:

"*Per P.K.Choudhary : The issue in dispute in both the appeals is common. Hence, both the appeals are taken up together for hearing and disposal.*

2. Appeal No.C/75008/2021 has been filed against Order-in-Appeal No.KOL/CUS(PORT)/AKR/582/2020 dated 17.09.2020 passed by the Commissioner of Customs (Appeals), Kolkata and Appeal No.C/75450/2023 has been filed against Order-in-Appeal No. 57- 58/CUS/CCP/2020 dated 31.12.2020 passed by Commissioner(Appeals), GST, CX and Customs, Bhubaneswar.

3. The facts of the case in brief are that the Commissioner of Customs (Appeals), Kolkata upheld the Order of Finalisation of Assessment of S/B No. 5114893 Dated 30.03.2017 by the Joint Commissioner of Customs(Export), Custom House, Kolkata, inter alia, on the following grounds : i) Load Port Test Report issued by Inspectorate Griffith India Pvt. Ltd. was adopted, discarding Test Report of Custom House Laboratory (CHLR) on the ground that it does not show impurities percentage which is vital for assessment and that various appellate authorities *have observed that testing by Customs House Laboratories is not as per mandatory BIS standard and that acceptance of Customs Lab Report may result in lower Customs Duty; ii) For assessment , the Transaction Value on DMT price as per contract was accepted. iii) Duty was charged @ 30% Adv, since the Fe content was more than 58% as per Load Port Test Report (LPTR), which was determined on dry Metric Ton basis and not on as received basis (WMT) resulting in levy of duty at higher rate .*

4. In Appeal No.C/75450/2023, the Commissioner(Appeals), Bhubaneswar upheld the Order of Finalisation of Assessment of S/B No. 8825745 Dated 22.09.2017 & 8881700 dated 25.09.2017 by the Assistant Commissioner of Customs, Dhamra, inter alia, holding that –

"the transaction value of the Iron Ore Fines had been rightly arrived at on DMT basis in terms of the contract, though the goods were presented for export in moist condition and therefore, for the purpose of classification to determine the rate of export duty, the Fe percentage has also to be arrived at on Dry Metric Ton (DMT) basis.

5. The ld.Consultant appearing on behalf of the appellants, submits that the two main ingredients of assessment of duty are determination of Transaction Value of the goods and determination of classification of the goods – which fixes the rate of duty. Both exporter and Department agreed on the ascertained Transaction Value calculated as per the Contract.

6. The ld.A.R. for the Revenue justified the impugned orders.

7. Heard both sides and perused the appeal records.

8. We find that the issue under dispute in these cases is whether for deciding the classification and rate of duty payable, the Fe %age of Iron Ore Fines is to be determined on Dry Metric Ton (DMT) basis or Wet Metric Ton (WMT) basis.

9. The issue stands decided as early as 1997 by Hon'ble Supreme Court in the case of Union of India Vs Gangadhar Narsingdas Aggarwal – 1997 (89) ELT 19(S.C.) and subsequent CBEC Circular No. 4/2012- Cus dated 17.12.2012 which was issued for adoption of uniform Customs procedure in all Customs Houses. In the said Circular, it was stipulated that for the purpose of charging of export duty the assessment of Iron ore, determination of Fe contents is required to be made on Wet Metric Ton (WMT) basis which in other words mean deducting the weight of all impurities (inclusive of moisture) out of the total weight/Gross Weight to arrive at Net Fe contents.

9.1 The rate of duty was being fixed, then and also now, on the basis of percentage of iron(Fe) in the ore. The higher is the percentage, more the rate of duty. In WMT the percentage of iron is taken from the material as it has been presented for exports, which contain all types of impurities – Moisture, Sulphur, Phosphorus, Aluminium trioxide etc. The percentage of impurities is substantial. If the percentage of Fe is taken after deducting all quantity of impurities, percentage of Fe will be lower. Therefore, the rate of duty will be lower. The Supreme Court directed that "the percentage of Fe will be taken out of total material presented for export after deducting all *the impurities including moisture. 1. This has been followed in the following judicial pronouncements : i) SOCIEDADE DE FOMENTO INDUSTRIAL PVT. LTD.- 1987 (30) E.L.T. 686 (Goa High Court) [Para7] where similar view was taken as under : "The iron contents in the moist iron ore which was exported ought to have been calculated following the well-recognised international practice and the duty calculated on basis of the said iron contents in the moist ore exported. By ignoring the moisture contents in the exported ore, the Customs Authorities arrived at a manifestly erroneous conclusion that cannot be sustained, as they were bound to consider; all the relevant circumstances ". ii) In the case of Mineral Enterprises Ltd. Vs CC Mangalore – 2010 (253) ELT 241 (Tri. – Bang.), the Tribunal has explained that the departmental chemist has reported the goods 64.6% on moisture free basis whereas the export was in moist condition. Report submitted by exporter stating Fe content as 63.00% is accepted. (No further Appeal) iii) Similarly, while determining the rate of duty under Notification No. 62/2007-Cus Dt. 3.5.2007, the Tribunal in the case of CC (Port) Kolkata Vs Sesa Goa Ltd. – 2014 (310) ELT915 (Tri.-Kol.) has observed[Para 5] "On a plain reading of the said Notification, it is clear that the conditions, in which the goods are exported, become relevant in determining Fe content; for application of the said Notification".*

The same issue was again agitated before the Tribunal. Hyderabad Bench in the case of General Nice Mineral Resources (I) P. Ltd. Versus C.C. Vijayawada- 2017 (352) E.L.T. 94 (Tri. - Hyd.).

The court reiterated Para 3 of Board Circular No. 4/2012-Cus dated 17.2.2012 and held "…. 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"[.emphasis added] (No Appeal) v) This issue was also discussed and decided by the Tribunal in the case of Oblapuram Mining Company Pvt. Ltd. Vs CC Visakhapatnam – 2017-TIOL-1169 (CESTAT - Hyd.), where the party filed Appeals against two OIO and the department also filed Appeal against the same two OIOs. The Division Bench followed the Board's Circular No. 4/2012 dated 17.12.2012 and the Supreme Court Judgments cited above dismissed the departments appeal. vi) All these cases have attained finality.

9.2 While finalizing the assessment of subject S/B, the assessing officers have overlooked the most important aspect of assessment, namely, determination of Fe content for the purpose of classification/rate of duty applicable.

9.3 It would not be out of place to mention here that the ld. Commissioner of Customs, Mangalore in Para 22 of his Order-InOriginal No.02/2010 under C. No. VIII/10/22/2009/Adjn dated 28.3.2010, has recorded as follows : "22. To resolve the issue relating to the moisture content in the sample in lieu of the various judicial pronouncements and to retain the relevance of the test report given by the Chemical Examiner, Custom House, Cochin this office had earlier *written to the Central Revenue Control Lab, New Delhi who has opined vide his letter dated 22.01.2009 that the iron content in samples in received basis can be calculated from iron content on dry basis if the moisture content in the samples as received basis is known: Iron content = Fe x (100-M) / 100 (on as received basis) Where Fe is % age of iron content on dry basis, M is moisture content in the sample. This method although not the best, was temporarily adopted by the department in previous orders on similar matters so as to meet the requirements of various judicial pronouncements."[we are attaching the order]*

9.4 This method of determining Fe content in WMT is elaborately by discussed by Hon'ble High Court of Bombay in Para 47 of its judgement in WP No. 216/2022 in case of V M Salgaokar Brothers. The Court mentions that it is universally recognised and followed for determination of Iron content in natural iron fines.

9.5 If the above formula is applied, in both the above cases under appeal, the Fe content of Iron Ore Fines exported on WMT basis would be more than 55% but less than 58% and hence would fall under CTSH 2601 11 42 as per the Tariff structure of the relevant period and would attract Nil rate of duty in terms of Notification No.27/2011-Cus Dt.1-3- 2011 (Sl.No.20A) as amended by Notification No.15/2016-Cus Dt.01.03.2016.

9.6 The Ld. Commissioner (Appeals) have only focussed on the valuation of the Iron Ore Fines, which is not in dispute. Here, classification of Iron Ore Fines exported and how the Fe %age is to be determined (as the classification is based on Fe *content), is the question which the Commissioner (Appeals) have not addressed in their Orders. Therefore, the Orders in Appeal are not legal, proper and correct.*

9.7 Meanwhile, with effect from 1.5.2022, by a Supplementary Note to Chapter 26, inserted in Indian Customs Tariff, it has been stipulated that in relation to the products under the heading 2601 the percentage of Fe (Iron) content wherever specified shall be calculated on dry metric ton basis.

9.8 It means that, only after 1.5.2022 for determination of Tariff heading the Fe content shall be calculated on DMT basis. And prior to 1.5.2022, the calculation of Fe content shall be on WMT basis.

9.9 The Hon'ble High Court of Bombay at Goa in their Order in Writ Petition No. 216/2022 dated 23.09.2022 in the case of VM Salgaokar & others vrs Asst Commissioner of Customs(Export), Goa & others have very elaborately dealt with this issue. The relevant portions are at Para 14 as under :-

"14. The petitioners have contended that the determination of Fe(iron) content on WMT basis was considered to be an acceptable norm in the prior assessments, which was clear from the fact that by virtue of the Finance Act 2022, for first time an amendment to the First Schedule to the Tariff Act, has been incorporated by adding a supplementary note in Chapter 26 to the effect that for the products of CTH 2601, the percentage of Fe (iron) content wherever specified, shall be calculated on the 'Dry Metric Ton' (DMT) basis to be effective from 01.05.2022. Hence, according to the petitioners there could not have been any

adoption of the DMT method in respect of any assessment for the period prior to 1st May 2022. 63. In the light of the above discussion, Court ordered the petition is partly allowed in terms of the following directions : "I. Insofar as the assessments in relation to the period prior to 1st May 2022 are concerned, they shall be governed by the principles of law in regard to the classification as laid down by the Supreme Court in Union of India vs. Gangadhar Narsingdas Aggarwal (supra), as clarified by the communication dated 17 February 2012, of the Tariff unit of the Ministry of Finance Department of Revenue (CBEC) Customs-IV Division. II. The GA Circular No. 2/2019 dated 12/15 April 2019, being not issued under Section 151-A of the Customs Act, same cannot form the basis of any assessment. III. In view of our above conclusion, we set aside the impugned orders-in-original dated 17 March 2022 and 13 March 2022 passed by the Assistant Commissioner of Customs. IV. We order a remand of the matter in both the cases to the Assistant Commissioner of Customs, who shall hear the petitioners and pass a fresh order in accordance with law, in the light of the principles of laws as discussed by us in this judgement. Such exercise shall be undertaken within a period of three months from today. 64. Rules is made absolute in the above terms, No costs". Signed – BHARAT P. DESHPANDE, J. G.S. KULKARANI, J." 9.10 The Assessing Officer for the impugned Shipping Bills have adopted the Test Report of Griffith India Pvt. Ltd. as it provides details of all types of impurities including *moisture, even though they said report is arrived at on DMT basis.*

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 recognised formula for determination of classification of IOF exported. The formula is :- Iron content = Fe x (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.

11. Accordingly, the impugned orders are set aside and the appeals are allowed with consequential relief, if any, as per law."

16. Therefore we hold that the Fe content is to be calculated on the basis of WMT and the Fe content is calculated on WMT basis same for 5 consignment involved now as under:

17. Table No. 2

18.

Consignment No.	**Table No. 1**		**Vessel Name**	**WMT (Quantity)**	**Fe Content on WMT Basis (percentage)**
	Sl. No.	**Ref. No.**			
1	1,2	1A+1B	MV Anarita	56633	54.79
2	3,4	2A+2B	AP Drzic	51960	54.35

3	5,6,7,8,9	3A+3B+3C+3D+3E	MV Pacific Pride	58550	56.53
4	10,11	5A+5B	Jewel of Shinas	53139	56.02
5	12,13	6A+6B	MV St. Cergue	59600	54.94

17. As if the allegation in the Revenue is to be taken to be true that there are only 5 consignments which has been exported by splitting into 13 consignments, we take note on that only 5 consignments are there and if Fe content is to be calculated on WMT basis the Fe content is less than 58%. These facts are not in dispute.

18. This issue in the case of M/s. Global Associates Vs.Commissioner of Customs (Preventive), Bhubaneshwar wherein this Tribunal has observed as under:

> *"10. We find that in this case, the allegation against the appellant is that the appellant has artificially splitted one consignment in three Shipping Bills with an intention to evade payment of Customs duty by declaring that one Shipping Bill is having Fe content less than 58% and other Shipping Bills are having Fe content more than 58%, it is held that it is only one consignment.*
>
> *11. Contention of the Ld.adjudicating authority and the Fe content as per DMT works out to 62.47%, which is more than 58%, therefore, the appellant is liable to pay duty on whole of the consignment @ 30% and differential duty was demanded. If the contention of the ld.adjudicating authority is considered and found*

to be correct, i.e. it is only one consignment. The Fe content is to be calculated based Wet MT and Dry MT as held by this Tribunal in the case of Jindal Steel & Power Ltd. (supra). Relevant paras of the order extracted below :-

"15. We observe that iron ore with Fe content up to 58% is allowed to be exported duty free, while 30% export duty is chargeable on exports of iran ore of Fe content between 58% to 64%; and export of iron ore of Fe content above 64% is prohibited. In the following test reposts, the Fe content are reported at less than 58%. The details of the reports certifying the Fe content are asunder

Sl. No.	***Name of the Lab/ Quality Control***	***Fe Results***
1.	*Office of the Deputy Director of Mines, while issuing the Transit Passes*	*56.14%-56.56%*
2.	*Pre-shipment quality test done at TCRC on 23.12.2020*	*56.87%*
3.	*Pre-shipment quality test done at TCRC on 24.02.2021*	*56.72%*
4.	*Report of Discharge Port dated 24.03.2021*	*56.70%*

*16. All other reports indicate that the Fe content was less than 58%. Thus, we observe that the main issue to be decided is whether the Fe content is to be determined on Wet Metric Ton basis or Dry Metric Ton basis. Revenue's case is entirely based on the CRCI, report dated 15.01.2021, wherein Fe content was found to be 58.89% on **Dry Metric Ton basis**, Ie after removing the moisture and not on **"as is"/ "Wet Metric ton"** basis. We find that the adjudicating authority has given a* *clear finding on this issue. He has relied upon the Board Circular No. 04/2012-Cus dated 17th February, 2012 states that for the purposes of charging export duty, the Fe (Iron) content in the Iron Ore Fines has to be determined on Wet Metric Ton basis and not Dry Metric Ton basis. Fe content on Dry Metric Ton basis certified by CRCL Report cannot be relied upon for levy of export duty. We agree with the submission of the Respondent. The Board Circular clearly specifies that the Fe content is to be determined on WMT basis. On applying the standard industry formula for determining Fe content on Wet Metric Ton (**WMT**) basis, after considering Fe Content on Dry Metric Ton (**DMT**) basis and Moisture content determined by CRCL, the Fe content works out to be below 58%, and therefore, in the impugned order he held that export duty is not applicable on the goods exported by the Respondent. We find that the department has not adduced any reason why the Board Circular should not be applied to determine the Fe content in this case. The adjudicating authority has correctly applied the Formula and determined the Fe content on WMT basis. Thus, we find no infirmity in the determination of Fe content by the adjudicating authority.*

*17. Hon'ble Supreme Court in **Union of India GangadharNarsingdasAggarwal V. [1997 (89) E.L.T. 19 (S.C.)]**, wherein the judgment of the Hon'ble Bombay High Court in the case of **Union of India &Ors. v. GangadharNarsingdas Agrawal &Anr.***

[1988 (33) E.L.T. 673 (Bom.)] *was upheld. The Hon'ble Bombay High Court in its judgment had observed as under:*

> *"3. Before going into the contentions of Mr. Rege, learned Counsel for the appellants, it must be noticed that there is no dispute that the lumpy iron ore and iron ore fines exported by the petitioners was in a moist condition at the time when it was exported. Thus, what the petitioners exported was moist lumpy iron ore and moist iron ore fines.*
>
> *4. It is also undisputed that the rate of customs duty has to be calculated on the basis of the goods being in such condition as they were in at the time of export, Thus, it is an undisputed position that the claim for partial exemption from customs duty made by the petitioners the present case has to be determined on the footing of the goods exported being moist iron ore fines and moist lumpy iron ores."*
>
> *5. Now, the only submession urged by Mr. Rege, learned Counsel for the appellants was that it is not possible by a physical analysis to determine the iron ore contents in moist lumpy iron ore or moist iron are fines, because suck moist iron ore fines and moist lampy iron ore has to be dried for finding out the iron contents. It was urged by him that this is*

the only method of analysis accepted by the Indian Standard Institute, and hence the result of that analysis must be made applicable directly or straightway to determine the percentage of iron contents in the iron ore exported by the petitioners. In our view, the submission has no merit whatever. Although it is true, as submitted by Mr. Rege, that moist lumpy iron ore and moist iron ore fines have to be dried for the purpose of determining the iron contents, there is a mathematical formula by which, on the basis of the results of these aforementioned analysis, the iron content in moist lumpy iron ore and moist iron ore fines can be easily determined. That formula has been in fact explained in a Letter dated 23rd June, 1978 addressed by Toman Trading Co. Ltd, a copy of which is at Exh. A to the petition. It appears that following this very method, Italab (Goa) Pvt. Ltd. have Issued certificates as to the iron content in the moist iron ore fines and moist lumpy iron ores exported by the petitioners, and these certificates show that the iron content in these iron ores was to the extent of about 57 percent. Merely because in respect of moist iron ore the iron content cannot be determined directly by physical analysis this cannot lead to the result that the iron ore content cannot be determined at all or that the petitioners should be

> *deprived of their just claim on that footing which is totally unwarranted by law. The submission of Mr. Rege must, therefore, fail."*

18. ***Circular No. 04/2012-Cus dated 17.02.2012*** *was issued by the Central Board of Excise and Customs (as it was known then), wherein it was specifically provided that the net Fe content for the purpose of charging export duty is to be determined on Wet Metric Ton basis. The relevant paragraph of the Circular is reproduced for reference:*

> *"3. In the 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."***

19. Thus, By following the decisions and Board Circular cited above, we hold that Fe content is to be determined on Wet Metric Ton basis. We observe that the adjudicating authority has rightly followed the decision of the Hon'ble Supreme Court and the Circular issued by Board on this issue and dropped the proceedings. Accordingly, we find no infirmity *in the impugned order passed by the adjudicating authority dropping the proceedings.*

20. In view of the above discussion, we uphold the impugned order and reject the appeal filed by the Appellant (Department)."

12. We find that if we take the contention of the department as correct that the appellant has artificially splitted one consignment into three Shipping Bills, in that case, the calculation to arrive at Fe content is as follows:-

S/B No. & Date	***WMT***	***Moisture***	***Fe on DMT***	***Fe on WMT***
489268/22.03.2017	*17117*	*6.9*	*57.67*	*53.69*
4897267/22.03.2017	*34000*	*6.29*	*66.33*	*59.35*
5055344/28.03.2017	*1143*	*6.29*	*63.33*	*59.35*
Treating Export as Single Consignment	*52260*	*6.48*	*61.47*	*57.48*

13. On going through the fact that as the Fe content is to be calculated on WMT and as per the test reports of the goods in question which have not been disputed by either of the sides, the Fe content on WMT treating the whole consignment as one consignment works out to 57.48% which is less than 58%, therefore, we hold that the appellant is not liable to pay any duty on the export of the said consignment treating as single consignment.

14. In view of this, the impugned order is not sustainable in the eyes of law. Consequently, no penalty is imposable on the appellants.

15. Therefore, we aside the impugned order and allow the appeals with consequential relief, if any. "

19. Therefore, we hold that the consignment are required to be considered as consolidated consignments and in all the consignments the Fe content is less than 58%. In that circumstances, the Respondent are not required to pay any duty.

20. With regard to observation made by the Ld. Adjudicating Authority with respect to shipping bill no. 6005016 dated 11th May, 2017 is contrary to the observations made by the Adjudicating Authority in the impugned order. Therefore, the said observation made by the Adjudicating Authority is bad in law and not sustainable. Therefore, we hold that in all the 5 consignment which has been splitted into 13 consignments the Respondent is not liable to pay any export duty.

21. Therefore, no demand is sustainable against the Respondent. As there is no demand of duty sustainable against the Respondent consequently, no penalty can be imposed on the Respondent under Section 114AA of the Customs Act, 1962.

22. In view of this we do not any merit in the appeals filed by Revenue and we find force in the cross objection filed by the Respondent.

23. Accordingly, the appeals filed by the revenue are dismissed and cross objection filed by the Respondents are allowed, with consequential benefit, if any.

(Pronounced in the open court on ___________)

(ASHOK JINDAL)

MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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